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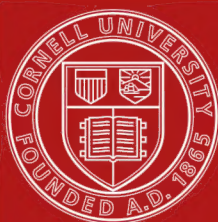
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**A TREATISE**  
**ON**  
**THE LAW OF TAXATION BY**  
**SPECIAL ASSESSMENTS**

BY  
*Adley*  
**CHARLES H. HAMILTON**  
**OF THE MILWAUKEE BAR.**

---

**CHICAGO**  
**GEORGE I. JONES**  
**1907**



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## PREFACE.

I wrote this book because I thought it was needed. The subject has grown to such magnitude as to demand more complete treatment than can be given it in an article in an encyclopedia or a chapter in a work on Municipal Corporations.

When Mr. Welty, in 1886, published his work on Assessments, he devoted two chapters to street improvement assessments, and cited 170 cases. More than twenty times that number of cases have been necessarily examined by the author in preparing the present treatise.

With the exception of the most excellent little work prepared as a thesis for a Doctor's degree by Mr. Rosewater, more than a decade ago (and to which I acknowledge myself deeply indebted), this is the pioneer book upon the subject of Special Assessments. For whatever errors have occurred because of that fact, or any other cause attributable to man's inherent limitations, I crave the indulgence of the most generous of all professions.

C. H. HAMILTON.

*Milwaukee, Dec. 24, 1906.*



TO  
REGINALD HAMILTON.



# TABLE OF CONTENTS.

## CHAPTER I.

### ORIGIN, HISTORY AND DEFINITION.

Introductory, 1.	Georgia, 27.
Municipal revenues classified, 2.	Illinois, 28.
Theory of equivalents, 3.	Indiana, 28 <i>a</i> .
Comparison of amounts of general and special taxes, 4.	Kansas, 29.
Origin and history, 5-6.	Louisiana, 30.
Origin in America, 7.	Maryland, 31.
English precedents, 8.	Missouri, 32.
Distinction between special assess- ment and tax, 9.	New York, 33.
U. S. supreme court, 10.	Pennsylvania, 34.
California, 11.	Texas, 35.
Illinois, 12.	Taxes and assessments defined, 36-38.
Mississippi, 12 <i>a</i> .	Legal theories of the power of special assessment, 39.
New York, 13.	Under the police power, 40-44.
Ohio, 14.	Under the power of eminent do- main, 45-47.
Pennsylvania, 15.	Under the power of taxation, 48-49.
Washington, 16.	Of the power to levy special as- sessments — constitutional au- thorization, 50-53.
Wisconsin, 17.	Restraints upon power to levy special assessments, 54.
Comparative definitions, 18.	What is meant by "taxation by special assessment," 55.
Distinction between special assess- ment and special taxation, 19.	Definition, 56.
When the word "tax" includes "special assessments," 20.	Objections to the system, 57.
When the word "tax" does not include "special assessments," 21.	Assessment of cost of work, 58.
Alabama, 22.	Further objections, 59-64.
Arkansas, 23.	Merits of the system, 65-66.
California, 24.	
Colorado, 25.	
Connecticut, 26.	

## CHAPTER II.

### OF CONSTITUTIONAL AND STATUTORY POWERS AND RESTRICTIONS.

Constitutional authority — Equal- ity and uniformity, 67.	Arkansas, 69-70.
Alabama, 68.	California, 71-73.
	Colorado, 74-75.



- Connecticut, 76.  
 Delaware, 77.  
 Florida, 78.  
 Georgia, 79.  
 Idaho, 80.  
 Illinois, 81-84.  
 Indiana, 85.  
 Kansas, 86.  
 Kentucky, 87.  
 Louisiana, 88.  
 Maine, 89.  
 Maryland, 90.  
 Massachusetts, 90a.  
 Michigan, 91.  
 Minnesota, 92-93.  
 Mississippi, 94.  
 Missouri, 95.  
 Nebraska, 96.  
 Nevada, 97.  
 New Hampshire, 98.  
 New Jersey, 99.  
 New York, 100.  
 North Carolina, 101.  
 North Dakota, 102.  
 Ohio, 103.  
 Oregon, 104.  
 Pennsylvania, 105-106.  
 Rhode Island, 107.  
 South Carolina, 108-109.  
 South Dakota, 110-111.  
 Tennessee, 112.  
 Texas, 113.  
 Vermont, 114.  
 Virginia, 115.  
 Washington, 116.  
 West Virginia, 117.  
 Wisconsin, 118-120.  
 Constitutional restrictions — State  
     constitutions not a grant of  
     power, 121.  
 Limitation on taxing power, 122.  
 Who may levy a tax, 123.  
 Effect of constitutional limitation  
     on indebtedness, 124.  
 The fourteenth amendment — Im-  
     portance of, 125.  
 Assessment of cost of work against  
     abutting property, 126-129.  
 The front foot rule, 130-131.  
 Priority of lien, 132.  
 Equal protection of the laws, 133.  
 Due process of law, 134-136.  
 Definition of, 137.  
 Arbitrary legislation, 138.  
 Interest on deferred payments,  
     139.  
 "Due process" not necessarily ju-  
     dicial process, 140.  
 Requisites of due process — No-  
     tice, 141-144.  
 Opportunity for hearing, 145-  
     147.  
     What notice sufficient, 148-149.  
     What is not sufficient notice,  
         150.  
 What constitutes a taking, 151-  
     159.  
 What is not a taking, 160-164.  
 Of property damaged for public  
     use, 165-166.  
 Of the constitutionality of stat-  
     utes, 167-169.  
 Legislative omnipotence, 170-182.  
 Of the delegation of power, 183-  
     184.  
 A continuing power, 185.  
 Express statutory authority neces-  
     sary, 186.  
 Power of special assessment strict-  
     ly construed, 187-189.  
 Statutory powers, 190-194.  
 Statutory construction, 195-201.

## CHAPTER III.

### OF LIMITATIONS ON THE EXERCISE OF THE POWER.

- In General, 202-203.  
 Public Purpose, 204-209.

- Apportionment, 210-232.  
     a. In General, 212.



- b. Taxing Districts, 213-218.
- c. Apportionment by Front Foot, 219-226.
- d. Assessment According to Cost of Work in Front of Each Lot, 227-228.

- e. Apportionment by Area, 229-230.
- f. Assessment by Value, 231.
- g. Assessment by Benefits, 232. Benefits, 233-241.

## CHAPTER IV.

### OF THE PURPOSES FOR WHICH SPECIAL ASSESSMENTS ARE AUTHORIZED.

In General, 242-243.  
Streets, 244.

- a. Opening, Widening and Vacating, 245-247.
- b. Grading and Paving, 248-249.
- c. Repairing and Maintenance, 250.
- d. Culverts, 251.

Sidewalks, 252.

Country Roads and Highways, 253-254.

Bridges and Viaducts, 255.

Public Parks, 256-257.

Levees, Dykes and Breakwaters, 258.

Waterworks, Pipes and Mains, 259-262.

Drains and Sewers, 263-270.

Irrigating Arid Lands, 271.

Sweeping, Sprinkling and Lighting Streets — Removing Snow, 272-273.

Improving Water Courses, 274.

Personal Property, 275.

Miscellaneous, 276-278.

## CHAPTER V.

### WHAT PROPERTY SUBJECT TO SPECIAL ASSESSMENT — EXEMPTIONS.

In General, 279-280.

Public Property, 281-283.

Street Railway Property, 284-288.

Railroad Property, 289-293.

Agricultural Lands, 294.

Personal Property, 295.

Realty Benefited, 296.

Realty Dedicated, 297.

Ownership, 298.

Street Intersections, etc., 299-301.

Location of Property Assessable, 302.

"Abutting" Property, 303-304.

"Adjacent" Property, 305.

"Adjoining" Property, 306.

"Contiguous" Property, 307.

Local" or "Vicinity" Property, 308.

"Fronting" Property, 309.

What is a "Square," 310.

What is a "Block," 311.

EXEMPTIONS — In General, 312-316.

Cemeteries, 317.

Property of Educational, Religious and Charitable Institutions, 318-319.

Homesteads, 320.

Railroad Property, 321.

Conveyances to Avoid Assessment, 322.



## CHAPTER VI.

## OF THE INITIATORY PROCEEDINGS.

- |   |   |
|---|---|
| <p>In general, 323-326.</p> <p>The petition — In general, 327-329.</p> <p>    Sufficiency of signature and authority for, 330-333.</p> <p>    Requisites of, 334.</p> <p>    Sufficiency of, 335-337.</p> <p>    Effect of signing — Estoppel, 338.</p> <p>    Dismissal of, 339.</p> <p>Challenging jurisdiction, 340.</p> <p>What steps are mandatory —</p> <p>    What directory, 341.</p> <p>The resolution — In general, 342.</p> <p>    Resolutions sufficient or valid, 343-344.</p> | <p>Resolutions insufficient or invalid, 345.</p> <p>Estimate of cost, 346.</p> <p>Notice — Requisites of, 347-352.</p> <p>    Sufficiency of, 353-354.</p> <p>    Notices held sufficient, 355-358.</p> <p>    Notices held insufficient, 359.</p> <p>    What record must show, 360.</p> <p>    How given, actual or construct-<br/>    ual, 361-367.</p> <p>    The official paper, 368-369.</p> <p>    Publication of, 370.</p> <p>    Proof of publication, 371-373.</p> <p>    Waiver of, 374-376.</p> <p>    Computation of time, 377.</p> <p>    Definitions, 378.</p> |
|---|---|

## CHAPTER VII.

OF THE PROCEEDINGS NECESSARY TO ACQUIRE JURISDICTION —  
— THE ORDINANCE.

- |   |   |
|---|---|
| <p>Necessity for, 379-381.</p> <p>Adoption — Presumption — Rec-<br/>ords, 382-383.</p> <p>Requisites to validity, 384-385.</p> <p>Construction of, 386.</p> <p>Effect of repeal of, 387.</p> <p>Must be reasonable, 388.</p> <p>Reference to plans, etc., on file,<br/>389.</p> <p>Omission to state location of im-<br/>provement, 390.</p> <p>Must be substantially complied<br/>with — Variance, 391-392.</p> <p>Embracing more than one im-<br/>provement, 393.</p> <p>Validity — In general, 394-402.</p> <p>    Sufficiency of description, 403.</p> <p>    Grade ordinances, 404.</p> <p>    Paving ordinances, 405-407.</p> | <p>    Curb ordinances, 408.</p> <p>    Sidewalk ordinances, 409.</p> <p>    Waterworks ordinances, 410.</p> <p>    Sewer ordinances, 411-414.</p> <p>Invalidity — In general, 415-422.</p> <p>    Invalid grade ordinances, 423.</p> <p>    Invalid paving ordinances, 424.</p> <p>    Invalid curb ordinances, 425.</p> <p>    Invalid sidewalk ordinances,<br/>    426.</p> <p>    Invalid waterworks ordinances,<br/>    427.</p> <p>    Invalid sewer ordinances, 428-<br/>    429.</p> <p>    Delegation of power, 430-431.</p> <p>Evidence, and burden of proof,<br/>432.</p> <p>When "may" means "must," 433.</p> <p>Publication of, 434.</p> |
|---|---|



# CHAPTER VIII.

## OF THE PROCEEDINGS NECESSARY TO ACQUIRE AND RETAIN JURISDICTION.

- Jurisdiction — In general, 435, 436.
- Acquiring jurisdiction by publication, 437.
- Collateral attack, 438.
- Powers of council — In general, 439.
  - Discretion of council, 440, 441.
  - What council may do, 442.
  - What council may not do, 443.
  - Delegation of authority, 444.
  - Ministerial powers, 445-447.
- The contract — In general, 448.
  - Bids and bidders, 449.
  - Lowest bidder, 450.
  - Powers of council in letting, 451.
  - Provisions tending to increase cost, 452.
  - Guarantee of work for a term of years, 453.
  - Performance of contract, 454, 455.
  - Description of work, 456.
  - Time for completion, 457.
  - Extra work, day labor, 458.
  - Patented articles — Monopoly, 459.
  - Assignment of contract, 460.
  - Construction of contract, 461.
  - Liability of city on contract, 462.
- Abandonment of proceedings, 463.
- Presumptions, 464.
- Apportionment — Fixing the taxing district, 465-469.
- Benefits, 470.
  - Conflicting decisions, 471-474.
  - Rule for assessment of benefits, 475-476.
  - Benefits a question of facts, 477-479.
  - What must affirmatively appear, 480.
  - Front foot assessments — Compliance with statute, 481.
  - Future benefits not to be considered, 482.
  - Offsetting benefits and damages, 483.
  - Objections to assessment — When made, 484.
  - Special taxation, 485.
  - Assessment in excess of value of property, 486.
    - Georgia, 487.
    - Iowa, 488.
    - Kentucky, 489.
    - Maryland, 490.
    - Nebraska, 491.
    - New Jersey, 492.
    - Ohio, 493.
    - Pennsylvania, 494.
  - Miscellaneous rulings, 495.
  - Benefit assessments held valid, 496.
  - Benefit assessments held invalid, 497-499.
- The front foot rule — In general, 500.
  - Front foot rule as a principle, 501.
  - Front foot rule as a convenience, 502, 503.
  - How frontage determined, 504, 505.
  - Assessments valid under the front foot rule, 506.
  - Frontage assessments held invalid, 507, 508.



# CHAPTER IX.

## OF THE PROCEEDINGS NECESSARY TO RETAIN JURISDICTION — THE ASSESSMENT.

- |   |  |
|---|--|
| <p><b>Commissioners — In general, 509.</b><br/>             Appointment — Qualifications, 510-513.<br/>             Oath of commissioners, 514.<br/>             Judgment of commissioners, 515-516.<br/>             Commissioners must act jointly — Signatures, 517.<br/>             Death or absence of one commissioner, 518.<br/>             Objections to report of — When made, 519.<br/>             Evidence, 520.<br/>             Commissioners as witnesses, 521.<br/>             View of premises by, 522.<br/>             Presumptions as to acts of, 523.<br/> <b>Estimate of cost, 524.</b><br/>             What expenses may be included in, 525-526.<br/>             What expenses may not be included in, 527-528.<br/> <b>Exceeding tax limit, 529.</b><br/> <b>Statute of limitations, 530.</b><br/> <b>Suits to vacate assessments, 531.</b><br/> <b>Validity of legislative bond act, 532.</b><br/> <b>Limitation on power to exempt, 533.</b><br/> <b>Plans and specifications, 534.</b><br/> <b>Eminent domain, 535.</b><br/> <b>Condemnation — Effects of, 536</b><br/>             What property assessed, 537.<br/>             Street intersections, 538.<br/>             Description of property, 539-540.<br/>             Assessing each parcel separately, 541.<br/> <b>Omission of property from assessment, 542.</b><br/> <b>Subdividing lands for assessment purposes, 543.</b></p> | <p><b>Improvements must be single, 544-545.</b><br/>             Acquiring title, 546.<br/>             Conditions precedent, 547.<br/>             Assessment roll, 548-549.<br/>             Against whom assessment to be made, 550.<br/>             When assessment may be made, 551.<br/>             Requisites in making assessment, 552.<br/>             As a ministerial act, 553.<br/>             Property in two assessment districts, 554.<br/>             Assessment by size or area, 555.<br/>             Assessment for cost of work, 556-558.<br/>             What assessment proceedings must show, 559.<br/>             Sufficiency of record, 560-561.<br/>             Conclusiveness of improvement bond, 562.<br/>             Who may contest assessment, 563.<br/>             When objections may be urged, 564-567.<br/>             Evidence — In general, 568.<br/>                 Burden of proof, 569.<br/>                 <i>Prima facie</i> evidence, 570.<br/>                 Evidence as to benefits, 571.<br/>             Method of assessment, 572-573.<br/>             Amount of assessment — Modification, 574.<br/>             Error and amendment, 575.<br/>             Judicial notice, 576.<br/>             Figures, abbreviations and names, 577.<br/>             Omission of dollar mark, 578.<br/>             Officers <i>de facto</i>, 579.<br/>             Dedication, 580.<br/>             Nuisance, 581.</p> |
|---|--|



## CHAPTER X.

### ASSESSMENTS FOR SPECIFIC IMPROVEMENTS — VALID AND INVALID ASSESSMENTS.

- |  |   |
|--|---|
| <p><b>GRADING</b> — In general, 582.<br/> Change of grade — General provisions, 583-585.<br/> Is an improvement, 586.</p> <p><b>PAVING</b> — Pavement — What constitutes, 587-590.<br/> What is not a pavement, 591.<br/> Street intersections, 592.<br/> Resolutions and estimates, 593.<br/> Liability of abutting owners, 594.<br/> Apportionment of tax, 595.<br/> Reconstruction and repairs, 596.<br/> Street railways — Liability for paving, 597.</p> <p><b>SEWERS</b> — In general, 598.<br/> Assessment by benefits, 599-603.<br/> Future benefits, 604.<br/> Front foot rule, 605.<br/> Sewer districts, 606.</p> | <p>Plans and specifications, 607.<br/> Private sewers, 608.<br/> Outlets, 609.<br/> Connections, 610.<br/> Assessments and objections, 611-612.<br/> Drainage and drainage districts, 613-614.</p> <p><b>SIDEWALKS</b> — In general — Necessity of notice, 615.<br/> Single improvement, 616.<br/> What included in, 617.<br/> Power of council — How exercised, 618.<br/> Review of benefits, 619.<br/> Liability for cost of sidewalk, 620.</p> <p><b>VALID AND INVALID ASSESSMENTS</b><br/> Valid assessments, 621.<br/> Invalid assessments, 622.</p> |
|--|---|

## CHAPTER XI.

### CONFIRMATION OF THE ASSESSMENT — DAMAGES.

- |  |   |
|--|---|
| <p><b>CONFIRMATION</b> — In general, 623.<br/> Application for confirmation, 624.<br/> <i>Res judicata</i>, 625.<br/> Judgment <i>in rem</i>, 626.<br/> Objections to confirmation, 627.<br/> Insufficient proof of notice, 628.<br/> Jurisdiction to enter judgment, 629.<br/> Conclusiveness of judgment, 630.<br/> When judgment final, 631.<br/> Confirmation by common council, 632.<br/> Collateral attack, 633-634.<br/> Recital of jurisdictional facts, 635.<br/> Reversal of judgment — Property affected by, 636.</p> | <p>Judgment of sale, 637-638.<br/> Validity of confirmation, 639.</p> <p><b>DAMAGES</b> — In general, 640.<br/> Determination of authorities on, 641.<br/> Liability for damages, 642.<br/> When city not liable, 643.<br/> Damages from change of grade, 644-649.<br/> Ordinance does not cause damage, 650.<br/> Damages for taking, 651-653.<br/> Measure of — In general, 654-657.<br/> Measure of — Change of grade, 658-660.<br/> Measure of — Taking, 661.<br/> To whom damages belong, 662.</p> |
|--|---|



Consequential damages, 663.  
Interest, 664.  
The jury, 665.

View of premises, 666.  
Questions for jury, 667.

## CHAPTER XII.

### COLLECTION OF THE TAX, AND METHOD OF ENFORCEMENT.

Personal liability, 668.  
*In rem.* 669-670.  
Municipal liability, 671-672.  
Cause for liability, 673.  
Liability arising from creation of special fund, 674-676.  
Reasons for non-liability, 677-678.  
Collection — In general, 679-680.  
Collection by city, 681.  
Collection by contractor, 682.  
Contract induced by fraud, 683.  
Defective or unfinished contracts, 684.  
Remedy of contractor, 685.  
Collection from property exempt from execution, 686.  
Penalties for non-payment, 687.  
Limitations, 688.  
Who may collect, 689.  
Completion of work, 690.  
Pleading, 691.  
Counterclaim — Demurrer, 692.  
Evidence — *Prima facie* proof, 693.  
Burden of proof, 694.  
Mandamus, 695.  
When mandamus will not lie, 696.  
Judgment of sale, 697.  
What may be shown on application for, 698.

Form and validity of judgment, 699.  
The sale, 700.  
Collection from railroads, 701.  
When sale void — *Caveat emptor*, 702.  
Defense to collection proceedings, 703.  
What defenses available, 704-705.  
Defenses not available, 706.  
Liens — In general, 707.  
Priorities, 708.  
Discharge of, 709.  
Filing or establishing, 710.  
Enforcement — Parties, 711.  
Foreclosure of, 712.  
Evidence in foreclosure, 713.  
Defenses in foreclosure, 714.  
Enforcement of, 715.  
Merger, 716.  
Payment, in general — Bonds, 717.  
Payment in installments, 718.  
Payment from general fund, 719.  
When payment neither waiver nor estoppel, 720.  
Interest, 721.  
Who should make payment, 722.

## CHAPTER XIII.

### DUTIES, RIGHTS, AND REMEDIES OF THE TAX PAYER.

Estoppel — In general, 723.  
Estoppel by municipality, 724.  
Estoppel by signing petition, 725.  
Estoppel to deny jurisdiction, 726.

When landowner estopped, 727-728.  
Active participation in causing improvement, 729.  
Acceptance of improvement, 730.



- Unconstitutionality of statute, 731.
- Taking action before completion of work, 732.
- Elements of estoppel — jurisdiction, 733.
- When grantee not estopped, 734.
- When landowner not estopped, 735.
- Laches, 736.
- Waiver and acquiescence, 737.
- Fraud, 738-740.
- Tax deeds and certificates, 741.
- Purchaser at tax sale — In general, 742.
- Caveat emptor*, 743.
- Subsequent purchaser, 744.
- Certiorari — In general, 745.
- When writ will issue, 746-747.
- Action of court, 748.
- When writ will not issue, 749.
- Assessment for benefits, 750.
- Laches, 751.
- To whom writ directed, 752.
- Answer to petition, 752a.
- Pleading and practice, 753.
- When court will not interfere, 754.
- Appeal — Regulation by statute, 755.
- When allowable, 756.
- What matters considered on, 757.
- When appeal exclusive remedy, 758-759.
- When appeal not exclusive remedy, 760.
- Waiver, 761.
- Burden of proof, 762.
- Mandamus, 763-764.
- Quo warranto*, 765.
- Trespass, 766-768.
- Recovery back — In general, 769-770.
- Facts outside the record, 771.
- Failure of jurisdiction, 772.
- Ignorance or coercion, 773.
- Abandoning work — Failure of consideration, 774.
- Unconstitutional assessment, 775.
- Voluntary and compulsory payments, 776.
- Who may recover, 777.
- Mistakes in payment, 778.
- Limitations, 779.
- When no recovery, 780.
- Vested rights, 781.
- Assessment valid on its face, 782.
- Assessment invalid on its face, 783.
- Rule alike as to taxes and assessments, 784.
- Authority of city to refund, 785.
- Recovery because of failure of consideration, 786.
- Equity — In general, 787-789.
- Injunction — When premature, 790.
- Cloud on title, 791.
- Apparent defect, 792.
- Extrinsic evidence, 793.
- Failure to make timely objection, 794.
- Assessment in excess of benefits, 795-796.
- Fraud, 797.
- Nuisance, 798.
- Adequate remedy at law, 799.
- Payment or tender, 800-801.
- When equity will not interfere, 802-803.
- Burden of proof, 804.
- Parties, 805.
- Pleadings, 806-807.
- De minimis*, 808.
- Application of equity principles to facts, 809-815.



## CHAPTER XIV.

REASSESSMENTS, AND PROCEEDINGS TO VALIDATE VOID  
ASSESSMENTS.

Curative acts — In general, 816-818.	Must be based on benefits, 827.
Limitations upon legislative power, 819-820.	Statute of limitations, 828.
Retroactive laws, 821.	Continuation of original proceedings, 829.
Jurisdiction, 822.	Payment of interest, 830.
Reassessment statutes, 823.	Duty of property owner, 831.
Constitutionality of, 824.	When reassessments may be ordered, 832-837.
Validity of, 825.	When not permitted, 838-841.
Construction of, 826.	



# TABLE OF CASES.

(The references are to sections.)

## A.

Aberdeen v. Lucas—37 Wash. 190; 79 Pac. 632.....	284, 305
Abraham v. Louisville—23 Ky. L. Rep. 375; 62 S. W. 1041.....	230
Adams v. Beloit—105 Wis. 363; 47 L. R. A. 441; 81 N. W. 869, 211,	327
Adams v. Brennan—177 Ill. 194; 42 L. R. A. 718; 69 Am. St. Rep.	
222; 52 N. E. 314.....	366, 410
Adams v. Fisher—63 Tex. 651.....	29, 127, 299, 300
Adams v. Fisher—75 Tex. 657; 6 S. W. 772.....	210
Adams v. Fisher—72 Mo. 198.....	74

## ERRATUM

### TABLE OF CASES

References are to *pages*

Alameda etc. Co. v. Williams—70 Cal. 534; 12 Pac. 800.....	
Alameda Mac. Co. v. Pringle—130 Cal. 226; 52 L. R. A. 264; 80	
Am. St. Rep. 124; 62 Pac. 394.....	414
Alberger v. Baltimore—64 Md. 1; 20 Atl. 988.....	168, 298, 396
Albuquerque v. Zeiger—5 N. Mex. 674; 27 Pac. 315.....	778
Alcorn v. Hamer—38 Miss. 652.....	73, 176, 219
Alcorn v. Philadelphia—112 Pa. St. 494; 4 Atl. 185.....	132, 213
Alden v. Springfield—121 Mass. 27.....	550
Aldis v. South Park Comr's—171 Ill. 424; 49 N. E. 565.....	759
Alexander v. Mayor etc.—5 Gill 383; 46 Am. Dec. 630.....	
42, 70, 107, 108, 191, 192, 207, 256	
Alexander v. Milwaukee—16 Wis. 248.....	113, 116, 142, 425, 556, 646
Alexander v. Tacoma—35 Wash. 366; 77 Pac. 686.....	
308, 478, 617, 618, 621, 821, 824, 832, 835, 840	
Allegheny v. West. Pa. R. Co.—138 Pa. St. 375; 21 Atl. 763.....	
201, 208, 242, 448, 464	
Allen v. Armstrong—16 Iowa 508.....	810
Allen v. Chicago—57 Ill. 264.....	321
Allen v. Chicago—176 Ill. 113; 52 N. E. 33.....	497
Allen v. Commissioners—176 Ill. 113; 52 N. E. 33.....	525
Allen v. Davenport—107 Iowa 90; 77 N. W. 532.....	
168, 243, 254, 412, 419, 470, 508, 562, 791, 792	



## CHAPTER XIV.

REASSESSMENTS, AND PROCEEDINGS TO VALIDATE VOID  
ASSESSMENTS.

Curative acts — In general, 816-818.	Must be based on benefits, 827.
Limitations upon legislative power, 819-820.	Statute of limitations, 828.
Retroactive laws, 821.	Continuation of original proceedings, 829.
Jurisdiction, 822.	Payment of interest, 830.
Reassessment statutes, 823.	Duty of property owner, 831.
Constitutionality of, 824.	When reassessments may be ordered, 832-837.
Validity of, 825.	When not permitted, 838-841.
Construction of, 826.	



# TABLE OF CASES.

(The references are to sections.)

## A.

Aberdeen v. Lucas—37 Wash. 190; 79 Pac. 632.....	284, 305
Abraham v. Louisville—23 Ky. L. Rep. 375; 62 S. W. 1041.....	230
Adams v. Beloit—105 Wis. 363; 47 L. R. A. 441; 81 N. W. 869, 211, 327	
Adams v. Brennan—177 Ill. 194; 42 L. R. A. 718; 69 Am. St. Rep. 222; 52 N. E. 314.....	366, 410
Adams v. Fisher—63 Tex. 651.....	29, 127, 299, 300
Adams v. Fisher—75 Tex. 657; 6 S. W. 772.....	210
Adams v. Lindell—72 Mo. 198.....	74
Adams v. Shelbyville—154 Ind. 467; 49 L. R. A. 797; 77 Am. St. Rep. 484; 57 N. E. 114.....	
	100, 161, 184, 190, 232, 289, 394, 441, 468, 776
Adams Co. v. Quincy—130 Ill. 566; 6 L. R. A. 155; 22 N. E. 624	
	35, 39, 90, 234, 251, 254, 332, 346, 355
Adcock v. Chicago—160 Ill. 611; 43 N. E. 589.....	279, 493
Adcock v. Chicago—172 Ill. 24; 49 N. E. 1008.....	824
Addy v. Janesville—70 Wis. 401; 35 N. W. 931.....	631
Addyston Pipe & Steel Co. v. Corry—197 Pa. St. 41; 80 Am. St. Rep. 812; 46 Atl. 1035.....	661
Affeld v. Detroit—112 Mich. 560; 71 N. W. 151.....	656, 658
Ahern v. Board of Improvement—69 Ark. 68; 61 S. W. 575.....	
	185, 234, 240, 245, 261, 263
Ahrens v. Minnie Creek Drain Dist.—170 Ill. 362; 48 N. E. 971..	593
Alameda etc. Co. v. Huff—57 Cal. 331.....	317
Alameda etc. Co. v. Williams—70 Cal. 534; 12 Pac. 530.....	409, 682
Alameda Mac. Co. v. Pringle—130 Cal. 226; 52 L. R. A. 264; 80 Am. St. Rep. 124; 62 Pac. 394.....	414
Alberger v. Baltimore—64 Md. 1; 20 Atl. 988.....	168, 298, 396
Albuquerque v. Zeiger—5 N. Mex. 674; 27 Pac. 315.....	778
Alcorn v. Hamer—38 Miss. 652.....	73, 176, 219
Alcorn v. Philadelphia—112 Pa. St. 494; 4 Atl. 185.....	132, 213
Alden v. Springfield—121 Mass. 27.....	550
Aldis v. South Park Comr's—171 Ill. 424; 49 N. E. 565.....	759
Alexander v. Mayor etc.—5 Gill 383; 46 Am. Dec. 630.....	
	42, 70, 107, 108, 191, 192, 207, 256
Alexander v. Milwaukee—16 Wis. 248... 113, 116, 142, 425, 556, 646	
Alexander v. Tacoma—35 Wash. 366; 77 Pac. 686.....	
	308, 478, 617, 618, 621, 821, 824, 832, 835, 840
Allegheny v. West. Pa. R. Co.—138 Pa. St. 375; 21 Atl. 763.....	
	201, 208, 242, 448, 464
Allen v. Armstrong—16 Iowa 508.....	810
Allen v. Chicago—57 Ill. 264.....	321
Allen v. Chicago—176 Ill. 113; 52 N. E. 33.....	497
Allen v. Commissioners—176 Ill. 113; 52 N. E. 33.....	525
Allen v. Davenport—107 Iowa 90; 77 N. W. 532.....	
	168, 243, 254, 412, 419, 470, 508, 562, 791, 792



(The references are to sections.)

Allen v. Davenport—65 C. C. A. 641; 132 Fed. 209.....	817
Allen v. Decatur—23 Ill. 332; 76 Am. Dec. 192.....	41, 133, 404, 406, 817
Allen v. Drew—44 Vt. 174.....	762
Allen v. Galveston—51 Tex. 302.....	41, 82, 158, 170, 172, 201, 221, 231, 783, 785
Allen v. Janesville—35 Wis. 403.....	22, 134, 175, 608
Allen v. Portland—35 Oreg. 420; 58 Pac. 509.....	143, 662
Allentown v. Henry—73 Pa. St. 404.....	136, 272, 273, 274, 275, 279, 285, 414
Allison Land Co. v. Tenaft—68 N. J. L. 205; 52 Atl. 231.....	201, 222
Allman v. Dist. of Col.—3 App. D. C. 8.....	454
Alton v. Foster—74 Ill. App. 511.....	249
Alton v. Foster—207 Ill. 150; 69 N. E. 783.....	774, 820
Alton v. Middleton's Heirs—158 Ill. 442; 41 N. E. 926.....	682
Alvord v. Syracuse—163 N. Y. 158; 57 N. E. 310.....	330, 342, 343, 367, 379
Amberson Ave.—179 Pa. St. 634; 36 Atl. 354.....	133, 779, 782
American Bonding Co. v. Ottumwa—137 Fed. 572.....	561
American etc. Co. v. Wagner—139 Pa. St. 623; 21 Atl. 160.....	572, 573
American Hide & Leather Co. v. Chicago—203 Ill. 451; 67 N. E. 979.....	407
Amery v. Keokuk—72 Iowa 701; 30 N. W. 780.....	330, 372, 614
Amsterdam, <i>In re</i> —126 N. Y. 158; 27 N. E. 272.....	168, 298
Anderson, <i>In re</i> —60 N. Y. 457.....	301, 449
Anderson, <i>In re</i> —109 N. Y. 554; 17 N. E. 209.....	314
Anderson v. Chicago—187 Ill. 264; 58 N. E. 1094.....	429
Anderson, etc., Corporation v. Gould—6 Mass. 44; 4 Am. Dec. 80..	375
Anderson v. Holland—40 Mo. 600.....	689
Anderson v. Kerns Drain Co.—14 Ind. 199; 77 Am. Dec. 63.....	703
Anderson v. Passaic—44 N. J. L. 580.....	66, 149, 224
Anderton v. Milwaukee—82 Wis. 279; 15 L. R. A. 830; 52 N. W. 95.....	500
Andrews v. Chicago—57 Ill. 239.....	91, 145
Andrews v. Love—46 Kan. 264; 26 Pac. 746.....	322
Andrews v. Love—50 Kan. 701; 31 Pac. 1094.....	778
Andrews v. People—83 Ill. 529.....	778
Andrews v. People—84 Ill. 28.....	616
Andrews v. People—164 Ill. 581; 45 N. E. 965.....	616
Andrews v. People—173 Ill. 123; 50 N. E. 335.....	349
Angell v. Cortright—111 Mich. 223; 69 N. W. 486.....	616
Annie Wright Seminary v. Tacoma—23 Wash. 109; 62 Pac. 444..	416
Ankeny v. Henningsen—54 Ia. 29; 6 N. W. 65.....	618, 620, 725, 791, 792, 821
Annapolis v. Harwood—32 Md. 471; 3 Am. Rep. 161.....	677
Aplin v. Fisher—84 Mich. 128; 47 N. W. 574.....	133, 134
Appeal of Hewitt—88 Pa. St. 55.....	275, 278
Application for Drainage, <i>In re</i> —35 N. J. L. 497.....	811
Argenti v. San Francisco—16 Cal. 256.....	224
Argentine v. Daggett—53 Kan. 491; 37 Pac. 14.....	660
Argentine v. Simmons—54 Kan. 699; 39 Pac. 181, 182.....	564
Arlington v. Cutter—114 Mass. 344.....	278, 509
Armstrong v. Chicago—61 Ill. 352.....	601
Armstrong v. Ogden—12 Utah 476; 43 Pac. 119.....	321
Armstrong v. St. Paul—30 Minn. 299; 15 N. W. 174.....	276
Arnold v. Cambridge—106 Mass. 352.....	155
	595



## TABLE OF CASES.

xvii

(The references are to sections.)

Arnold v. Fort Dodge—111 Ia. 152; 82 N. W. 495.....	312, 316, 337, 717, 722
Arnold v. Knoxville, (Tenn.)—90 S. W. 469.....	81, 450, 774
Arimond v. G. B. & M. Canal Co.—31 Wis. 316.....	113, 646
Asberry v. Roanoke—91 Va. 562; 42 L. R. A. 636; 22 S. E. 360...	201, 654
Asheville v. Means—29 N. C. (7 Ired., L.) 406.....	134
Astor, <i>In re</i> —50 N. Y. 363.....	382
Astor, <i>In re</i> —53 N. Y. 617.....	211
Astor v. New York—5 Jones & S. 539.....	10
Atchison v. Bartholomew—4 Kan. 135.....	140
Atchison v. Byrnes—22 Kan. 65.....	661
Atchison v. Price—45 Kan. 296; 25 Pac. 605.....	501, 584, 587, 589
Atkins v. Boston—188 Mass. 77; 74 N. E. 292.....	458
Atkinson v. Newton—169 Mass. 240; 47 N. E. 1029.....	192, 555, 601, 555, 647, 722
Atlanta v. First Presb. Church—86 Ga. 730; 12 L. R. A. 852; 13 S. E. 252.....	261
Atlanta v. Gabbett—93 Ga. 266; 20 S. E. 306.....	378, 468
Atlanta v. Hamlein—96 Ga. 381; 23 S. E. 408.....	187, 462
Atlanta v. Hamlein—101 Ga. 697; 29 S. E. 14.....	783
Atlanta v. Smith—99 Ga. 462; 27 S. E. 696.....	276
Atlanta v. Stein—111 Ga. 789; 51 L. R. A. 335; 36 S. E. 932....	410
Atlanta etc. Ry. Co. v. Atlanta—111 Ga. 255; 36 S. E. 667.....	237
Auburn v. Paul—84 Me. 212; 24 Atl. 817.....	69, 191, 310, 749
Auditor General v. Calkins—136 Mich. 1; 98 N. W. 742.....	308, 320, 439, 731
Auditor General v. Chase—132 Mich. 630; 94 S. W. 178.....	293, 568
Auditor General v. Hoffman—132 Mich. 198; 93 N. W. 259.....	305, 433, 617, 732
Auditor General v. Maier—95 Mich. 127; 54 N. W. 640.....	724
Audrey v. Dallas—13 Tex. Civ. App. 442; 35 S. W. 726.....	720
Auer v. Dubuque—65 Iowa 650; 22 N. W. 914.....	105
Augusta v. King—115 Ga. 454; 41 S. E. 661.....	105
Augusta v. Murphy—79 Ga. 101; 3 S. E. 326.....	19, 133
Austin v. Seattle—2 Wash. 667; 27 Pac. 557.....	12, 83, 170
Ayer v. Chicago—149 Ill. 262; 37 N. E. 57.....	516
Ayer v. Somerville—143 Mass. 585; 10 N. E. 457.....	588

## B.

Bacon v. Savannah—86 Ga. 301; 12 S. E. 580.....	129, 167, 336
Bacon v. Savannah—91 Ga. 500; 17 S. E. 749.....	135, 156
Bacon v. Savannah—105 Ga. 62; 31 S. E. 127.....	334, 451, 677
Baker v. Clem—102 Ind. 109; 26 N. E. 215.....	727
Ball v. Tacoma—9 Wash. 592; 38 Pac. 133.....	283, 720
Ballard v. Appleton—26 Wis. 67.....	778
Ballard v. Ross—38 Wash. 209; 80 Pac. 429.....	699
Baltimore v. Green Mount Cemetery—7 Md. 517.....	15, 192
Baltimore v. Johns Hopkins Hospital—56 Md. 1.....	168
Baltimore v. Ullman—79 Md. 469; 30 Atl. 43.....	820
B. O. & C. R. Co. v. Wagner—43 Ohio St. 75; 1 N. E. 91.....	300
Banaz v. Smith—133 Cal. 102; 65 Pac. 309.....	109, 167
Bank v. Port Townsend—16 Wash. 450; 47 Pac. 896.....	663
Bank of Columbia v. Portland—41 Oreg. 1; 67 Pac. 1112.....	136, 195, 315, 319, 324
Banks v. New Albany—11 Ind. 139.....	66



(The references are to sections.)

Barber v. Chicago—152 Ill. 37; 38 N. E. 253.....	335, 364, 492, 526
Barber A. Pav. Co. v. Denver—19 C. C. A. 139; 36 U. S. App. 499; 72 Fed. 336.....	660
Barber A. Pav. Co. v. Edgerton—125 Ind. 455; 25 N. E. 436.....	190, 288
Barber A. P. Co. v. Erie—203 Pa. St. 120; 52 Atl. 22.....	677
Barber A. Pav. Co. v. Field (Mo.)—86 S. W. 860.....	786
Barber A. Pav. Co. v. French—158 Mo. 534; 54 L. R. A. 492; 58 S. W. 934.....	299, 401
Barber A. Pav. Co. v. French—181 U. S. 324; 45 L. ed. 879; 21 Sup. Ct. Rep. 625.....	169
Barber Asphalt Pav. Co. v. Gogreve—41 La. Ann. 251; 5 So. 848...	69, 168
Barber A. Pav. Co. v. Harrisburg—29 L. R. A. 401; 12 C. C. A. 100; 28 U. S. App. 108; 64 Fed. 283; 62 Fed. 565.....	660
Barber A. Pav. Co. v. Hezel—155 Mo. 391; 48 L. R. A. 285; 56 S. W. 449.....	413
Barber A. Pav. Co. v. Hunt—100 Mo. 222; 8 L. R. A. 110; 18 Am. St. Rep. 530; 13 S. W. 98.....	424
Barber A. Pav. Co. v. Peck—186 Mo. 506; 85 S. W. 387.....	790
Barber A. Pav. Co. v. Ullman—137 Mo. 543; 38 S. W. 453.....	343, 359, 413, 433, 694
Barber A. Pav. Co. v. Watt—51 La. Ann. 1345; 26 So. 70.....	135, 142, 653, 828
Barclay, <i>In re</i> —91 N. Y. 430.....	209
Barden v. Portage—79 Wis. 126; 48 N. W. 210.....	627, 660
Barkley v. Oregon City—24 Oreg. 515; 33 Pac. 978.....	273
Barlow v. Tacoma—12 Wash. 32; 40 Pac. 382.....	721
Barnes v. Atchison—2 Kan. 455.....	168, 536
Barnes v. Dyer—56 Vt. 469.....	193, 201
Barr v. Omaha—42 Neb. 341; 60 N. W. 591.....	637
Bartlett v. Wilson—50 Vt. 23; 8 Atl. 321.....	814
Bartram v. Bridgeport—55 Conn. 122; 10 Atl. 470.....	600
Bass v. Chicago—195 Ill. 109; 62 N. E. 913.....	285
Bass v. People—203 Ill. 206; 67 N. E. 806.....	514
Bass v. So. Park Com'rs—171 Ill. 370; 49 N. E. 549.....	219, 460
Bassford, <i>In re</i> —50 N. Y. 509.....	382
Bates v. Adamson (Cal. App.)—84 Pac. 51.....	753
Bates v. Twist—138 Cal. 52; 70 Pac. 1023.....	528
Batterman v. New York—65 App. Div. 576; 73 N. Y. Supp. 44...	221
Batty v. Hastings—63 Neb. 26; 88 N. W. 139.....	137, 272, 720, 728, 731, 732, 737
Bauman v. Ross—167 U. S. 548; 42 L. ed. 270; 17 Sup. Ct. Rep. 966.....	203, 207
Baxter v. Jersey City—36 N. J. L. 188.....	175
Bayonne v. Morris—61 N. J. L. 127; 38 Atl. 819.....	244, 842
Bay Rock v. Bell—133 Cal. 150; 65 Pac. 299.....	137, 421, 519
Beach v. Chicago—157 Ill. 659; 41 N. E. 1117.....	343, 345, 363
Beach v. Chicago—193 Ill. 162; 61 N. E. 1015.....	375
Beals v. Brookline—174 Mass. 1; 54 N. E. 339.....	551
Beard v. Brooklyn—31 Barb. 142.....	660
Bears v. Boston—173 Mass. 71; 43 L. R. A. 834; 53 N. E. 138....	192
Bears v. Street Commissioners—173 Mass. 350; 53 N. E. 786....	192
Beaser v. Ashland—89 Wis. 28; 61 N. W. 77.....	738, 779, 780
Beaser v. Barber A. P. Co.—120 Wis. 599; 98 N. W. 525....	788, 789
Beatrice v. Brethren Church—41 Neb. 358; 59 N. W. 932, 934....	27
Beaudry v. Palmer—32 Cal. 269.....	654
Beaudry v. Valdez—32 Cal. 269.....	133, 290, 428, 569, 693, 753



(The references are to sections.)

Beaumont v. Wilkesbarre—142 Pa. St. 198; 21 Atl. 888.....	78, 170, 381, 478
Beaver Dam v. Frings—17 Wis. 404.....	404
Beck v. Holland—29 Mont. 234; 74 Pac. 410.....	396, 433, 455, 524
Beck v. Obst—12 Bush. 268.....	552
Becker v. B. & O. R. R. Co.—17 Ind. App. 324, 326; 46 N. E. 685..	680
Becker v. Chicago—208 Ill. 126; 69 N. E. 748.....	504
Becker v. Hudson—100 Ky. 450.....	351
Becker v. Washington—94 Mo. 375; 7 S. W. 291.....	342, 383
Bedard v. Hall—44 Ill. 91.....	35, 63, 187, 210, 481
Beecher v. Detroit—92 Mich. 268; 52 N. W. 731....	193, 397, 465, 537
Beechwood Avenue, <i>In re</i> —194 Pa. St. 86; 45 Atl. 127, 1093..	210, 218
Beechwood Ave. Sewer—179 Pa. St. 490; 36 Atl. 209.....	580
Beekman St., <i>In re</i> —4 Brad. 503.....	151
Beidler Manfg. Co. v. Muskegon—63 Mich. 44; 29 N. E. 678.....	531
Belknap v. Belknap—2 Johns ch. 472; 7 Am. Dec. 548.....	776
Bell v. Norwood—8 Ohio C. C., N. S. 435.....	508, 715, 719
Bellevue v. Peacock—89 Ky. 495; 25 Am. St. Rep. 552; 12 S. W. 1042 .....	119, 699
Bellevue Imp. Co. v. Bellevue—39 Neb. 876; 58 N. W. 446.....	506, 774, 788, 793
Bellingham Bay etc. Co. v. New Whatcom—17 Wash. 496; 50 Pac. 477 .....	747
Beltzhoover v. Beltzhoover's Heirs—173 Pa. St. 213; 33 Atl. 1047..	259
Beltzhoover v. Maple—130 Pa. St. 335; 18 Atl. 650.....	595
Bemis v. McCloud—4 Neb. (Unof.) 731; 97 N. W. 828.....	797
Beniteau v. Detroit—41 Mich. 116; 1 N. W. 899.....	501, 502
Bennett v. Seibert—10 Ind. App. 369; 35 N. E. 35; 37 N. E. 1071 .....	219, 235
Benson v. Bunting—141 Cal. 462; 75 Pac. 59.....	523
Benson v. Waukesha—74 Wis. 31; 41 N. W. 1017.....	396, 629
Benton Street Case—9 La. Ann. 446.....	69
Berdel v. Chicago—217 Ill. 429; 75 N. E. 386.....	450
Bergen v. State—32 N. J. L. 490.....	821
Berghaus v. Harrisburg—122 Pa. St. 289; 16 Atl. 365.....	707
Berry v. Chicago—192 Ill. 154; 61 N. E. 498.....	338
Berry v. People—200 Ill. 231; 66 N. E. 1072.....	432
Berry v. People—202 Ill. 231; 66 N. E. 1072.....	618, 723
Besinger v. Dist. of Col.—6 Mackey 285.....	308
Besinger v. Dist. of Col.—6 Mackey 352.....	308
Betts v. Naperville—214 Ill. 380; 73 N. E. 752.....	322, 487, 490, 499, 505, 506
Beveridge v. Livingston—54 Cal. 54.....	147, 421
Bibel v. People—67 Ill. 172.....	466, 647, 648
Bickerdike v. Chicago—185 Ill. 280; 56 N. E. 1096.....	341, 363, 364, 526, 578, 746
Bickerdike v. Chicago—203 Ill. 636; 68 N. E. 161.....	292, 387, 504
Bickett v. Peoria—185 Ill. 369; 57 N. E. 30.....	311
Bidwell v. Coleman—11 Minn. 78; Gil 45.....	73
Bidwell v. Huff—103 Fed. 362.....	783, 784
Bidwell v. Pittsburg—85 Pa. St. 412; 27 Am. Rep. 662.....	720
Bigelow v. Boston—120 Mass. 326.....	547
Bigelow v. Chicago—90 Ill. 49.....	517
Bigelow v. Los Angeles—85 Cal. 614; 24 Pac. 778.....	794
Biggins Estate v. People—193 Ill. 601; 61 N. E. 1124.....	372, 376, 381, 680
Big Rapids v. Mecosta Co.—99 Mich. 351; 58 N. W. 358.....	256



(The references are to sections.)

Bill v. Denver—29 Fed. 344.....	660
Billings v. Chicago—167 Ill. 337; 47 N. E. 731....	257, 264, 492, 623
Bingham v. Pittsburgh—147 Pa. St. 353; 23 Atl. 395.....	821
Birdseye v. Clyde—61 Ohio St. 27; 55 N. E. 169.....	720, 783, 784
Bishop v. Marks—15 La. Ann. 147.....	176, 219
Bishop v. Tripp—15 R. I. 466; 8 Atl. 692.....	79, 223, 233, 587
Biss v. New Haven—42 Wis. 605.....	766
Blade v. Water Commissioners—122 Mich. 366; 81 N. W. 271....	231
Blair v. Atchison—40 Kan. 353; 19 Pac. 815.....	572
Blair v. Luring—76 Cal. 134; 18 Pac. 153.....	419
Blake v. People—109 Ill. 504.....	614
Blanchard v. Barre, Vt.—77 Vt. 420; 60 Atl. 970.....	117, 134, 531, 775, 782
Blanden v. Fort Dodge—102 Ia. 441; 71 N. W. 411.....	290, 331, 540, 626, 729
Blanding v. Burr—13 Cal. 343.....	59
Bliss v. Chicago—156 Ill. 584; 41 N. E. 160.....	343, 546
Blodgett, <i>In re</i> —91 N. Y. 117.....	423, 425
Bloomington v. C. & A. R. Co.—134 Ill. 451; 26 N. E. 366.....	152, 188, 204, 216, 370, 467, 614
Bloomington v. Latham—142 Ill. 462; 18 L. R. A. 487; 32 N. E. 506	15, 35, 86, 109, 110, 339, 515
Bloomington v. Miller—84 Ill. 621.....	635
Bloomington v. Phelps—149 Ind. 596; 49 N. E. 581.....	726
Bloomington v. Pollock—141 Ill. 346; 31 N. E. 146.....	643
Bloomington v. Reeves—177 Ill. 161; 52 N. E. 278....	270, 278, 281
Bloomington Cem. Asso. v. People—139 Ill. 16; 28 N. E. 1076....	258, 517
Blount v. Janesville—31 Wis. 648.....	84, 211
Blount v. People—188 Ill. 538; 59 N. E. 241.....	383, 392
Blue v. Wentz—54 Ohio St. 247; 43 N. E. 493.....	593
Blue Island v. Eames—155 Ill. 398; 40 N. E. 615.....	221
Bluffton v. Miller—33 Ind. App. 521; 70 N. E. 989.....	133, 287, 291, 420, 774, 806
Boals v. Bachman—201 Ill. 340; 66 N. E. 336.....	713, 737
Board etc. v. Fallen—111 Ind. 410; 12 N. E. 298.....	131
Board etc. v. Fallen—118 Ind. 158; 20 N. E. 771.....	502
Board etc. v. People—219 Ill. 83; 76 N. E. 75.....	267, 616
Board of Councilmen v. Murray—99 Ky. 422; 36 S. W. 180.....	359
Board of Directors v. Houston—71 Ill. 318.....	86
Board of Education v. Toledo—48 Ohio St. 87; 26 N. E. 404.....	234
Board of Improvement v. School District—56 Ark. 354; 16 L. R.	A. 418; 35 Am. St. Rep. 108; 19 S. W. 969.....
Board of Supervisors v. Murray—56 Ill. 160.....	764
Boardman v. Beckwith—18 Ia. 292.....	810
Boehme v. Monroe—106 Mich. 401; 64 N. W. 204. 440, 503, 513,	558
Bogert v. Elizabeth—27 N. J. Eq. 568.....	107
Boice v. Plainfield—38 N. J. L. 95.....	309
Bolton v. Cleveland—35 Ohio St. 319.....	798
Bolton v. Gilleran—105 Cal. 244; 45 Am. St. Rep. 33; 38 Pac. 881	403, 778
Bond v. Kenosha—17 Wis. 284.....	84, 85
Bond v. Newark—19 N. J. Eq. 376.....	417
Bonsall v. Lebanon—19 Ohio 418.....	77, 141
Boom Co. v. Patterson—98 U. S. 403; 25 L. ed. 206.....	642
Boorman v. Santa Barbara—65 Cal. 313; 4 Pac. 31.....	345



## TABLE OF CASES.

xxi

(The references are to sections.)

Borchardt v. Wausau Boom Co.—54 Wis. 107; 41 Am. Rep. 12; 11 N. W. 440.....	647
Borgman v. Detroit—102 Mich. 261; 60 N. W. 696.....	619, 648
Boston v. B. & A. R. Co.—170 Mass. 95; 49 N. E. 95.....	192, 264
Boston etc. R. R. Co. v. State—60 N. H. 87.....	75
Bow v. Smith—9 Mod. 94.....	223
Bowditch v. Supt. etc.—168 Mass. 239; 46 N. E. 1026.....	286
Bowen v. Chicago—61 Ill. 268.....	835
Bowers v. Braddock—172 Pa. St. 596; 39 Atl. 759.....	747
Bowman v. People—137 Ill. 436; 27 N. E. 598-600.....	685
Bowman v. Wood—41 Ill. 203.....	324
Bowne v. Logan—43 N. J. L. 421.....	308
Boyce v. Tuhey—163 Ind. 202; 70 N. E. 531.....	397, 398, 587, 591, 618, 619
Boyd v. Milwaukee—92 Wis. 456; 66 N. W. 603.....	145, 219, 235, 271, 415, 571, 575
Boyd v. Murphy—127 Ind. 174; 25 N. E. 702.....	408, 409
Boyden v. Brattleboro—65 Vt. 504; 27 Atl. 164.....	821
Boynton v. People—155 Ill. 66; 39 N. E. 622.....	493, 495
Boynton v. People—159 Ill. 553; 42 N. E. 842.....	715
Brackett v. People—115 Ill. 29; 3 N. E. 723.....	616
Bradford v. Chicago—25 Ill. 411.....	766, 767
Bradford v. Fox—171 Pa. St. 343; 33 Atl. 85.....	373, 729
Bradford v. Pontiac—165 Ill. 612; 46 N. E. 794.....	323, 366, 374, 380
Bradley v. McAtee—7 Bush 667; 3 Am. Rep. 309.....	68, 122, 132, 147, 177, 191
Brady, <i>In re</i> —85 N. Y. 268.....	433, 569
Brady v. Bartlett—56 Cal. 350.....	138, 428
Brady v. Hayward—114 Mich. 326; 72 N. W. 233.....	738
Brady v. King—53 Cal. 44.....	59, 299, 814
Brady v. Mayor—20 N. Y. 312.....	407, 420
Brady v. Page—59 Cal. 52.....	297
Bramhall v. Bayonne—35 N. J. L. 476.....	485
Brand v. Multnomah Co.—38 Oreg. 79; 50 L. R. A. 389; 84 Am. St. Rep. 772; 60 Pac. 390; 62 Pac. 209.....	811, 812
Brands v. Louisville—111 Ky. 56; 63 S. W. 2.....	772
Brennan v. Buffalo—162 N. Y. 491; 57 N. E. 81.....	504, 510, 733
Brennan v. St. Paul—44 Minn. 464; 47 N. W. 55.....	540
Bretholt v. Wilmette—168 Ill. 162; 48 N. E. 38.....	486, 496
Brevoort v. Detroit—24 Mich. 322..193, 211, 429, 439, 756, 820, 838	
Brewer v. Elizabeth—66 N. J. L. 547; 49 Atl. 480..485, 603, 730, 821	
Brewer v. Springfield—97 Mass. 152.....	179, 192
Brewster v. Davenport—51 Iowa 427; 1 N. W. 737.....	333, 401
Brewster v. Peru—180 Ill. 124; 54 N. E. 233.....	381
Brewster v. Syracuse—19 N. Y. 116.....	122
Bridge v. Grand Forks—1 N. D. 300; 10 L. R. A. 165; 47 N. W. 390.....	821
Bridgeport v. N. Y. & N. H. R. Co.—36 Conn. 255; 4 Am. Rep. 63 19, 228, 242	
Briggs v. Whitney—159 Mass. 97.....	219
Briggs v. Whitney—159 Mass. 383; 34 N. E. 179.....	219
Bright v. McCullough—27 Ind. 223.....	66
Brightman v. Kirner—22 Wis. 54.....	266
Brink v. Dunmore—174 Pa. St. 395; 34 Atl. 598.....	762
Broad St. etc., <i>In re</i> —165 Pa. St. 475; 30 Atl. 1007....255, 263, 724	
Broadway, etc., Church v. McAtee—8 Bush 508; 8 Am. Rep. 480 68, 130, 131, 177, 260, 445, 651	



(The references are to sections.)

Broek v. Luning—89 Cal. 316; 26 Pac. 972.....	135, 421
Brodhead v. Milwaukee—19 Wis. 636; 88 Am. Dec. 711.....	155
Brookfield v. Sterling—214 Ill. 100; 73 N. E. 302.....	270
Brooks v. Chicago—168 Ill. 60; 48 N. E. 136.....	189, 532, 533
Brooks v. Satterlee—49 Cal. 289.....	310
Brophy v. Harding—137 Ill. 622; 27 N. E. 523; 34 N. E. 253....	736
Brophy v. Laudman—28 Ohio St. 542.....	494
Brown v. Central Bermudez Co.—162 Ind. 452; 69 N. E. 150....	404, 482, 502, 617, 705
Brown v. Chicago—62 Ill. 106.....	322
Brown v. Chicago—62 Ill. 289.....	689
Brown v. Chicago—117 Ill. 21; 7 N. E. 108.....	795
Brown v. Denver—3 Colo. 169.....	186
Brown v. Denver—7 Colo. 305; 3 Pac. 455.....	29, 60, 96, 331
Brown v. Drain—112 Fed. 582.....	755
Brown v. Fitchburg—128 Mass. 282.....	501, 745
Brown v. Grand Rapids—83 Mich. 101; 47 N. W. 117.....	438
Brown v. Jenks—98 Cal. 10; 32 Pac. 701.....	414
Brown v. Joliet—22 Ill. 123.....	553, 653
Brown v. Mayor—63 N. Y. 239.....	426
Brown v. Palmer—66 Neb. 287; 92 N. W. 315.....	598
Brown v. Saginaw—107 Mich. 643; 65 N. W. 601.....	398, 602, 615, 619, 756
Browning v. Chicago—155 Ill. 314; 40 N. E. 565.....	546
Browne v. May—120 N. Y. 357; 24 N. E. 947.....	765
Bruecher v. Port Chester—101 N. Y. 240; 4 N. E. 272.....	765
Brumby v. Harris—107 Ga. 257; 33 S. E. 49.....	691
Brunner v. Bay City—46 Mich. 236; 9 N. W. 263.....	798
Brush v. Detroit—32 Mich. 43.....	314, 514
Bryant v. Robbins—70 Wis. 258; 35 N. W. 545.....	32
Bryant v. Russell—127 Mo. 422; 30 S. W. 107.....	688
Buchan v. Broadwell—88 Mo. 31.....	119
Buckley v. Tacoma—9 Wash. 253; 37 Pac. 441....	136, 289, 391, 510
Buckley v. Tacoma—9 Wash. 269; 37 Pac. 446.....	399, 815, 843
Buckman v. Cuneo—103 Cal. 62; 36 Pac. 1025.....	512
Bucroft v. Council Bluffs—63 Ia. 646; 19 N. W. 807.....	430, 567, 638, 656, 660
Buffalo City of, <i>In re</i> —78 N. Y. 362.....	136, 391, 434
Buffalo City Cemetery v. Buffalo—46 N. Y. 506, 509.....	11, 27, 259
Burgett v. Norris—25 Ohio St. 308.....	271, 281, 794, 811
Burham v. Norwood Park—138 Ill. 147; 27 N. E. 1088.....	307, 348
Burk v. Mayor, etc.—77 Med. 469; 26 Atl. 868.....	342
Burke, <i>In re</i> —62 N. Y. 224.....	316, 566, 796
Burke v. Kansas City—118 Mo. 309; 24 S. W. 48.....	386
Burke v. Turney—54 Cal. 486.....	676, 681
Burnham v. Chicago—24 Ill. 496.....	565, 566
Burnham v. Milwaukee—69 Wis. 379; 34 N. W. 389.....	425
Burlington v. Quick—47 Iowa 222.....	162, 346, 577, 655
Burlington & M. R. R. Co. v. Spearman—12 Iowa 112.....	240, 398
Burlington Sav. Bk. v. Clinton—106 Fed. 269.....	88
Burmeister, <i>In re</i> —76 N. Y. 174.....	132, 211, 315, 327
Burnett v. Sacramento—12 Cal. 76; 73 Am. Dec. 518.....	59, 158, 159, 186, 441
Burns v. Duluth (Minn.)—104 N. W. 714.....	501
Burns v. Mayor—48 Md. 198.....	155
Burnes v. Atchison—2 Kan. 454.....	129
Burton v. Chicago—53 Ill. 87.....	318



## TABLE OF CASES.

xxiii

(The references are to sections.)

Burton v. Chicago—62 Ill. 179.....	492
Busbee v. Commissioners—93 N. C. 143.....	76
Buser v. Cedar Rapids—115 Ia. 685; 87 N. W. 404.....	634
Bush v. Dubuque—69 Ia. 233; 28 N. W. 542.....	559
Bush v. Keesport—166 Pa. St. 57; 30 Atl. 1023.....	634
Bush v. Peoria—215 Ill. 515; 74 N. E. 797.....	573
Bushnell v. Leland—164 U. S. 684; 41 L. ed. 598; 17 Sup. Ct. Rep. 209.....	97
Butler v. Chicago—56 Ill. 341.....	390
Butler v. Keyport—64 N. J. L. 181; 44 Atl. 849.....	805
Butler v. Robinson—75 Mo. 192.....	554
Butler v. Toledo—5 Ohio St. 225.....	821, 839
Butte v. School Dist. No. 1—29 Mont. 336-341.....	228
Byram v. Detroit—50 Mich. 56; 12 N. W. 912; 14 N. W. 698....	722, 787, 789, 820
Byrne v. Drain—127 Cal. 663; 60 Pac. 433.....	543

## C.

Cabell v. Henderson (Ky.)—88 S. W. 1095.....	547
Cain v. Commissioners—86 N. C. 8.....	76, 231
Cain v. Omaha—42 Neb. 120; 60 N. W. 368.....	195, 463, 526
Caldwell v. Carthage—49 Ohio St. 334; 31 N. E. 602.....	115
Caldwell v. Rupert—10 Bush 179.....	68, 133, 140, 253, 552, 662
Caldwell v. Texas—137 U. S. 692; 34 L. ed. 816; 11 Sup. Ct. Rep. 224.....	93
California Imp. Co. v. Moran—128 Cal. 373; 60 Pac. 969.....	721
California Imp. Co. v. Reynolds—123 Cal. 88; 55 Pac. 802.....	403
Callender v. Patterson—66 Cal. 357; 5 Pac. 610.....	723
Callister v. Kochesperger—168 Ill. 334; 48 N. E. 156.....	758
Callon v. Jacksonville—147 Ill. 113; 35 N. E. 223.....	342, 588
Camden v. Mulford—26 N. J. L. 49.....	309, 594
Cameron, <i>In re</i> —46 N. Y. 502.....	541
Camp v. Simpson—118 Ill. 224; 8 N. E. 308.....	793
Campau v. Detroit—14 Mich. 276.....	326
Campbell v. Com'rs—118 Ind. 119; 20 N. E. 772.....	747
Campbell v. Dist. of Col.—117 U. S. 615; 29 L. ed. 1007; 6 Sup. Ct. Rep. 922.....	425
Campbell v. Park—32 Ohio St. 544.....	277, 278
Campion v. Elizabeth—41 N. J. L. 355.....	400, 771
Canal St., <i>In re</i> —11 Wend 156.....	107, 197
Canfield v. Smith—34 Wis. 381.....	283, 286, 721, 776
Canal Trustees v. Chicago—12 Ill. 403, 406.....	49, 63, 187, 254, 501
Carlin v. Cavender—56 Mo. 286.....	350
Carlinville v. McClure—156 Ill. 492; 41 N. E. 169.....	342, 348
Carlyle v. Clinton Co.—140 Ill. 512; 30 N. E. 782....	134, 139, 332, 369
Carpenter v. Lancaster—212 Pa. St. 581; 61 Atl. 1113.....	639
Carpenter v. St. Paul—23 Minn. 232.....	319, 396, 820
Carry v. Folz—29 Ohio St. 320.....	471, 522
Carry v. Gaynor—22 Ohio St. 584.....	722
Carson v. St. Francis Levee Dist.—59 Ark. 513, 537; 27 S. W. 590	57, 96, 185, 459
Carson v. Sewer Com'rs—182 U. S. 398; 45 L. ed. 1151; 21 Sup. Ct. Rep. 860.....	102, 290
Carter v. Cemansky—126 Iowa 506; 102 N. W. 438..	469, 728, 729, 843
Case of Chester Mills—10 Co. 499.....	223
Case v. Johnson—9 Ind. 477.....	270



(The references are to sections.)

Casey v. Burt Co.—59 Neb. 624; 81 N. W. 851.....	637, 731, 770
Casey v. Leavenworth—17 Kan. 189.....	656, 658
Casey v. People—165 Ill. 49; 46 N. E. 7.....	322, 614
Cason v. Lebanon—153 Ind. 567; 55 N. E. 768.....	726
Cass v. People—166 Ill. 126; 46 N. E. 729.....	367, 377, 388, 392
Cass Farm Co. v. Detroit—124 Mich. 433; 83 N. W. 108.....	102, 168, 406, 422
Cass Farm Co. v. Detroit—181 U. S. 395, 396; 45 L. ed. 914; 21 Sup. Ct. Rep. 644.....	88, 98, 102, 170
Cemansky v. Fitch—121 Ia. 186; 96 N. W. 754.....	698, 702
Central etc. Co. v. Bayonne—56 N. J. L. 297; 28 Atl. 713.....	169
Central Ir. Dist. v. De Lappe—79 Cal. 351; 21 Pac. 823.....	226
Central Park, <i>In re</i> —50 N. Y. 493.....	217
Central Park Comr's, <i>In re</i> —63 Barb. 282.....	218
Central Savings Bank v. Mayor, etc.—71 Md. 515; 18 Atl. 809; 20 Atl. 283.....	319
Chadwick v. Kelley—104 La. 719; 29 So. 295.....	482
Chadwick v. Kelley—187 U. S. 540; 47 L. ed. 293, 295; 23 Sup. Ct. Rep. 175.....	88, 90, 117, 481, 482, 727
Chaffee v. Granger—6 Mich. 51.....	777
Chaliss v. Parker—11 Kan. 384, 394.....	597, 598
Chamberlain v. Cleveland—34 Ohio St. 551.....	154, 199, 295, 434, 448, 452, 783
Chamberlin v. Gleason—163 N. Y. 214; 57 N. E. 487....	568, 715, 777
Chambers v. Satterlee—40 Cal. 497.....	9, 17, 59, 110, 167, 287, 386, 441, 748, 751
Chambliss v. Johnson—77 Iowa 611; 42 N. W. 427.....	220
Chance v. Portland—26 Oreg. 286; 38 Pac. 68.....	416
Chandler v. People—161 Ill. 41; 43 N. E. 590.....	320
Chapman v. Ames—135 Cal. 246; 67 Pac. 1125.....	59
Chapman v. Brooklyn—40 N. Y. 372.....	533, 765
Chariton v. Holliday—60 Iowa 391; 14 N. W. 775.....	314, 539, 595
Charles v. Marion—98 Fed. 166.....	102, 108, 798
Charleston v. Johnston—170 Ill. 336; 48 N. E. 985.....	144, 224
Charnock v. Fardoche etc. Co.—38 La. An. 323.....	20, 41, 177, 458
Chase v. Evanston—172 Ill. 403; 50 N. E. 241.....	486, 487
Chase v. Los Angeles—122 Cal. 540; 55 Pac. 414.....	313, 403, 747, 776, 790
Chase v. Oshkosh—81 Wis. 313; 15 L. R. A. 553; 29 Am. St. Rep. 898; 51 N. W. 560.....	647
Chase v. Scheerer—136 Cal. 248; 68 Pac. 768.....	807
Chase v. Portland—86 Me. 367; 29 Atl. 1104.....	644
Chase v. Sioux City—86 Ia. 603; 53 N. W. 333.....	563
Chase v. Trout—146 Cal. 350; 80 Pac. 81.....	98, 510, 512, 700
Claffin v. Chicago—178 Ill. 549; 53 N. E. 339.....	354, 556
Clapp v. Hartford—35 Conn. 66.....	165, 177, 749, 755
Clark v. Chicago—152 Ill. 223; 57 N. E. 15.....	366, 614
Clark v. Chicago—166 Ill. 84; 46 N. E. 730.....	754
Clark v. Chicago—184 Ill. 354.....	500
Clark v. Chicago—214 Ill. 318; 73 N. E. 358.....	504
Clark v. Ewing—87 Ill. 344.....	546
Clark v. Janesville—10 Wis. 136.....	142
Clark v. Kerns—146 Ill. 348; 35 N. E. 60.....	688
Clark v. People—146 Ill. 348; 35 N. E. 60.....	309, 613, 615, 617
Clark v. Porter—53 Cal. 409.....	685
Clark v. Teller—50 Mich. 618; 16 N. W. 167.....	775
Clay v. Grand Rapids—60 Mich. 451; 27 N. W. 596.....	592, 802



(The references are to sections.)

Craft v. Kochesperger—173 Ill. 617; 50 N. E. 1061.....	778, 780, 795, 808
Craig v. People—193 Ill. 199; 61 N. E. 1072.....	376, 381
Craig v. Philadelphia—89 Pa. St. 265.....	155, 682
Crain v. Chicago—139 Ill. 265; 28 N. E. 758.....	519
Cram, <i>In re</i> —69 N. Y. 452.....	523
Cram v. Chicago—138 Ill. 506; 28 N. E. 757.....	550, 612
Cramer v. Charleston—176 Ill. 507; 52 N. E. 73.....	353, 374
Cramer v. Stone—38 Wis. 259.....	213, 610
Crane v. W. Chic. Park Comr's—153 Ill. 348; 26 L. R. A. 311; 38 N. E. 943	155
Cratty v. Chicago—217 Ill. 453; 75 N. E. 343.....	812, 834
Craw v. Tolono—96 Ill. 255; 36 Am. Rep. 143.....	13, 14, 64, 376, 597, 651
Crawford v. Burrell—53 Pa. St. 219.....	253
Crawford v. People—82 Ill. 557.....	484
Cheany v. Houser—9 B. Monroe 341.....	822
Cheney v. Beverly—188 Mass. 81; 74 N. E. 306.....	86, 121, 469, 507, 531
Cherington v. Columbus—50 Ohio St. 475; 34 N. E. 680.....	169
Chester v. Black—132 Pa. St. 568; 6 L. R. A. 802; 19 Atl. 276 78, 170, 821, 827	727
Chester v. Bullock—187 Pa. St. 544; 41 Atl. 452.....	821, 823
Chester v. Pennell—169 Pa. St. 300; 32 Atl. 408.....	618
Chew v. People—202 Ill. 380; 66 N. E. 1069.....	733
Chicago v. Adams—24 Ill. 492.....	189, 582
Chicago v. Adcock—163 Ill. 221; 48 N. E. 155.....	344
Chicago v. Ayers—212 Ill. 59; 72 N. E. 32.....	63, 187, 246, 256, 264, 524
Chicago v. Baer—41 Ill. 306.....	256, 511
Chicago v. Baptist Theological Union—115 Ill. 245; 2 N. E. 254	431
Chicago v. Barbian—80 Ill. 482.....	137, 152, 227, 326
Chicago v. Blair—149 Ill. 310; 24 L. R. A. 412; 36 N. E. 829....	339, 341
Chicago v. Brown—205 Ill. 568; 69 N. E. 65.....	617, 692, 733
Chicago v. Burtice—24 Ill. 489.....	17
Chicago v. Colby—20 Ill. 614.....	362
Chicago v. Corcoran—196 Ill. 146; 63 N. E. 690.....	574
Chicago v. Cummings—144 Ill. 446; 33 N. E. 34.....	521, 689
Chicago v. Habar—62 Ill. 283.....	375
Chicago v. Holden—194 Ill. 213; 62 N. E. 550.....	344, 348, 350, 383, 384, 412, 824
Chicago v. Hulbert—205 Ill. 346; 68 N. E. 786.....	35, 63, 64, 187, 481, 537, 538
Chicago v. Larned—34 Ill. 203.....	133, 134, 139, 153, 229
Chicago v. Law—144 Ill. 576; 33 N. E. 855.....	616
Chicago v. Nicholes—192 Ill. 489; 61 N. E. 434.....	387, 506, 610, 621, 623
Chicago v. Nodeck—202 Ill. 257; 67 N. E. 39.....	820, 833, 836, 839
Chicago v. Noonan—210 Ill. 18; 71 N. E. 32.....	647
Chicago v. Palmer—93 Ill. 125.....	668
Chicago v. People—48 Ill. 416.....	660, 667, 668, 712
Chicago v. People—56 Ill. 322.....	841
Chicago v. Richardson—213 Ill. 96; 72 N. E. 791.....	135
Chicago v. Rock Island R. Co.—20 Ill. 286.....	544
Chicago v. Rosenfeld—24 Ill. 495.....	345, 350, 360, 820, 824
Chicago v. Sherman—212 Ill. 498; 72 N. E. 396.....	343
Chicago v. Silverman—156 Ill. 601; 41 N. E. 162.....	674, 764
Chicago v. Singer—116 Ill. App. 559.....	



(The references are to sections.)

Chicago v. Singer—202 Ill. 75; 66 N. E. 874.....	340, 346, 372
Chicago v. Stuart—53 Ill. 83.....	770
Chicago v. Taylor—125 U. S. 161; 31 L. ed. 638; 8 Sup. Ct. Rep. 820.....	623, 625
Chicago v. Walker—24 Ill. 493.....	553, 557
Chicago v. Walsh—203 Ill. 318; 67 N. E. 774.....	365
Chicago v. Wheeler—25 Ill. 478; 78 Am. Dec. 342.....	557, 718
Chicago v. Wilson—195 Ill. 19; 57 L. R. A. 127; 62 N. E. 843....	340
Chicago v. Wright—32 Ill. 192.....	388, 458, 748
Chicago v. Wright—80 Ill. 579.....	134, 135, 368, 820
Chicago etc. v. Chicago—207 Ill. 37; 69 N. E. 580.....	676, 691
C. & A. R. Co. v. Joliet—153 Ill. 649; 39 N. E. 1077.....	40, 168, 189, 208, 241, 475
C. & A. R. Co. v. Pontiac—169 Ill. 155; 48 N. E. 485.....	637
C. B. & Q. R. Co. v. Chicago—166 U. S. 226, 241; 41 L. ed. 979, 986; 17 Sup. Ct. Rep. 581.....	96
C. B. & Q. R. Co. v. Frary—22 Ill. 34.....	793
C. B. & Q. R. Co. v. Quincy—136 Ill. 563; 29 Am. St. Rep. 334; 27 N. E. 192.....	241, 251, 347
C. B. & Q. R. Co. v. Quincy—139 Ill. 355; 28 N. E. 1069.....	347
C. & E. R. Co. v. Jacobs—110 Ill. 414.....	639
C. M. & St. P. R. Co. v. Milwaukee—89 Wis. 506; 28 L. R. A. 249; 62 N. W. 417.....	208, 240, 243, 266
C. M. & St. P. R. Co. v. Mitchell—159 Ill. 406; 42 N. E. 973....	645
C. M. & St. P. R. Co. v. Phillips—111 Iowa 377; 82 N. W. 787..	446, 591, 752, 797
C. & N. P. R. Co. v. Chicago—172 Ill. 66; 49 N. E. 1006..	358, 360, 395
C. & N. P. R. Co. v. Chicago—174 Ill. 439; 51 N. E. 596..	331, 334, 372
C. & N. W. R. Co. v. Chicago—148 Ill. 141; 35 N. E. 881..	431, 516
C. & N. W. R. Co. v. Cicero—154 Ill. 656; 39 N. E. 574.....	340
C. & N. W. R. Co. v. Elmhurst—165 Ill. 148; 46 N. E. 437.....	39, 162, 165, 189, 241, 339, 459, 690
C. & N. W. R. Co. v. People—83 Ill. 467.....	615, 616
C. & N. W. R. Co. v. People—120 Ill. 104; 11 N. E. 418..	240, 241, 264
C. P. & M. R. Co. v. Mitchell—159 Ill. 406; 42 N. E. 973.....	643
C. R. I. & P. R. Co. v. Chicago—27 N. E. 926.....	240
C. R. I. & P. R. Co. v. Chicago—139 Ill. 573; 28 N. E. 1108....	240, 264, 452, 491, 495, 544
C. R. I. & P. R. Co. v. Chicago—143 Ill. 641; 32 N. E. 178..	432, 516
C. R. I. & P. R. Co. v. Moline—158 Ill. 64; 41 N. E. 877. See note in 28 L. R. A. 249.....	208, 242, 498, 600, 671
C. R. I. & P. R. Co. v. Ottumwa—112 Iowa 300; 51 L. R. A. 763; 83 N. W. 1074.....	242, 580, 656
Chicago City R. Co. v. Chicago—90 Ill. 573; 32 Am. Rep. 54....	236
Chicago Park Com'rs v. Farber—171 Ill. 146; 49 N. E. 427.....	460, 820, 836, 839, 841
Chicago T. Tr. Co. v. Chicago—178 Ill. 429; 53 N. E. 361.....	237
Chicago T. Tr. Co. v. Chicago—184 Ill. 154; 56 N. E. 410.....	354
Chicago U. T. Co. v. Chicago—202 Ill. 576; 67 N. E. 383..	190, 247, 333
Chicago U. T. Co. v. Chicago—204 Ill. 363; 68 N. E. 579.....	449, 450, 464, 468
Chicago U. T. Co. v. Chicago—207 Ill. 544; 69 N. E. 849..	345, 346, 355
Chicago U. T. Co. v. Chicago—207 Ill. 607; 69 N. E. 803..	547, 681
Chicago U. T. Co. v. Chicago—215 Ill. 410; 74 N. E. 449..	343, 503, 504
Chic. W. Div. R. Co. v. People—154 Ill. 256; 40 N. E. 342.....	303
C. & O. R. Co. v. Mullins—94 Ky. 355; 22 S. W. 558.....	304, 309
Chickering v. Faile—38 Ill. 340.....	558
Chrisman v. Brookhaven—70 Miss. 477; 12 So. 458.....	73



## TABLE OF CASES.

xxvii

(The references are to sections.)

Church v. McAtee—8 Bush 508; 8 Am. Rep. 480 .....	653
Church v. Milwaukee—31 Wis. 512.....	497, 632, 633, 641, 757
Church v. Milwaukee—34 Wis. 66.....	628, 641, 642
Church v. People—174 Ill. 366; 51 N. E. 747.....	344, 591, 686
Church v. People—179 Ill. 205; 53 N. E. 554.....	343, 363, 588
Churchill, <i>In re</i> —82 N. Y. 28.....	524
Chytraus v. Chicago—160 Ill. 18; 43 N. E. 335.....	346
Cicero v. Green—211 Ill. 241; 71 N. E. 884....	377, 502, 832, 837, 841
Cicero v. Skinner (Ill.)—77 N. E. 137.....	834
Cicero & P. St. R. Co. v. Chicago—176 Ill. 501; 52 N. E. 866; 68 Notes Ochsenfeld Sept. 26, No 6.....	236
Cincinnati v. Anchor White Lead Co.—44 Ohio St. 243; 7 N. E. 11.	604
Cincinnati v. Anderson—52 Ohio St. 600; 43 N. E. 1040.....	288
Cincinnati v. Batsche—52 Ohio St. 324; 27 L. R. A. 536.....	169, 249
Cincinnati v. Bickett—26 Ohio St. 49.....	319, 686
Cincinnati v. Bryson—15 Ohio 625; 45 Am. Dec. 593.....	134
Cincinnati v. C. & S. G. Ave. Co.—26 Ohio St. 345.....	432
Cincinnati v. Connor—55 Ohio St. 82; 44 N. E. 582.....	143
Cincinnati v. Davis—58 Ohio St. 225; 50 N. E. 918.....	391
Cincinnati v. Emerson—57 Ohio St. 132; 48 N. E. 667.....	754
Cincinnati v. James—55 Ohio St. 180; 44 N. E. 925.....	805
Cincinnati v. Manso—54 Ohio St. 257; 43 N. E. 687.....	284
Cincinnati v. Seasongood—46 Ohio St. 296; 21 N. E. 630.....	819
Cincinnati v. Sherike—47 Ohio St. 217; 25 N. E. 169.....	288
Cincinnati v. Taft—63 Ohio St. 141; 58 N. E. 63.....	794
C. & E. R. Co. v. Keith—67 Ohio St. 279.....	100
Citizens etc. Trust Co. v Chicago—215 Ill. 174; 74 N. E. 115....	94, 306, 485
City Bond Co. v. Bruner—34 Ind. App. 659; 73 N. E. 711.....	705
City Bond Co. v. Wells—34 Ind. App. 675; 73 N. W. 713.....	705
City Council v. Birdsong—126 Ala. 632, 648, 650; 28 So. 522....	167, 185, 679, 730
City Council v. Foster—133 Ala. 587, 596, 597; 32 So. 610.....	144, 185, 481, 783
City Council v. Montgomery—133 Ala. 587, 598; 32 So. 610.....	535
City Council v. Pinckney—3 Brev. 217.....	79
City Improvement Co. v. Babcock—123 Cal. 205; 55 Pac. 762....	287
City Street Imp. Co. v. Taylor—138 Cal. 364; 71 Pac. 446.....	568
Clementi v. Jackson—92 N. Y. 591.....	811, 814
Clemes v. Mayor &c.—16 Md. 208.....	656, 725
Cleneay v. Norwood—137 Fed. 962.....	450
Cleveland v. Clements etc. Co.—67 Ohio St. 197; 59 L. R. A. 775; 93 Am. St. Rep. 670; 65 N. E. 885.....	410
Cleveland v. Tripp—13 R. I. 50.....	79, 104, 170, 177, 503, 504
Cleveland v. Wick—18 Ohio St. 303.....	112, 211, 635
C. L. & N. R. Co. v. Cincinnati—62 Ohio St. 465; 49 L. R. A. 566; 57 N. E. 229.....	635
Cline v. Seattle—13 Wash. 444; 43 Pac. 367.....	821, 840
Clingman v. People—183 Ill. 339; 55 N. E. 727.....	623
Clinton v. Henry Co.—115 Mo. 557; 37 Am. St. Rep. 415; 22 S. W. 494 .....	652, 669, 670, 687
Clinton v. Portland—26 Oreg. 410; 38 Pac. 407.....	304, 315, 332, 390, 431, 618, 619, 717, 722
Clinton v. Walliker—98 Ia. 655; 68 N. W. 431.....	811
Cluggish v. Koons—15 Ind. App. 599; 43 N. E. 158.....	723
Critchfield v. Bermudez A. Pav. Co.—174 Ill. 466; 42 L. R. A. 347; 51 N. E. 552.....	25



(The references are to sections.)

Coates v. Dubuque—68 Iowa 550; 27 N. W. 750.....	131, 564, 573
Cochran v. Collins—29 Cal. 129 .....	652, 726
Cochran v. Park Ridge—138 Ill. 295; 27 N. E. 939.....	364
Codman v. Johnson—104 Mass. 491.....	713
Cody v. Cicero—203 Ill. 322; 67 N. E. 859.....	828
Coggeshall v. City of Des Moines—78 Ia. 235; 41 N. W. 617; 42 N. W. 650.....	135, 331
Cohen v. Virginia—6 Wheat 264, 404; 5 L. ed. 257, 291.....	117
Cohn v. Parcels—72 Cal. 367; 14 Pac. 26.....	808
Cohn v. Wausau Boom Co.—47 Wis. 314; 2 N. W. 546.....	647
Coit v. Grand Rapids—115 Mich. 493; 73 N. W. 811.....	262
Colclough v. Milwaukee—92 Wis. 185; 65 N. W. 1039.....	114, 647, 794
Cole v. Skrainka—105 Mo. 303; 16 S. W. 491.....	345, 671
Cole v. People—161 Ill. 16; 43 N. E. 607.....	351, 355, 576
Cole v. Peoria—18 Ill. 301 .....	495
Cole v. St. Louis—132 Mo. 633; 34 S. W. 469.....	630, 644
Coleman v. Rathbun (Wash.)—82 Pac. 540.....	775
College St., <i>In re</i> —8 R. I. 474.....	263
Collins v. Holyoke—146 Mass. 298; 15 N. E. 908.....	580, 589, 590, 743
Columbus v. Agler—44 Ohio St. 485; 8 N. E. 302.....	802
Columbus v. Hunt—5 Rich L. 550.....	134
Columbus v. Sohl—44 Ohio St. 479; 18 N. E. 299.....	275
Columbus v. Slyh—44 Ohio St. 484; 8 N. E. 302.....	724
Com. Ins. Co. v. People—172 Ill. 31; 49 N. E. 989.....	554
Com. Natl. Bank v. Portland—24 Oreg. 188; 41 Am. St. Rep. 854; 33 Pac. 532.....	660, 661, 664
Commissioners etc. v. Abbott—52 Kan. 148; 34 Pac. 416.....	245
Commissioners v. Armstrong—45 N. Y. 234; 6 Am. Rep. 70....	218
Commissioners etc. v. Com'rs—127 Ill. 581; 21 N. E. 206.....	242
Commissioners v. Commissioners—92 N. C. 180.....	76, 161
Com'rs v. County of Hudson—44 N. J. L. 570.....	712
Commissioners v. Fallen—111 Ind. 410; 12 N. E. 298.....	145, 296, 491, 825
Commissioners v. Fallen—118 Ind. 158; 20 N. E. 771.....	215, 747
Commissioners v. Gurver—115 Ind. 224; 17 N. E. 290.....	842
Commissioners v. Harper—38 Ill. 103; and see Chi. ii, under notice.	293
Commissioners etc. v. Harrell—147 Ind. 500; 46 N. E. 124.....	49, 162, 168, 172, 190, 435
Commissioners v. Jamison—115 Ind. 597; 17 N. E. 294.....	842
Commissioners v. Kelsey—120 Ill. 482; 11 N. E. 256.....	187
Commissioners v. Mialeghich—52 La. Ann. 1292; 27 So. 790.....	229
Commissioners v. Ottawa—49 Kan. 747; 33 Am. St. Rep. 396; 31 Pac. 788 .....	234
Commissioners v. Taylor—99 N. C. 210; 6 S. E. 114.....	134
Commissioners v. Young—36 Ohio St. 288.....	277
Commissioners of Elizabeth—49 N. J. L. 488; 10 Atl. 363.....	441, 534, 821, 826, 828
Commonwealth v. Abbott—160 Mass. 282; 35 N. E. 782.....	287
Commonwealth v. George—148 Pa. St. 463; 24 Atl. 59, 61....	144, 683
Commonwealth v. Woods—44 Pa. St. 113.....	201
Concordia Cemetery Asso. v. M. & N. W. R. Co.—121 Ill. 199; 12 N. E. 536.....	458
Conde v. Schenectady—164 N. Y. 258; 58 N. E. 130.....	169, 277, 284, 603, 779, 781
Cone v. Hartford—28 Conn. 363, 364.....	186, 225, 769
Conger v. Bergman—10 Ky. L. Rep. 899; 11 S. W. 84.....	215
Conklin v. Keokuk—73 Ia. 343; 35 N. W. 444.....	629, 634



(The references are to sections.)

Conkling v. Springfield—132 Ill. 420; 24 N. E. 67.....	770
Conn. Mut. Life Ins. Co. v. Chicago—185 Ill. 148; 56 N. E. 1071..	366
Connor v. Paris—87 Tex. 32; 27 S. W. 88.....	134, 136, 139, 287
Conway v. Cable—37 Ill. 82; 87 Am. Dec. 240.....	790, 814
Conway v. Chicago—219 Ill. 295; 76 N. E. 384.....	834
Cook v. Gage Co.—65 Neb. 611; 91 N. W. 559.....	293
Cook v. Port of Portland—20 Oreg. 580; 13 L. R. A. 533; 27 Pac. 263 .....	77, 162, 229
Cook v. Racine—49 Wis. 243; 5 N. W. 352.....	788, 789, 807
Cook v. Slocum—27 Minn. 509; 8 N. W. 755.....	208, 451, 491
Cook v. So. Park Com'rs—61 Ill. 115.....	218
Cook v. State—101 Ind. 446.....	700
Cook County v. Chicago—103 Ill. 646.....	234
Cook Co. v. C. B. & Q. R. Co.—35 Ill. 460.....	775
Cook Farm Co. v. Detroit—124 Mich. 426; 83 N. W. 130.....	120
Cooper v. Nevin—90 Ky. 85; 13 S. W. 841.....	435, 731, 820
Copeland v. Packard—16 Pick. 219 .....	601
Cornell v. People—107 Ill. 372 .....	64, 146
Corliss v. Highland Park (Mich.)—132 Mich. 152; 93 N. W. 254, 610; 95 N. W. 416.....	487, 544, 592, 820, 838, 839
Corsicana v. Kerr—89 Tex. 461; 35 S. W. 794.....	291
Corry v. Campbell—25 Ohio St. 134.....	417
Cossitt Land Co. v. Neuscheler (N. J.)—60 Atl. 1128.....	529, 552
Cothren v. Lean—9 Wis. 279.....	425
County Court v. Griswold—58 Mo. 175.....	126, 218
Covington v. Boyle—6 Bush 204.....	68, 168, 175, 213
Covington v. Casey—3 Bush 698.....	368
Covington v. Nadand—103 Ky. 455; 45 S. W. 498.....	725
Covington v. Nelson—35 Ind. 532.....	270
Covington v. Noland (Ky.)—89 S. W. 216.....	753
Covington v. Worthington—88 Ky. 206; 10 S. W. 790; 11 S. W. 1038 .....	168, 575
Cowley v. Spokane—99 Fed. 840.....	730
Creed v. McCombs—146 Cal. 449; 80 Pac. 679.....	755, 790
Creighton v. Manson—27 Cal. 613.....	59, 287
Creighton v. Pragg—21 Cal. 115.....	549
Creighton v. Scott—14 Ohio St. 438.....	77, 179, 518, 538
Creighton v. Toledo—18 Ohio St. 447.....	658, 665
Creote v. Chicago—56 Ill. 422.....	549
Crockett v. Boston—5 Cush. 182 .....	601
Cronan v. Municipality No. 1—5 La. Ann. 537.....	661
Cronin v. Jersey City—38 N. J. L. 410.....	171
Crosby v. Lyon—37 Cal. 242.....	59
Crossett v. Janesville—28 Wis. 420, 421.....	565, 632, 762
Crowley v. Copley—9 La. Ann. 329 .....	42, 176
Cruger, <i>In re</i> —84 N. Y. 619.....	437, 439
Cruikshanks v. City Council—1 McCord L. 360 .....	79
Culver v. People—161 Ill. 89; 43 N. E. 812.....	144
Culver v. Chicago—171 Ill. 399; 49 N. E. 573.....	335, 336, 348
Culver v. Jersey City—45 N. J. L. 256.....	731
Cuming v. Grand Rapids—46 Mich. 150; 9 N. W. 141.....	289, 292, 494, 501, 502, 512, 527, 602, 776
Cumming v. Police Jury—9 La. Ann. 503.....	69
Cummings v. Kearney—141 Cal. 156; 74 Pac. 759.....	722, 723
Cummings v. W. Chic. Park Comr's—18 Ill. 136; 54 N. E. 941..	820
Cunningham v. Peoria—157 Ill. 499; 41 N. E. 1014.....	342, 373, 460
Curnen v. Mayor etc.—79 N. Y. 511 .....	701
Curry v. McSterling—15 Ill. 320.....	305, 395



(The references are to sections.)

## D.

Daily v. Swope—47 Miss. 367.....	73, 139, 176, 194, 219, 253
Dakota L. & T. Co. v. Codrington Co.—9. S. Dak. 159, 68 N. W. 314 .....	774
Dallas v. Emerson—(Tex. Civ. App.), 36 S. W. 304.....	175
Dalrymple v. Milwaukee—53 Wis. 178; 10 N. W. 141.....	12, 16, 84
Dalton v. Poplar Bluffs—173 Mo. 39; 72 S. W. 1068.....	658
Daly v. Gubbins—(Ind.), 73 N. E. 833.....	308, 697
Daly v. Morgan—69 Md. 460; 1 L. R. A. 757; 16 Atl. 300.....	24, 70
Daly v. San Francisco—72 Cal. 154; 13 Pac. 321.....	418, 430
Damkoehler v. Milwaukee—124 Wis. 144; 101 N. W. 706.....	110, 113, 114, 267, 544, 626, 647, 761, 777
Dancer v. Mannington—50 W. Va. 322; 40 S. E. 475.....	401
Danforth v. Livingston—23 Mont. 558; 59 Pac. 916.....	396
Danforth v. Hinsdale—177 Ill. 579; 52 N. E. 372.....	611
Daniels v. Watertown—61 Mich. 514; 28 N. W. 673.....	811, 815
Dann v. Woodruff—51 Conn. 203.....	135, 246
Danville v. McAdams—153 Ill. 216; 38 N. E. 632.....	346
Darnell v. Keller—18 Ind. App. 103; 45 N. E. 676.....	726
Dartmouth College v. Woodward—4 Wheat. 518; 4 L. ed. 629.....	92
Dashiell v. Mayor, etc.—45 Md. 615.....	285, 349, 501, 502, 672
Dayton v. Bauman—66 Ohio St. 379; 64 N. E. 433.....	199, 635
Davenport v. Iowa—120 Fed. 172.....	807
Davidson v. Chicago—178 Ill. 582; 53 N. E. 367.....	375
Davidson v. New Orleans—96 U. S. 97; 24 L. ed. 616.....	89, 93, 101
Davies v. Los Angeles—86 Cal. 37; 24 Pac. 771.....	103, 301, 524
Davies' Executors v. Galveston—16 Tex. Civ. App. 13.....	291
Davis v. Gaines—48 Ark. 370; 3 S. W. 184.....	185, 219, 257, 524
Davis v. L. S. & M. S. R. Co.—114 Ind. 364; 16 N. E. 369.....	293, 618
Davis v. Litchfield—145 Ill. 313; 21 L. R. A. 563; 33 N. E. 888.....	136, 150, 168, 175, 181, 188, 460, 475, 595
Davis v. Litchfield—155 Ill. 384; 40 N. E. 354.....	9, 40, 64, 205, 332, 349, 370, 373, 435, 544
Davis v. Lynchburg—84 Va. 861; 6 S. E. 230.....	82, 106, 170, 172
Davis v. Mo. Pac. R. Co.—119 Mo. 180; 41 Am. St. Rep. 648; 24 S. W. 777.....	116
Davis v. Newark—54 N. J. L. 144; 23 Atl. 276.....	236, 447, 712
Davis v. Newark—54 N. J. L. 595; 25 Atl. 336.....	630
Davis v. Saginaw—87 Mich. 439; 49 N. W. 667.....	158, 394, 399, 438, 497, 575
Deady v. Townsend—57 Cal. 298.....	290
Dean v. Borschenius—30 Wis. 236.....	118, 211, 407, 713, 790, 799, 809, 821, 823, 825, 828
Dean v. Charlton—29 Wis. 400; 9 Am. Rep. 578.....	411
Dean v. Charlton—23 Wis. 590; 99 Am. Dec. 205.....	408, 791, 792, 821, 843
Dean v. Davis—51 Cal. 407.....	778, 794
Dean v. Patterson—68 N. J. L. 664; 54 Atl. 836.....	756
Deane v. Indiana, etc., Co.—161 Ind. 371; 68 N. E. 686.....	119, 482, 679
De Baker v. Carrillo—52 Cal. 473.....	768
Dederer v. Voorhies—81 N. Y. 153.....	735, 779, 781, 808, 811, 815
Dehail v. Morford—95 Cal. 457; 30 Pac. 593.....	801
De Haven v. Berendes—135 Cal. 178; 67 Pac. 786.....	810, 814
DeClerg v. Barber A. Pav. Co.—167 Ill. 215; 47 N. E. 367.....	15, 16
Deering, <i>In re</i> —93 N. Y. 361.....	397
Defenbaugh v. Foster—40 Ind. 382.....	425



(The references are to sections.)

De Gravelle v. Drainage Dist.—104 La. 703; 29 So. 302.....	224
De Graw St., <i>In re</i> —18 Wend. 568.....	207
DeKoven v. Lake View—129 Ill. 399; 21 N. E. 813.....	177, 523
DeKoven v. Lake View—131 Ill. 541; 23 N. E. 240.....	612
Delamater v. Chicago—158 Ill. 575; 42 N. E. 444.....	292, 352, 710
Delancey, <i>In re</i> —52 N. Y. 80.....	432
Delphi v. Evans—36 Ind. 90; 10 Am. Rep. 12.....	131
Del. & H. Canal Co., <i>In re</i> —129 N. Y. 105; 29 N. E. 237.....	554
Dempster v. Chicago—175 Ill. 278; 51 N. E. 710.....	224, 591, 785
Dempster v. People—158 Ill. 36; 41 N. E. 1022.....	686
Denise v. Fairport—32 N. Y. Supp. 97; 11 Misc. 199.....	169
Dennison v. New York—182 N. Y. 24; 74 N. E. 486.....	770
Dennison v. Kansas City—95 Mo. 416; 8 S. W. 429.....	271, 803
Denton v. Atchison—34 Kan. 438; 8 Pac. 750.....	417, 420
Denver v. Campbell—33 Colo. 162; 80 Pac. 142....	167, 394, 475, 717
Denver v. Colorado—33 Colo. 104; 80 Pac. 117; see <i>Same v. Londoner</i> .	
Denver v. Dumars—33 Colo. 94; 80 Pac. 114.....	383, 441, 522, 583, 725, 787
Denver v. Dunning—33 Colo. 487; 81 Pac. 259.....	724
Denver v. Hallett—33 Colo. 94; 80 Pac. 114.....	383, 583, 725
Denver v. Kennedy—33 Colo. 80; 80 Pac. 122, 467.....	98, 216, 438, 442, 507, 791, 792, 809
Denver v. Knowles—17 Colo. 204; 17 L. R. A. 135; 30 Pac. 1041..	18, 60, 167, 171, 213
Denver v. Londoner—33 Colo. 104; 80 Pac. 117.....	267, 271, 283, 320, 383, 441, 698, 791, 792
Denver v. Nat'l Exch. Bank (Colo.)—82 Pac. 448.....	790
De Peyster, <i>In re</i> —80 N. Y. 565.....	309
De Peyster v. Murphy—66 N. Y. 622.....	703
De Pierris, <i>In re</i> —82 N. Y. 243.....	319
De Puy v. Wabash—133 Ind. 336; 32 N. E. 1016.....	618, 722, 726
Derby v. W. Chic. Park Comr's—154 Ill. 213; 40 N. E. 438....	301, 535
Des Moines, etc., Co. v. Smith—108 Ia. 307; 79 N. W. 77.....	701
Des Moines v. Dorr—31 Ia. 89.....	714
Detroit v. Parker—181 U. S. 399; 45 L. ed. 917; 21 Sup. Ct. Rep. 624 .....	88, 98, 170
Detroit v. Judge, etc.—112 Mich. 588; 42 L. R. A. 638; 71 N. W. 149 .....	193
Detroit v. Daly—68 Mich. 503; 37 N. W. 11.....	207
Detroit v. Michigan Pav. Co.—36 Mich. 335.....	656, 658
Detroit, G. H. & M. R. Co. v. Grand Rapids—106 Mich. 13; 28 L. R. A. 793; 58 Am. St. Rep. 466; 63 N. W. 1007.....	690
Dever v. Junction City—45 Kan. 417; 25 Pac. 861.....	801, 804
Dever v. Keokuk, etc., Bank—126 Ia. 691; 102 N. W. 542....	147, 412
Devlin v. Mayor—63 N. Y. 8.....	425
Dewey v. Des Moines—173 U. S. 193; 43 L. ed. 665; 19 Sup. Ct. Rep. 379.....	446, 655
Dewey v. Des Moines—101 Iowa 416; 70 N. W. 605.....	204, 394, 397, 398, 655
Dewhurst v. Allegheny—95 Pa. St. 437.....	720
De Witt Co. v. Clinton—194 Ill. 521; 62 N. E. 780.....	366, 375, 403
Dexter v. Boston—176 Mass. 247; 79 Am. St. Rep. 306; 57 N. E. 379 .....	117, 192, 587, 764
Dick v. Philadelphia—197 Pa. St. 467; 47 Atl. 750.....	566, 569
Dickinson v. Detroit—11 Mich. 480; 69 N. W. 728.....	132, 212
Dickerman v. Duluth, Minn.—88 Minn. 288; 92 N. W. 1119....	117, 646



(The references are to sections.)

Dickerman v. N. Y., N. H. & H. R. Co.—72 Conn. 271; 44 Atl. 228.	634
Dickey v. Chicago—152 Ill. 468; 38 N. E. 932.....	313
Dickey v. Chicago—164 Ill. 37; 45 N. E. 537; 38 S. W. 857.....	357
Dickey v. Kochersperger—160 Ill. 633; 43 N. E. 606.....	312
Dickey v. People—160 Ill. 633; 43 N. E. 606.....	614
Dickey v. People—213 Ill. 51; 72 N. E. 791.....	732
Dickson v. Racine—65 Wis. 306; 27 N. W. 58.....	457, 755
Dickson v. Racine—61 Wis. 545, 546; 21 N. W. 620....	545, 675, 755
Dieckmann v. Sheboygan Co.—89 Wis. 571; 62 N. W. 410.....	271
Diefenthaler v. Mayor—111 N. Y. 331; 19 N. E. 48.....	765
Dietz v. Neenah—91 Wis. 422; 64 N. W. 299.....	105, 134, 779, 780, 789, 823
Diggins v. Brown—76 Cal. 318; 18 Pac. 373.....	524
Diggins v. Hartshorne—108 Cal. 154; 41 Pac. 283..	167, 470, 753, 755
Dill v. Roberts—30 Wis. 178.....	822
Ditoe v. Davenport—74 Iowa 66; 36 N. E. 895.....	298, 577, 773
Dixon v. Detroit—86 Mich. 516; 49 N. W. 628.....	692, 775, 786
Doan v. Omaha—58 Neb. 815; 80 N. W. 54.....	382
Dobler v. Warren—174 Ill. 92; 50 N. E. 1048.....	652
Doherty v. Enterprise M. Co.—50 Cal. 187.....	599
Dolan v. Mayor—62 N. Y. 472.....	615
Donnelly v. Decker—58 Wis. 461, 465, Op.; 46 Am. Rep. 637; 17 N. W. 389.....	32, 43, 202, 445
Donnelly v. Howard—50 Cal. 291.....	507
Dooling v. Ocean City—67 N. J. L. 215; 50 Atl. 621.....	169, 476
Doran v. Barnes—54 Kan. 238; 38 Pac. 300.....	509
Dorathy v. Chicago—53 Ill. 79.....	531
Dore v. Milwaukee—42 Wis. 108.....	116, 631, 642, 750
Doremus v. People—161 Ill. 26; 43 N. E. 701.....	279, 618
Doremus v. People—173 Ill. 63; 50 N. E. 686.....	533
Doremus v. Chicago—212 Ill. 513; 72 N. E. 403.....	832
Dorgan v. Boston—12 Allen 223.....	71, 130, 151, 192, 640
Dorman v. State—34 Ala. 216.....	56
Douglas, <i>In re</i> —46 N. Y. 42.....	382
Douglass v. Harrisville—9 W. Va. 162; 27 Am. Rep. 548.....	83, 774
Dougherty v. Coffin—69 Cal. 454; 10 Pac. 672.....	730
Dougherty v. Miller—36 Cal. 83.....	386, 676
Dougherty v. Porter—18 Kan. 206.....	291, 325
Dowell v. Portland—13 Oreg. 248; 10 Pac. 308.....	136, 533, 618, 691, 821, 823, 842
Dowlan v. Sibley Co.—36 Minn. 430; 31 N. W. 517....	32, 73, 234, 756
Dowling v. Hibernia S. & L. Soc.—143 Cal. 425; 77 Pac. 141.....	289, 291, 313, 704
Downer v. Boston—7 Cush. 277.....	179
Downey v. People—205 Ill. 230; 68 N. E. 807.....	612, 732
Doyle v. Austin—47 Cal. 353.....	18, 261
Doyle v. Leas—5 Ill. 202.....	549
Doyle v. People—207 Ill. 75; 69 N. E. 639.....	416
Drainage Comr's v. Ill. Cent. R. Co.—158 Ill. 353; 41 N. E. 1073..	241, 242
Drake v. Grout—21 Ind. App. 534; 52 N. E. 775.....	441
Drake v. Phillips—40 Ill. 388.....	133, 144
Dressman v. Nat'l Bank—100 Ky. 571; 36 L. R. A. 121; 38 S. W. 1052 .....	699, 700
Dressman v. Simowin—104 Ky. 693; 47 S. W. 767.....	700
Drexel v. Lake—127 Ill. 54; 20 N. E. 38.....	225, 363
Drummond v. Eau Claire—79 Wis. 97; 48 N. W. 244....	355, 372, 563



## TABLE OF CASES.

xxxiii

(The references are to sections.)

Drummond v. Eau Claire—85 Wis. 556; 55 N. W. 1028..	625, 630, 762
Duane v. Chicago—198 Ill. 471; 64 N. E. 1033.....	340, 364
Dudley v. Cilley—5 N. H. 558.....	601
Dugger v. Hicks—11 Ind. App. 374; 36 N. E. 1085; 37 N. E. 284..	680
Dugro, <i>In re</i> —50 N. Y. 513.....	210, 396, 424
Dukes v. Rowley—24 Ill. 222.....	687
Duluth v. Dibblee—62 Minn. 18; 63 N. W. 1117.....	94, 386, 618
Dumesnil v. Shanks—97 Ky. 354; 30 S. W. 654; 31 S. W. 864....	247
Duncan v. Ramish—142 Cal. 686; 76 Pac. 661.....	426, 636, 722, 733
Dunham v. Hyde Park—75 Ill. 371.....	395
Dunham v. People—96 Ill. 331.....	64, 154, 219
Duniway v. Portland (Oreg.)—81 Pac. 945.....	821, 829, 840
Dunkle v. Herron—115 Ind. 470; 18 N. E. 12.....	118
Dunlap v. Gallatin Co.—15 Ill. 7.....	670
Dunlap v. Mount Sterling—14 Ill. 251.....	395
Dunne v. Altschul—57 Cal. 472.....	425, 434
Dupuis v. C. & N. W. R. Co.—115 Ill. 97; 3 N. E. 720.....	640
Durant v. Kaufman—34 Iowa 194.....	186
Durkee v. Kenosha—59 Wis. 123; 48 Am. Rep. 480; 17 N. W. 677..	660
Durrell v. Dorner—119 Cal. 411; 51 Pac. 628.....	133
Dutton v. Hanover—42 Ohio St. 215.....	284
Dyer v. Barstow—50 Cal. 652.....	680, 692
Dyer v. Brogan—70 Cal. 136; 11 Pac. 589.....	149
Dyer v. Chase—52 Cal. 440.....	133
Dyer v. Miller—58 Cal. 585.....	135
Dyer v. Parrott—60 Cal. 551.....	707
Dyer v. St. Paul—27 Minn. 457.....	626
Dyer v. Scalmanini—69 Cal. 637; 11 Pac. 327.....	752, 819, 844
Dyker, etc., Co. v. Cook—159 N. Y. 6; 53 N. E. 690.....	608

## E.

Eachus v. Los Angeles, etc., R. Co.—103 Cal. 614; 42 Am. St. Rep. 149; 37 Pac. 750.....	108, 564, 630, 631, 634, 636
Eagle Manfg. Co. v. Davenport—101 Ia. 493; 38 L. R. A. 480; 70 N. W. 707.....	698
E. St. Louis v. Albrecht—150 Ill. 506; 37 N. E. 934....	332, 600, 885
Eckert v. Walnut—117 Iowa 629; 91 N. W. 929.....	331, 629
Ede v. Cuneo—126 Cal. 167; 58 Pac. 538.....	540, 820
Eddy v. Omaha (Neb.)—103 N. W. 692; 101 N. W. 25.....	274, 324, 383, 806
Edgerton v. Mayor, etc.—19 Fla. 140.....	62
Edwards v. Berlin—123 Cal. 544; 56 Pac. 432.....	289, 421
Edwards v. Chicago—140 Ill. 440; 30 N. E. 350.....	451, 452, 456, 457, 467
Egyptian Levee Co. v. Hardin—72 Am. Rep. 276; 27 Mo. 495....	74, 176, 219
Eilert v. Oshkosh—14 Wis. 587.....	660
Elgin v. Kimball—90 Ill. 356 ..	631
Elizabeth v. State—45 N. J. L. 157.....	821, 839
Elkhart v. Wickwire—121 Ind. 331; 22 N. E. 342.....	314, 504, 711
Elliott v. Berry—41 Ohio St. 110.....	133
Elliott v. Chicago—48 Ill. 293.....	489
Ellis v. Iowa City—29 Ia. 229.....	625
Ellis v. Pontchartrain, etc., Dist.—43 La. Ann. 33; 8 So. 914....	176
Ellis v. Witmer—134 Cal. 249; 66 Pac. 301.....	313
Ellston v. Chicago—40 Ill. 514; 89 Am. Dec. 361.....	770



(The references are to sections.)

Elston v. Kennicott—46 Ill. 187.....	558
Ellwood v. Rochester—122 N. Y. 229; 25 N. E. 238.....	438
Elyton Land Co. v. Mayor—89 Ala. 477; 7 So. 901.....	56
Elma v. Carney—9 Wash. 466; 37 Pac. 707.....	167, 171, 416, 481
Elma v. Wood—9 Wash. 466; 37 Pac. 707.....	171
Ely v. Grand Rapids—84 Mich. 336; 47 N. W. 447.....	416
Elmore v. Drainage Comr's—135 Ill. 269; 25 Am. St. Rep. 363; 25 N. E. 1010.....	29
Emerson v. Saltmarshe—7 Ad. & El. 156.....	223
Emery v. Bradford—29 Cal. 75.....	59, 392, 654, 726, 747, 753
Emery v. San Francisco Gas Co.—28 Cal. 345.....	18, 40, 59, 167, 171, 186, 288, 420, 654, 692
Emery v. Sullivan—125 Ind. 407; 25 N. E. 540.....	280
Emigrant Ind. Sav. Bk., <i>In re</i> —75 N. Y. 388.....	423, 425, 624
Emporia v. Bates—16 Kan. 495.....	820, 837
Emporia v. Norton—13 Kan. 569.....	811, 820, 837
English v. Danville—150 Ill. 92; 30 N. E. 994.....	395
English v. Wilmington—37 Atl. 158; 2 Marv. (Del.) 63.....	104, 123, 167
Eno v. Mayor—68 N. Y. 214.....	319, 736, 813
Enos v. Springfield—113 Ill. 65.....	13, 205, 356
Eppinger v. Kirby—23 Ill. 521; 76 Am. Dec. 709.....	687
Equitable Trust Co. v. O'Brien—55 Neb. 735; 76 N. W. 417....	300
Erie v. Church—105 Pa. 278.....	11, 15, 263
Erie v. Griswold—184 Pa. St. 435; 39 Atl. 231.....	255
Erie v. Piece of Land—171 Pa. St. 610; 33 Atl. 378.....	694
Erie v. Reed—113 Pa. St. 468; 6 Atl. 679.....	821, 827
Erie v. Russell—148 Pa. St. 384; 23 Atl. 1102.....	199, 577
Ernst v. Kunkle—5 Ohio St. 520.....	77, 169, 425
Eschbach v. Pitts—6 Md. 71.....	656
Espy Estate Co. v. Pacific Co. Comr's Wash.—82 Pac. 129.....	758
Essroger v. Chicago—185 Ill. 420; 56 N. E. 1086.....	374
Estes v. Owen—90 Mo. 113; 2 S. W. 133.....	131, 213
Eustace v. People—213 Ill. 424; 72 N. E. 1089.....	344, 693
Evans v. Lewis—121 Ill. 478; 13 N. E. 246.....	759
Evans v. People—139 Ill. 552; 28 N. E. 1111.....	321
Evans v. Sharp—29 Wis. 564.....	830
Excelsior, etc., Co. v. Green—39 La. Ann. 455; 1 So. 873....	245, 536
Exposition Park v. Kansas City—174 Mo. 425; 74 S. W. 979....	254
Extension of Hancock St.—18 Pa. St. 26.....	201, 252, 465
Ewart v. Western Springs—180 Ill. 318; 54 N. E. 478.....	228, 246, 326, 347

## F.

Fadger v. Aitkin—87 Minn. 445; 92 N. W. 332, 934.....	787
Fagan v. Chicago—84 Ill. 227.....	187, 233, 255, 295, 628, 637
Fahnestock v. Peoria—171 Ill. 454; 49 N. E. 496.....	327
Fairbanks v. Fitchburg—132 Mass. 42.....	168, 743, 744, 745, 746
Fairchild v. St. Paul—46 Minn. 540; 49 N. W. 325.....	36, 299, 513
Fair Haven & W. R. Co. v. New Haven—77 Conn. 667; 60 Atl. 667; 60 Atl. 651.....	722
Fairfield v. Ratcliff—20 Ia. 396.....	133, 134, 139
Fallbrook Ir. Dist. v. Bradley—164 U. S. 112; 41 L. ed. 369; 17 Sup. Ct. Rep. 56.....	96, 102, 103, 202, 226
Falls v. Cairo—58 Ill. 403.....	768, 770, 772
Farber v. W. Chic. Park Comr's—182 Ill. 250; 55 N. E. 325.....	820
Farmers' L. & T. Co. v. Ansonia—61 Conn. 76; 23 Atl. 705.....	236



## TABLE OF CASES.

XXXV

(The references are to sections.)

Farmers' L. & T. Co. v. Hastings—2 Neb. (Unof.) 337; 96 N. W. 104	135
Farr v. Detroit—136 Mich. 200; 99 N. W. 19	723
Farr v. W. Chic. Park Comr's—167 Ill. 355; 46 N. E. 893	251, 326, 501, 824, 826
Farrar v. St. Louis—80 Mo. 379	127, 131, 168, 169
Farrell v. Chicago—162 Ill. 280; 44 N. E. 527	144
Farrell v. Chicago—198 Ill. 558; 65 N. E. 103	683
Farrell v. W. Chic. Park Comr's—182 Ill. 250; 55 N. E. 325	546
Farrell v. W. Chic. Park Comr's—181 U. S. 404; 45 L. ed. 924; 21 Sup. Ct. Rep. 609	819
Farwell v. Des Moines, etc., Co.—97 Iowa 302; 35 L. R. A. 63; 66 N. W. 176	204, 254, 258, 655, 722
Farwell v. Park Comr's—181 U. S. 404; 45 L. ed. 924; 21 Sup. Ct. Rep. 609	98
Fass v. Seehawer—60 Wis. 525; 19 N. W. 533	249, 267, 281, 304, 315, 666
Fay v. Chicago—194 Ill. 136; 62 N. E. 530	360
Fay v. Reed—128 Cal. 357; 60 Pac. 927	290, 511
Fay v. Springfield—94 Fed. 409	202
Fehler v. Gosnell—99 Ky. 380; 35 S. W. 1125	383, 414, 415, 731
Fehringer v. Chicago—187 Ill. 416; 58 N. E. 303	374
Felch v. People—99 Ill. 137	63
Felker v. New Whatcom—16 Wash. 178; 47 Pac. 505	303, 391, 534, 670
Felsenthal v. Johnson—104 Ill. 21	793
Felt v. Ballard—38 Wash. 300; 80 Pac. 532	384
Fenelon's Petition—7 Pa. St. 173	78, 201
Ferguson's Appeal—159 Pa. St. 39; 28 Atl. 130	490
Ferguson v. Stamford—60 Conn. 432; 22 Atl. 782	186
Ferris v. Chicago—162 Ill. 111; 44 N. E. 436	337, 499
Ferry v. Campbell—110 Ia. 290; 50 L. R. A. 92; 81 N. W. 604	816
Ferry v. Tacoma—34 Wash. 652; 76 Pac. 277	507, 725
Ferson's Appeal—96 Pa. St. 140	688
Field v. Barber A. Pav. Co.—117 Fed. 925	697
Field v. Barber A. Pav. Co.—194 U. S. 618; 48 L. ed. 1142; 24 Sup. Ct. Rep. 784	95, 324, 400, 408, 424, 735
Field v. Chicago—198 Ill. 224; 64 N. E. 840	357, 572
Field v. Highland Park (Mich.)—104 N. W. 393	713
Field v. Western Springs—181 Ill. 186; 59 N. E. 929	597, 758, 787, 788
Fifield v. Marinette Co.—62 Wis. 532; 22 N. W. 705	798
Fifty-fourth Street, <i>In re</i> —165 Pa. St. 8; 30 Atl. 503	207, 213, 252
Findley v. Hull—13 Wash. 236; 43 Pac. 28	105, 659, 665
Findley v. Frey—51 Ohio St. 390; 38 N. E. 114	169, 179, 527
Finnell v. Kates—19 Ohio St. 405	299
Farr v. Detroit—136 Mich. 200; 99 N. W. 19	723
Finney v. Oshkosh—18 Wis. 210	660, 672, 688
First Ect'l Soc. v. Hartford—35 Conn. 66	238
First M. E. Church v. Atlanta—76 Georgia 181	62
First Nat'l Bank v. Arnoldia—63 Mo. 229	423, 425
First Nat'l Bank v. Isaacs—161 Ind. 278; 68 N. E. 288	812
First Nat'l Bank v. Nelson—64 Mo. 418	423, 425
First Presbyterian Church v. Fort Wayne—36 Ind. 338; 10 Am. Rep. 35	261
Fisher v. Chicago—213 Ill. 268; 72 N. E. 680	223, 546, 732
Fisher v. People—157 Ill. 85; 41 N. E. 615	610



(The references are to sections.)

Fiske v. People—188 Ill. 206; 52 L. R. A. 291; 58 N. E. 985.....	323, 366, 410
Fisher v. St. Louis—44 Mo. 482.....	660
Fitzgerald v. Sioux City—125 Ia. 396; 101 N. W. 268....	135, 728, 737
Fitzhugh v. Bay City—109 Mich. 581; 67 N. W. 904.....	722
Flatbush Ave., <i>In re</i> —1 Barb. 286.....	150
Fletcher v. Oshkosh—18 Wis. 240.....	659, 664
Flewelling v. Proetzel—80 Tex. 191; 15 S. W. 1043.....	134
Flint v. Webb—25 Minn. 93.....	214
Floyd v. Atlanta Bk. Co.—109 Ga. 779.....	723
Fogg v. Hoquiam—23 Wash. 340; 63 Pac. 234.....	830, 832
Foley v. Bullard—99 Cal. 516; 33 Pac. 1081.....	676
Follansbee v. Chicago—62 Ill. 288.....	600
Folmsbee v. Amsterdam—142 N. Y. 118; 36 N. E. 821..	560, 760, 829
Folsom, <i>In re</i> —56 N. Y. 60.....	316
Fond du Lac Water Co. v. Fond du Lac—82 Wis. 322; 16 L. R. A. 581; 52 N. W. 439.....	243
Foot v. Milwaukee—18 Wis. 271.....	735
Ford v. North Des Moines—80 Ia. 626; 45 N. W. 1031.....	99
Forsythe v. Chicago—62 Ill. 304.....	686
Forsyth v. Hammond—166 U. S. 506, 518; 41 L. ed. 1095, 1100; 17 Sup. Ct. Rep. 665.....	146
Fort Dodge, etc., Co. v. Fort Dodge—115 Ia. 568; 89 N. W. 7..	656, 658
Ft. Scott v. Kaufman—44 Kan. 137; 24 Pac. 64.....	588
Ft. Wayne v. Shoaf—106 Ind. 66; 5 N. E. 403.....	231, 774
Foss v. Chicago—56 Ill. 354.....	366
Foster v. Alton—173 Ill. 587; 51 N. E. 76. 383, 613, 668, 820, 836, 839	
Foster v. Commissioners—131 Mass. 225.....	218
Foster v. Commissioners—133 Mass. 321.....	745
Foster v. Wood Co.—9 Ohio St. 540.....	77, 215
Fountain v. Newark—57 N. J. Eq. 76; 40 Atl. 212.....	821
Fowler v. St. Joseph—37 Mo. 228.....	135, 168, 522, 689, 778
Frantz v. Jacob—88 Ky. 525; 11 S. W. 654.....	444
Frederick v. Seattle—13 Wash. 428; 43 Pac. 364.....	743, 821, 839
Freeland v. Williams—131 U. S. 418; 33 L. ed. 198; 9 Sup. Ct. Rep. 763.....	92, 93
Freeport St. R. Co. v. Freeport—151 Ill. 451; 38 N. E. 137.....	330, 718, 820, 823, 831, 836, 839
French v. Barber A. Pav. Co.—181 U. S. 324; 45 L. ed. 879; 21 Sup. Ct. Rep. 625.....	3, 50, 88, 102, 170, 203, 625, 774
French v. Lansing—30 Mich. 379.....	820
French v. Milwaukee—49 Wis. 584; 6 N. W. 244.....	641
Freetown v. Bristol—9 Pick. 46.....	601
Frevert v. Mayor, etc.—63 N. J. L. 202; 42 Atl. 773.....	463
Frosh v. Galveston—73 Tex. 401; 11 S. W. 402.....	286, 500
Friedenwald v. Mayor, etc.—74 Md. 116; 21 Atl. 555.....	638
Friedrich v. Milwaukee—114 Wis. 504; 90 N. W. 174.....	159, 167, 171, 318, 325, 467, 525
Friedrich v. Milwaukee—118 Wis. 254; 95 N. W. 126.....	159, 480, 498, 548, 762, 638
Fuller v. Elizabeth—42 N. J. L. 427.....	615, 773

## G.

Gaffney v. Gough—36 Cal. 104.....	652
Gafney v. San Francisco—72 Cal. 146; 13 Pac. 467.....	500, 675
Gage v. Chicago—143 Ill. 157; 32 N. E. 264.....	336, 374



(The references are to sections.)

Gage v. Chicago—146 Ill. 499; 34 N. E. 1034.....	515, 610
Gage v. Chicago—162 Ill. 313; 44 N. E. 729.....	279, 280, 334
Gage v. Chicago—191 Ill. 210; 60 N. E. 896.....	377
Gage v. Chicago—193 Ill. 108; 61 N. E. 850.....	611
Gage v. Chicago—195 Ill. 490; 63 N. E. 184.....	362, 505
Gage v. Chicago—196 Ill. 512; 63 N. E. 1031.....	338, 360, 361, 505
Gage v. Chicago—201 Ill. 93; 66 N. E. 374.....	325
Gage v. Chicago—203 Ill. 26; 67 N. E. 477.....	118
Gage v. Chicago—207 Ill. 56; 69 N. E. 588.....	359
Gage v. Chicago—216 Ill. 107; 74 N. E. 726.....	365, 555, 710
Gage v. Graham—57 Ill. 144.....	39, 41, 74, 194
Gage v. Parker—103 Ill. 528.....	724
Gage v. People—163 Ill. 39; 44 N. E. 819.....	685
Gage v. People—193 Ill. 316; 61 N. E. 1045; 56 L. R. A. 916.....	419, 605
Gage v. People—200 Ill. 432; 65 N. E. 1084.....	344, 400
Gage v. People—205 Ill. 547; 69 N. E. 80.....	687, 695
Gage v. People—207 Ill. 61; 69 N. E. 635.....	280, 411, 615, 686
Gage v. People—207 Ill. 377; 69 N. E. 840.....	352, 506, 686
Gage v. People—207 Ill. 615; 69 N. E. 635.....	506, 621
Gage v. People—213 Ill. 347; 72 N. E. 1062.....	613, 621
Gage v. People—213 Ill. 410; 72 N. E. 1084.....	622, 686
Gage v. People—213 Ill. 468; 72 N. E. 1108.....	426, 558
Gage v. People—219 Ill. 20; 76 N. E. 56.....	621
Gage v. People—219 Ill. 634; 76 N. E. 834.....	700
Gainesville v. Dean (Ga.)—53 S. E. 183.....	775
Galesburg v. Searles—114 Ill. 217; 29 N. E. 686.....	14, 204
Gallaher v. Garland—126 Ia. 206; 101 N. W. 867.....	300, 728, 733, 790, 801, 843
Galt v. Chicago—174 Ill. 605; 51 N. E. 653.....	131, 331, 490, 601
Galveston v. Heard—54 Tex. 429.....	299
Galveston v. Trust Co.—46 C. C. A. 319; 107 Fed. 325.....	23
Gans v. St. L. K. & N. W. R. Co.—113 Mo. 308; 18 L. R. A. 339; 35 Am. St. Rep. 706; 20 S. W. 658.....	108, 116
Gantz, <i>In re</i> —85 N. Y. 536.....	327
Garden City v. Trigg—57 Kan. 632; 47 Pac. 524.....	661
Gardiner v. Collins—188 Mass. 223; 74 N. E. 341.....	503, 820
Gardner v. The Collector—6 Wall. 499-504; 18 L. ed. 890, 891..	535
Garrett v. St. Louis—25 Mo. 505; 69 Am. Dec. 475.....	39, 41, 74, 194
Garvey, <i>In re</i> —77 N. Y. 523.....	212
Garvin v. Daussman—114 Ind. 429; 5 Am. St. Rep. 637; 16 N. E. 826.....	99, 100, 101, 103, 305, 601
Gas Light Co. v. New Albany—158 Ind. 268; 63 N. E. 458.....	620, 695
Gaston v. Portland—41 Oreg. 373; 69 Pac. 34-445.....	691, 730, 806
Gatch v. Des Moines—63 Ia. 718; 18 N. W. 310...96, 97, 309, 559, 578	
Gates v. Grand Rapids—134 Mich. 96; 95 N. W. 998.....	305, 503
Gauen v. Drainage Dist.—131 Ill. 446; 23 N. E. 643.....	16, 593
Gault's Appeal—33 Pa. St. 94.....	41
George v. Young—45 La. Ann. 1232; 14 So. 137.....	220
Genet v. Brooklyn—99 N. Y. 206; 1 N. E. 777.....	36, 115, 211
Genois v. St. Paul—35 Minn. 330; 29 N. W. 129.....	749
Gerke v. Purcell—25 Ohio St. 229.....	263
Germania Bank v. St. Paul—81 N. W. 542; 79 Minn. 29.....	766
German Am. Bank v. Spokane—17 Wash. 315; 38 L. R. A. 259; 47 Pac. 1103; 49 Pac. 542.....	659, 662, 664, 683
German Savings, etc., Society v. Ramish—138 Cal. 120; 69 Pac. 89; 70 Pac. 1067.....	91, 133, 167, 699



(The references are to sections.)

Gest v. Cincinnati—26 Ohio St. 275.....	655, 657
Gibbons v. Ogden—9 Wheat. 1; 6 L. ed. 23.....	48
Gibler v. Mattoon—167 Ill. 18; 47 N. E. 319.....	611
Gibson v. Chicago—22 Ill. 566.....	501, 502, 553, 555, 557
Gibson v. Commissioners—128 Ind. 65; 11 L. R. A. 835; 27 N. E. 235.....	66
Gilcrest v. Macartney—97 Ia. 138; 66 N. W. 103.....	168, 477
Gilkerson v. Scott—76 Ill. 509.....	323, 578, 648
Gill v. Oakland—124 Cal. 335; 57 Pac. 150.....	312, 763, 820, 835
Gill v. Patton—118 Iowa 88; 91 N. W. 904.....	135, 522, 523, 729, 820, 823
Gillette v. Denver—21 Fed. 822.....	60, 104, 177, 298, 537, 794
Gilman v. Fox—10 Kan. 509.....	722
Gilman v. Milwaukee—55 Wis. 328; 13 N. W. 266.....	801
Gilman v. Milwaukee—61 Wis. 588; 21 N. W. 640.....	397, 465, 762
Gilmore v. Hentig—33 Kan. 156; 5 Pac. 781.....	179, 294, 301, 500, 578, 803
Gilmore v. Utica—121 N. Y. 561; 24 N. E. 1009.....	238, 239
Gilmore v. Utica—131 N. Y. 26; 29 N. E. 841.....	320, 402, 407, 511, 546, 603
Given v. State—160 Ind. 552; 66 N. E. 750.....	32
Givens v. Chicago—186 Ill. 399; 57 N. E. 1095.....	292, 354, 355
Givens v. Chicago—188 Ill. 348; 58 N. E. 912.....	146, 325
Givin v. Simon—116 Cal. 604; 48 Pac. 720.....	409
Givins v. People—194 Ill. 150; 88 Am. St. Rep. 143; 62 N. E. 534.....	406, 411, 807
Gleason v. Waukesha Co.—103 Wis. 225; 79 N. W. 249.....	113, 303, 402, 604
Glover v. People—188 Ill. 576; 59 N. E. 429.....	613
Glover v. People—194 Ill. 22; 61 N. E. 1047.....	710
Glover v. People—201 Ill. 545; 66 N. E. 820.....	410
Goddard, Nathaniel, Petition of—16 Pick. 504; 28 Am. Dec. 259..	33
Goldstein v. Milford—214 Ill. 528; 73 N. E. 758.....	280, 613, 621
Goodall v. Milwaukee—5 Wis. 32.....	633
Goodrich v. Chicago—218 Ill. 18; 75 N. E. 805.....	812
Goodrich v. Detroit—12 Mich. 279.....	656, 658
Goodrich v. Detroit—123 Mich. 559; 82 N. W. 255.....	111, 161, 521, 619
Goodrich v. Detroit—184 U. S. 432; 46 L. ed. 627; 22 Sup. Ct. Rep. 397.....	97, 104, 203, 520
Goodrich v. Milwaukee—24 Wis. 422.....	633, 689
Goodrich v. Minonk—62 Ill. 121.....	499, 517, 681, 685
Goodrich v. Omaha—10 Neb. 98; 4 N. W. 424.....	563
Goodrich v. Turnpike Co.—26 Ind. 119.....	66, 215, 216
Goodwillie v. Detroit—103 Mich. 283; 61 N. W. 526.....	722
Goodwillie v. Lake View—137 Ill. 51; 27 N. E. 15.....	308, 451, 452, 500, 530, 649, 650, 783
Goodwin v. Commissioners—146 Ind. 164; 44 N. E. 1110.....	693, 837
Goodyear, etc., Co. v. Jackson—55 L. R. A. 692; 50 C. C. A. 159; 112 Fed. 146.....	572
Gordon v. Chicago—201 Ill. 623; 66 N. E. 823.....	610
Gordon v. People—154 Ill. 664; 39 N. E. 560.....	317, 390
Gorman v. State—157 Ind. 205; 60 N. E. 1083.....	726
Gorton v. Chicago—201 Ill. 534; 66 N. E. 541.....	824
Gosnell v. Louisville—104 Ky. 201; 46 S. W. 722.....	68, 414
Gould v. Baltimore—59 Md. 378, 380.....	26, 42, 656
Grace v. Newton—135 Mass. 490.....	310, 741, 744
Graham v. Chicago—187 Ill. 411; 58 N. E. 393.....	412, 442



## TABLE OF CASES.

xxxix

(The references are to sections.)

Graham v. Conger—85 Ky. 582; 4 S. W. 327.....	215, 444
Grand Rapids v. Blakely—40 Mich. 367; 29 Am. Rep. 539.....	606, 764, 769
Grand Rapids, etc. v. Grand Rapids—92 Mich. 564; 52 N. W. 1028	122, 158, 301, 548
Grand Rapids v. Luce—92 Mich. 92; 52 N. W. 635.....	647
Grant v. Bartholomew—58 Neb. 839; 80 N. W. 45.....	135, 137, 271, 281, 720
Gray v. Cicero—177 Ill. 459; 53 N. E. 91.....	362
Gray v. Richardson—124 Cal. 460; 57 Pac. 385.....	420, 684
Gregory v. Ann Arbor—127 Mich. 454; 86 N. W. 1013....	520, 541, 559
Greeley v. Cicero—148 Ill. 632; 36 N. E. 603.....	188
Greeley v. People—60 Ill. 19.....	370
Green v. Chicago—97 Ill. 370.....	634
Green v. People—130 Ill. 515; 22 N. E. 602.....	167
Green v. Springfield—130 Ill. 515; 22 N. E. 602.....	168, 248, 335, 461, 612
Green v. Ward—82 Va. 324.....	134, 138, 201, 654
Green Bay v. Brauns—50 Wis. 204; 6 N. W. 503.....	330
Green Co. Commissioners v. Lenoir—92 N. C. 180.....	231
Greendale v. Suit—163 Ind. 282; 71 N. E. 658.....	135
Greenfield v. State—113 Ind. 598; 15 N. E. 241.....	757
Greensboro v. McAdoo—112 N. C. 359; 17 S. E. 178.....	136, 138
Greensburg v. Laird—138 Pa. St. 533; 21 Atl. 96.....	569
Greensburg v. Young—53 Pa. St. 280.....	144, 201, 628
Greenwood v. La Salle—137 Ill. 225; 26 N. E. 1089.....	520
Greenwood v. Morrison—128 Cal. 350; 60 Pac. 971.....	121, 600
Grey v. People—194 Ill. 486; 62 N. E. 894.....	349
Gridley v. Bloomington—88 Ill. 554; 30 Am. Rep. 566....	140, 228, 677
Griffin v. Chicago—57 Ill. 317.....	321
Griffin v. Dogan—48 Miss. 11.....	35
Griggsby Const. Co. v. Freeman—108 La. 435; 58 L. R. A. 349; 32 So. 399, 400.....	26
Grim v. Weissenberg School Dist.—57 Pa. St. 433; 91 Am. Dec. 237	817, 821, 827
Grinnell v. Adams—34 Ohio St. 44.....	285
Grinnell v. Des Moines—57 Ia. 144; 10 N. W. 330....	177, 361, 584, 589
Griswold v. Benton—34 Ohio St. 482.....	797
Griswold v. Pelton—34 Ohio St. 482.....	133
Groesbeck v. Cincinnati—51 Ohio St. 365; 37 N. E. 707.....	538
Groff v. Philadelphia—150 Pa. St. 594; 24 Atl. 1028.....	625
Gross v. Grossdale—177 Ill. 248; 52 N. E. 372.....	556
Gross v. People—172 Ill. 571; 50 N. E. 334.....	348, 354, 357, 380, 383, 613
Gross v. People—193 Ill. 260; 61 N. E. 1012; 86 Am. St. Rep. 322..	615
Gue v. Tide Water Canal Co.—24 How. 263; 16 L. ed. 636....	243, 690
Guest v. Brooklyn—69 N. Y. 500, 506, 516.....	46, 49, 198, 778, 779, 780, 804
Guild v. Chicago—82 Ill. 472.....	25, 233, 251
Gurnee v. Chicago—40 Ill. 165.....	131, 488, 506, 520, 736
Guthrie v. Territory—1 Okla. 188; 21 L. R. A. 841; 31 Pac. 190..	89
Guyer v. Rock Island—215 Ill. 144; 74 N. E. 105.....	283, 285, 355, 360, 381

## H

Hackett v. State—113 Ind. 532; 15 N. E. 799.....	302, 710, 720
Hackworth v. Louisville—105 Ky. 234; 50 S. W. 33....	131, 360, 441
Hackworth v. Ottumwa—114 Ia. 467; 87 N. W. 424.....	41, 168, 172



(The references are to sections.)

Hadley v. Dague—130 Cal. 207; 62 Pac. 500.....	164, 167, 171
Haegele v. Mallinckrodt—46 Mo. 577.....	374
Hagar v. Recla. Dist. 111 U. S. 701; 28 L. ed. 569; 4 Sup. Ct. Rep. 663 .....	93, 95, 224
Hagar v. Yolo County—47 Cal. 222.....	18, 59, 117, 207, 226, 741
Hager v. Burlington—42 Iowa 661.....	368
Haisch v. Seattle—10 Wash. 435; 38 Pac. 1131.....	435, 693, 730
Hale v. Kenosha—29 Wis. 599.....	17, 84, 151
Haley v. Alton—152 Ill. 113; 38 N. E. 750.....	280, 527, 550
Hall v. Chippewa Falls—47 Wis. 267; 2 N. W. 279.....	372, 511, 659
Hall v. Moore—3 Neb. (unof.) 1574; 92 N. W. 294.....	727, 728
Hall v. Street Com'rs—177 Mass. 434; 59 N. E. 68.....	820
Hallinger v. Davis—146 U. S. 317; 36 L. ed. 989; 13 Sup. Ct. Rep. 105 .....	93
Halpin v. Campbell—71 Wis. 493.....	342
Halsey v. Lake View—188 Ill. 540; 59 N. E. 234.....	412
Halsey v. People—84 Ill. 89.....	217
Hamar v. Leihy—124 Wis. 265; 102 N. W. 568.....	510, 736
Hamilton Ave.—14 Barb. 405.....	150
Hamilton v. Chopard—9 Wash. 352; 37 Pac. 472.....	705
Hamilton v. Cummings—1 Johns. Ch. 516.....	776
Hamilton v. Fond du Lac—25 Wis. 490.....	523, 776, 783
Hammond v. People—169 Ill. 545; 48 N. E. 573.....	618, 704
Hamilton v. People—194 Ill. 133; 62 N. E. 533.....	411
Hammett v. Philadelphia—65 Pa. St. 146; 3 Am. Rep. 615.....	11, 78, 107, 129, 133, 154, 183, 199, 207, 210, 211, 747
Hancock St. Extension—18 Pa. St. 26.....	78, 208, 210
Hancock v. Bowman—49 Cal. 413.....	704
Hancock v. Whittemore—50 Cal. 522.....	654
Hand v. Elizabeth—31 N. J. L. 547.....	169
Hand v. Fellows—148 Pa. St. 456; 23 Atl. 1126.....	170, 201
Hanscom v. Omaha—11 Neb. 37; 7 N. W. 739, 741.....	27, 154, 195
Hansen v. Hammer—15 Wash. 315; 46 Pac. 332.....	111, 220
Hardin v. Chicago—186 Ill. 424; 57 N. E. 1048.....	354, 355
Hare v. Kennerly—83 Ala. 608; 3 So. 683.....	56, 134
Harman v. Omaha—53 Neb. 164; 73 N. W. 671.....	135
Harman v. People—214 Ill. 454; 73 N. E. 760.....	621
Harmon v. Chicago—140 Ill. 374; 29 N. E. 732.....	338
Harney v. Applegate—57 Cal. 205.....	704
Harney v. Benson—113 Cal. 314; 45 Pac. 687.....	121, 167, 579, 722, 750
Harnung v. McCarthy—126 Cal. 17; 58 Pac. 303.....	820
Harper v. Dowdney—113 N. Y. 644; 21 N. E. 63.....	702
Harper v. Grand Rapids—105 Mich. 551; 63 N. W. 517.....	692
Harriman v. Yonkers—181 N. Y. 24; 73 N. E. 492.....	525, 567
Harrington v. Smith—28 Wis. 43.....	142
Harris v. Ansonia—73 Conn. 359; 47 Atl. 672.....	810, 820
Harris v. Chicago—162 Ill. 288; 44 N. E. 437.....	456, 530, 686
Harris v. Chicago—213 Ill. 47; 72 N. E. 762.....	574
Harris v. Macomb—213 Ill. 47; 72 N. E. 762.....	237
Harris v. Supervisors Colusa Co.—49 Cal. 662.....	494
Harris v. Tacoma (Wash.)—81 Pac. 690.....	724
Harrisburg v. Baptist—156 Pa. St. 526; 27 Atl. 8.....	696, 698, 720
Harrisburg v. McCormick—129 Pa. St. 213; 18 Atl. 126.....	173, 464
Harrisburg v. Funk—200 Pa. St. 348; 49 Atl. 1135.....	210
Harrisburg v. McPherran—200 Pa. St. 343; 49 Atl. 988.....	170
Harrisburg v. Sigelbaum—151 Pa. St. 172; 20 L. R. A. 834; 24 Atl. 1070 .....	212, 569



(The references are to sections.)

Harrison v. Chicago—163 Ill. 129; 44 N. E. 395.....	359, 486
Harrison v. Milwaukee—49 Wis. 247; 5 N. W. 326.....	751, 768
Harrison v. Sauerwein—70 Ia. 291; 30 N. W. 571.....	729
Harrison v. Supervisors—51 Wis. 646; 8 N. W. 731.....	647
Hart v. Henderson—17 Mich. 218.....	790
Hart v. Smith—44 Wis. 213.....	792
Hart v. W. Chi. Park Com'rs—186 Ill. 464; 57 N. E. 1036.....	756
Hartford v. West Middle Dist.—45 Conn. 462; 29 Am. Rep. 687	186, 237, 261
Harts v. People—171 Ill. 458; 49 N. E. 538.....	361, 520
Harvard v. St. Clair, etc., Drainage Co.—51 Ill. 130....	35, 62, 86, 325
Harvard College v. Boston—104 Mass. 470.....	262
Harwood v. Bloomington—124 Ill. 48; 16 N. E. 91.....	644
Harwood v. Donovan—188 Mass. 487; 74 N. E. 914....	724, 725, 738
Haskell v. Bartlett—34 Cal. 281.....	317, 669
Haslam v. G. & S. W. R. Co.—64 Ill. 353.....	636
Hassan v. Rochester—65 N. Y. 516.....	806
Hassan v. Rochester—67 N. Y. 528.....	233, 234, 256, 790, 799
Hastings v. Columbus—42 Ohio St. 585.....	349, 410, 425, 427, 697
Hatzung v. Syracuse—92 Hun 203; 36 N. Y. Supp. 521.....	811
Haubner v. Milwaukee—124 Wis. 153; 101 N. W. 930; 102 N. W. 578.....	112, 114, 117, 480, 642, 761, 822, 828
Haughawout v. Hubbard—131 Cal. 675; 63 Pac. 1078....	393, 500, 586
Hause v. St. Paul—94 Minn. 115; 102 N. W. 221.....	271, 618
Hasiland v. Columbus—50 Ohio St. 471; 34 N. E. 679..	169, 173, 477
Hawes v. Chicago—158 Ill. 653; 30 L. R. A. 225; 42 N. E. 373....	339, 341
Hawes v. Fliegler—87 Minn. 319; 92 N. W. 223.....	146, 227, 320
Hawkins v. Horton—91 Minn. 285; 97 N. W. 1053.....	271, 282, 392
Hawley v. Ft. Dodge—103 Iowa 573; 72 N. W. 756.....	594
Hawthorne v. E. Portland—13 Ore. 271; 10 Pac. 342.....	136, 307, 532, 533, 652, 726
Hayden v. Atlanta—70 Ga. 817.....	62, 114, 167, 446
Hayes v. Douglass Co.—92 Wis. 429; 31 L. R. A. 213; 53 Am. St. Rep. 926; 65 N. W. 482.....	112, 134, 166, 171, 307, 455, 752
Hays v. Cincinnati—62 Ohio St. 116; 56 N. E. 658.....	504
Hays v. Jones, 27 Ohio St. 218.....	284
Head v. Amoskeag Co.—113 U. S. 9; 28 L. Ed. 889; 5 Sup. Ct. Rep 441 .....	224
Heath v. McCrea—20 Wash. 342; 55 Pac. 432.....	458, 536, 618, 620, 792, 821, 826, 833
Hedge v. Oskaloosa (Iowa)—99 N. W. 557.....	332, 370, 822, 829
Heinroth v. Kochesperger—173 Ill. 205; 50 N. E. 171.....	758, 786, 787, 788, 795, 801, 807
Heiple v. Portland—13 Ore. 97; 8 Pac. 907.....	233, 328
Hellenkamp v. Lafayette—30 Ind. 192.....	727
Helm v. Witz (Ind.)—73 N. E. 846.....	680
Hellman v. Shoulters—114 Cal. 136; 44 Pac. 915; 45 Pac. 1057..	400, 791, 792, 796
Heller v. Garden City—58 Kan. 263; 48 Pac. 841.....	231, 261
Heller v. Milwaukee—96 Mo. 134; 70 N. W. 1111.....	659
Heman v. Allen—156 Mo. 535; 57 S. W. 539.....	169, 177, 194, 195, 299, 584
Heman v. Schulte—166 Mo. 409; 66 S. W. 163.....	40, 581
Hemingway v. Chicago—60 Ill. 324.....	301, 689
Hempstead v. Des Moines—63 Iowa 36; 18 N. W. 676.....	634
Henderson v. Edmunds—3 Mackey 142.....	163



(The references are to sections.)

Henderson v. Lambert—14 Bush 25.....	135, 409, 695
Henderson v. Mayor, etc.—8 Md. 352.....	70, 496, 606
Henderson v. Minneapolis—32 Minn. 319; 20 N. W. 322.....	116
Hendrick v. W. Springfield—107 Mass. 541.....	660
Hendrickson v. Pt. Pleasant—65 N. J. L. 535; 47 Atl. 465.....	492
Henis v. Lincoln—102 Iowa 69; 71 N. W. 189.....	331
Henkel v. Mattoon—170 Ill. 316; 48 N. E. 908.....	492
Hentig v. Gilmore—33 Kan. 156, 534; 5 Pac. 781; 6 Pac. 304.....	291, 292
Hennepin Co. v. Bartleson—37 Minn. 343; 34 N. W. 222.....	298
Hennessy v. Douglas Co.—99 Wis. 129; 74 N. W. 983.....	106, 166, 170, 173, 250, 298, 302, 439, 604
Hennessy v. St. Paul—54 Minn. 219; 55 N. W. 1123.....	618
Hensley v. Butte (Mont.)—83 Pac. 481.....	774
Hepburn v. Curtis—7 Watts 300; 32 Am. Dec. 766.....	816, 821, 827
Herbert v. Chicago—213 Ill. 452; 72 N. E. 1097.....	293
Herhold v. Chicago—106 Ill. 547.....	15
Herman v. State—54 Ohio St. 506; 32 L. R. A. 734; 43 N. E. 990..	591
Herrman v. Guttenberg—62 N. J. L. 605; 43 Atl. 703.....	27
Herschberger v. Pittsburgh—115 Pa. St. 78; 8 Atl. 381.....	293, 811, 815
Hertig v. People—159 Ill. 237; 50 Am. St. Rep. 162; 42 N. E. 879..	321
Hessler v. Drainage Com'rs—53 Ill. 105.....	35, 86, 325
Heth v. Radford—96 Va. 272; 31 S. E. 8.....	107
Heth v. Fond du Lac—63 Wis. 228; 53 Am. Rep. 279; 23 N. W. 495	647
Hetley v. Bayer—2 Cro. Jac. 336.....	223
Hewes v. Gloss—170 Ill. 436; 48 N. E. 922....	153, 221, 394, 400, 618
Hewes v. Reis—40 Cal. 255.....	287, 310, 530
Hervetson v. Chicago—172 Ill. 112; 49 N. E. 992.....	611
Hibben v. Smith—158 Ind. 206; 62 N. E. 447.....	619
Hibben v. Smith—191 U. S. 310; 48 L. Ed. 195; 24 Sup. Ct. Rep. 88	96, 97, 102, 146
Hickman v. Kansas City—120 Mo. 110; 23 L. R. A. 658; 41 Am.	116
St. Rep. 684; 25 S. W. 225.....	654
Higgins v. Ausmuss—77 Mo. 351.....	22, 263
Higgins v. Bordages—88 Tex. 458; 53 Am. St. Rep. 770; 31 S. W.	256, 653, 655
52, 803 .....	669
Higgins v. Chicago—18 Ill. 276.....	94, 504
Highlands v. Johnson—24 Colo. 371; 51 Pac. 1004.....	557
Higman v. Sioux City (Iowa)—105 N. W. 524.....	11, 38, 77, 154, 198, 199, 657
Hill v. Figley—25 Ill. 156.....	661
Hill v. Higdon—5 Ohio St. 243; 67 Am. Dec. 289.....	586
Hill v. Oakland—124 Cal. 335; 57 Pac. 154.....	327, 328, 533
Hill v. Swingley—159 Mo. 45; 60 S. W. 114.....	76, 100, 169
Hill v. Warrell—87 Mich. 135; 49 N. W. 479.....	689
Hilliard v. Asheville—118 N. C. 845; 24 S. E. 738.....	645
Hills v. Chicago—60 Ill. 86.....	707
Hilton v. St. Louis—99 Mo. 199; 12 S. W. 657.....	310, 519
Himmelmann v. Bateman—50 Cal. 11.....	135, 819
Himmelmann v. Cahn—49 Cal. 285.....	810
Himmelmann v. Coffran—36 Cal. 411.....	133
Himmelmann v. Hoadley—44 Cal. 213.....	18, 692
Himmelmann v. Saterlee—50 Cal. 68.....	692
Himmelmann v. Spanagel—39 Cal. 389.....	680
Himmelmann v. Steiner—38 Cal. 175.....	20, 67, 120, 135
Himmelmann v. Townsend—49 Cal. 150.....	311, 493, 494
Hines v. Leavenworth—3 Kan. 186.....	
Hinkel v. Mattoon—170 Ill. 316; 48 N. E. 908.....	



## TABLE OF CASES.

xliii

(The references are to sections.)

Hinsdale v. Shannon—182 Ill. 312; 55 N. E. 327.....	345, 362
Hintze v. Elgin—186 Ill. 251; 57 N. E. 856.....	323, 358
Hitchcock v. Galveston—96 U. S. 341; 24 L. ed. 659.....	661
Hixon v. Oneida Co.—82 Mo. 515; 52 N. W. 445.....	788, 789
Hoffeld v. Buffalo—130 N. Y. 38; 29 N. E. 747.....	179, 739
Hoke v. Atlanta—107 Ga. 416; 33 S. E. 412.....	773
Holbrook v. Dickinson—46 Ill. 285.....	173, 538
Holden v. Chicago—172 Ill. 263; 50 N. E. 181.....	374, 375
Holden v. Alton—179 Ill. 318; 53 N. E. 556.....	366, 410
Holden v. Chicago—212 Ill. 289; 72 N. E. 435.....	841
Holden v. Hardy—169 U. S. 366; 42 L. ed. 780; 18 Sup. Ct. Rep. 383 .....	92, 95
Holdom v. Chicago—169 Ill. 109; 48 N. E. 164.....	336, 459
Holland v. Mayor—11 Md. 186; 69 Am. Dec. 195.....	656
Holland v. People—189 Ill. 348; 59 N. E. 753.....	294, 381
Holliday v. Atlanta—96 Ga. 377; 23 S. E. 406.....	841
Holloran v. Morman—27 Ind. App. 309; 59 N. E. 869.....	726
Holly v. Orange County—106 Cal. 426; 39 Pac. 790.....	9, 18, 38
Holmes v. Hyde Park—121 Ill. 128; 13 N. E. 540.....	515, 530, 783
Holmes v. Mayor, etc.—12 N. J. Eq. 299.....	207, 805
Holt v. E. St. Louis—150 Ill. 530; 37 N. E. 927.....	250
Holt v. Somerville—127 Mass. 408.....	218, 248, 399, 514, 742
Holton v. Milwaukee—31 Wis. 27.....	207, 229, 630, 637
Holzhauser v. Newport—94 Ky. 396; 22 S. W. 752.....	68
Honore v. Chicago—62 Ill. 305.....	309, 681
Hood v. Finch—8 Wis. 381.....	105, 637
Hoover v. People—171 Ill. 182; 49 N. E. 367.....	381, 650, 652, 653, 671, 684
Horbach v. Omaha—54 Neb. 83; 74 N. W. 434.....	32, 296, 778, 783
Horn v. New Lots—83 N. Y. 100; 38 Am. Rep. 402.....	767
Hosmer v. Drainage Dist.—135 Ill. 51; 26 N. E. 587.....	593
Householder v. Kansas City—83 Mo. 488.....	697
Houston v. Chicago—191 Ill. 559; 61 N. E. 396.....	348, 649
Houston v. McKenna—22 Cal. 550.....	428, 540
Hoyt v. East Saginaw—19 Mich. 39; 2 Am. Rep. 76.....	71, 122, 181, 193, 288, 387
Howard v. Ind. Church—18 Md. 451.....	70, 168, 192, 286
Howard, etc., Inst. v. Newark—52 N. J. L. 1; 18 Atl. 672.....	821, 825
Howard St., <i>In re</i> —142 Pa. St. 601; 21 Atl. 974.....	209, 657
Howe v. Cambridge—114 Mass. 388.....	175
Howe v. People—86 Ill. 288.....	523
Howell v. Bristol—8 Bush 493.....	109, 120, 168, 191
Howell v. Buffalo—15 N. Y. 512.....	761
Howell v. Buffalo—37 N. Y. 267.....	821, 825
Howell v. Tacoma—3 Wash. 711; 28 Am. St. Rep. 83; Pac. 447 536, 728, 791	
Howes v. Racine—21 Wis. 410.....	689
Hubbard v. Norton—28 Ohio St. 116.....	421, 679
Hubbell Son & Co. v. Bennett Bros. (Ia.)—106 N. W. 375.....	812
Huddleston v. Eugene—34 Oreg. 343; 43 L. R. A. 444; 55 Pac. 868 514, 576	
Hudson v. People—188 Ill. 103; 80 Am. St. Rep. 166; 58 N. E. 964, 965 .....	25, 712, 713
Hudson Co. v. State—24 N. J. L. 718.....	309
Hudson, etc., Protectory v. Kearney—56 N. J. L. 385; 28 Atl. 1043 143, 257	
Huff v. Cook—44 Iowa 639.....	810



(The references are to sections.)

Hughes, <i>In re</i> —93 N. Y. 512.....	713
Hughes v. Momence—163 Ill. 535; 45 N. E. 300.....	601
Hughes v. Momence—164 Ill. 16; 45 N. E. 302.....	22, 361
Hughes v. Parker—148 Ind. 692; 49 N. E. 243.....	288, 706, 746
Hughes v. Trustees—1 Ves. Sr. 188.....	776
Huidenkoper v. Meadville—83 Pa. St. 158.....	566, 821, 827
Hulbert v. Chicago—213 Ill. 452; 72 N. E. 1097.....	503
Hulbert v. Chicago—217 Ill. 286; 74 N. E. 726.....	503, 652
Hulbert v. People—213 Ill. 472.....	97, 503
Hull v. Chicago—156 Ill. 381; 40 N. E. 937.....	368, 376
Hull v. People—170 Ill. 246; 48 N. E. 984.....	349, 351, 612, 615
Hull v. W. Chi. Park Com'rs—185 Ill. 150; 57 N. E. 1.....	350
Humphrey v. Nelson—115 Ill. 45; 4 N. E. 637.....	793
Hun, <i>In re</i> —144 N. Y. 472.....	652
Hundley v. Commissioners—67 Ill. 559.....	64, 187, 484
Hungerford v. Hartford—39 Conn. 279.....	756
Hunnerberg v. Hyde Park—130 Ill. 156; 22 N. E. 486.....	529
Hunt v. Chicago—60 Ill. 183.....	486, 549
Hunt v. Utica—18 N. Y. 442.....	658, 659
Hunter's Appeal—71 Conn. 189; 41 Atl. 557.....	274
Hurford v. Omaha—4 Neb. 336.....	44, 74, 119, 563
Hurtado v. California—110 U. S. 516; 28 L. ed. 232; 4 Sup. Ct. Rep. 111, 292.....	93
Huse v. Merriam—2 Me. 375.....	800
Huston v. Clark—112 Ill. 344.....	532
Huston v. Tribbetts—171 Ill. 547; 163 Am. St. Rep. 166; 49 N. E. 711.....	16, 190
Hutcheson v. Storrie—92 Tex. 685; 45 L. R. A. 289; 71 Am. St. Rep. 884; 51 S. W. 848.....	201, 293, 300, 480, 608, 811, 815
Hutchison v. Omaha—52 Neb. 345; 72 N. W. 218.....	136, 281, 528, 727, 790
Hutson, etc. v. Woodbridge, etc., Dist.—79 Cal. 90; 16 Pac. 549 21 Pac. 435.....	105
Hutt v. Chicago—132 Ill. 352; 23 N. E. 1010.....	346, 456, 457
Hyde Park v. Borden—94 Ill. 26.....	364, 529, 535
Hyde Park v. Carton—132 Ill. 100; 23 N. E. 590.....	339, 367, 456
Hyde Park v. Dunham—85 Ill. 569.....	636, 640
Hyde Park v. Spencer—118 Ill. 446; 8 N. E. 846.....	367, 379
Hyman v. Chicago—188 Ill. 462; 59 N. E. 10.....	360, 544
Hynes v. Chicago—175 Ill. 56; 51 N. E. 705.....	347, 363

## I.

Ill. Cent. R. Co. v. Bloomington—76 Ill. 447.....	383
Ill. Cent. R. Co. v. Chicago—138 Ill. 453; 28 N. E. 740.....	797
Ill. Cent. R. Co. v. Chicago—141 Ill. 509; 30 N. E. 1036.....	188, 628, 639
Ill. Cent. R. Co. v. Decatur—126 Ill. 92; 1 L. R. A. 613; 18 N. E. 315.....	241, 264
Ill. Cent. R. Co. v. Decatur—154 Ill. 173; 45 Am. St. Rep. 124; 38 N. E. 626.....	207, 264, 326, 394
Ill. Cent. R. Co. v. Decatur—147 U. S. 190; 37 L. ed. 132; 13 Sup. Ct. Rep. 293.....	8, 24, 202, 253
Ill. Cent. R. Co. v. Effingham—172 Ill. 607; 50 N. E. 103.....	347, 374, 498
Ill. Cent. R. Co. v. Kankakee—164 Ill. 608; 45 N. E. 971.....	240
Ill. Cent. R. Co. v. Mattoon—141 Ill. 32; 30 N. E. 773.....	241, 264
Ill. Cent. R. Co. v. People—161 Ill. 244; 43 N. E. 1107.....	653



## TABLE OF CASES.

xlv

(The references are to sections.)

Ill. Cent. R. Co. v. People—170 Ill. 224; 48 N. E. 215.....	241, 323, 350, 521, 597, 653
Independence v. Gates—110 Mo. 374; 19 S. W. 728.....	40, 158, 530
Indianapolis v. Holt—155 Ind. 222; 57 N. E. 966, 988, 1100....	96, 168, 474, 705
Indianapolis v. Mansur—15 Ind. 112.....	65, 211
Indianapolis, etc., R. Co. v. Capitol Pav. Co.—24 Ind. App. 114;	
54 N. E. 1076.....	149
Ingraham, <i>In re</i> —64 N. Y. 311.....	583
Iowa, etc., Land Co. v. Soper—39 Iowa, 112.....	810
Iowa Pipe & Tile Co. v. Callanan—125 Iowa 358; 67 L. R. A.	
408; 106 Am. St. Rep. 311; 101 N. W. 141.....	3, 50, 104, 190, 656, 658, 790
Irrigation Dist. v. Collins—64 N. W. 1086; 46 Neb. 411....	74, 94, 226
Irwin v. Devars—65 Mo. 625.....	679
Irwin v. Mobile—57 Ala. 6.....	56
Ittner v. Robinson—35 Neb. 133; 52 N. W. 846.....	24, 26
Ivanhoe v. Enterprise—29 Ore. 245; 35 L. R. A. 58; 45 Pac. 771..	654
Iverslie v. Spaulding—32 Wis. 394.....	552
Ives v. Irey—51 Neb. 136; 70 N. W. 961.....	330, 595, 788, 793

## J.

Jackson v. Smith—120 Ind. 520; 22 N. E. 431.....	550, 620, 791
Jacksonville v. Hamill—178 Ill. 235; 52 N. E. 949.....	649
Jacksonville R. Co. v. Jacksonville—114 Ill. 562; 2 N. E. 478....	330, 358, 380, 508
J. & S. E. R. Co. v. Walsh—106 Ill. 253.....	645
Jacobs v. Chicago—178 Ill. 560; 53 N. E. 363.....	374, 375
Jaeger v. Burr—36 Ohio St. 164.....	169, 474
Janesville v. M. & W. R. Co.—7 Wis. 484.....	142, 425, 555
Jefferson City v. Whipple—71 Mo. 519.....	698
Jefferson Co. v. Mt. Vernon—145 Ill. 807; 33 N. E. 1091.....	335, 612
Jeffries v. Cash—207 Ill. 405; 69 N. E. 904.....	381
Jelliff v. Newark—48 N. J. L. 101; 2 Atl. 627.....	132
Jenks v. Chicago—48 Ill. 296.....	496, 549
Jennings v. Le Breton—80 Cal. 8; 21 Pac. 1127.....	167, 470
Jerome v. Chicago—62 Ill. 285.....	725
Jersey City v. Howeth—30 N. J. L. 521; 31 N. J. L. 547.....	169, 475
Jewell v. Superior—135 Fed. 19; 67 C. C. A. 623.....	698
Jex v. Mayor—103 N. Y. 536; 9 N. E. 39.....	271, 766
Job v. Alton—189 Ill. 256; 82 Am. St. Rep. 448; 59 N. E. 622....	91, 168, 339, 597
Job v. People—193 Ill. 609; 61 N. E. 1079.....	213
John v. Connell—61 Neb. 267; 85 N. W. 82.....	625
John v. Connell—64 Neb. 233; 89 N. W. 806..	169, 320, 434, 473, 499
John v. Connell (Neb.)—98 N. W. 457.....	499, 583
Johnson, <i>In re</i> —103 N. Y. 260; 8 N. E. 399.....	501
Johnson v. Board of Commissioners—107 Ind. 15; 8 N. E. 1.....	811
Johnson v. Dist. of Col.—6 Mackey 21.....	135, 251, 698
Johnson v. Duer—115 Mo. 366; 21 S. W. 800.....	177, 588, 590, 669, 726, 791
Johnson v. Hahn—4 Neb. 139.....	776
Johnson v. Indianapolis—16 Ind. 227.....	673
Johnson v. Lewis—115 Ind. 490; 18 N. E. 70.....	118, 294
Johnson v. Milwaukee—40 Wis. 315.....	84, 201, 229, 496, 501, 505, 516, 608, 801



(The references are to sections.)

Johnson v. Milwaukee—88 Wis. 383; 60 N. W. 270.....	225, 808
Johnson v. Oshkosh—21 Wis. 186.....	136, 295, 680
Johnson v. People—177 Ill. 64; 52 N. E. 308.....	392
Johnson v. People—189 Ill. 83; 59 N. E. 515.....	359, 613
Johnson v. People—202 Ill. 306; 66 N. E. 1081.....	836, 839
Johnson v. Tacoma (Wash.)—82 Pac. 1092.....	450
Jonas v. Cincinnati—18 Ohio St. 318.....	228
Jones v. Bangor—144 Pa. St. 638; 23 Atl. 252.....	634
Jones v. Boston—104 Mass. 461.....	119, 192, 208, 434, 714, 745
Jones v. Chicago—206 Ill. 374; 69 N. E. 64.....	450, 466, 549
Jones v. Dist. of Col.—3 App. D. C. 26.....	167
Jones v. Lake View—151 Ill. 663; 38 N. E. 688.....	205, 611
Jones v. Portland—35 Ore. 512; 58 Pac. 657.....	648, 661, 664
Jones v. Seattle—19 Wash. 669; 53 Pac. 1105.....	247, 299, 305
Jones v. Seattle—23 Wash. 757; 63 Pac. 553.....	640
Jones v. Third School Dist.—3 Cush. 567.....	769
Jones v. Tonawanda—158 N. Y. 438; 53 N. E. 280.....	211, 277, 295, 821, 826
Jones v. Water Commissioners—34 Mich. 273.....	222
Joplin, etc. Co. v. Joplin—124 Mo. 129; 27 S. W. 406.....	299
Jordan v. Mayor, etc.—187 Mass. 290; 72 N. E. 1022.....	820
Jorgenson v. Superior—111 Wis. 561; 87 N. W. 565.....	142, 562, 625, 729, 751
Joy v. People—193 Ill. 609; 61 N. E. 1079.....	596
Joyce v. Barron—67 Ohio St. 264; 65 N. E. 1001.....	296, 809
Joyes v. Shadburn—11 Ky. L. Rep. 892; 13 S. W. 361.....	168
Junction R. Co. v. Philadelphia—88 Pa. St. 424.....	242

## K.

Kaderley v. Portland—44 Ore. 118; 74 Pac. 710; 75 Pac. 222.....	77, 829
Kahn v. Board—79 Cal. 388; 21 Pac. 849; 25 Pac. 403.....	270
Kalamazoo v. Francoise—115 Mich. 554; 73 N. W. 801.....	168, 471, 474
Kankakee v. Potter—119 Ill. 324; 10 N. E. 212.....	336, 337, 378, 379
Kankakee Stone & Lime Co. v. Kankakee—128 Ill. 173; 20 N. E. 670.....	449, 450
Kankakee, etc. Co. v. Kankakee—128 Ill. 173; 20 N. E. 720.....	640
Kansas City v. Bacon—147 Mo. 259; 48 S. W. 860.....	218, 466, 508
Kansas City v. Bacon—157 Mo. 450; 57 S. W. 1045.....	169, 454, 525
Kansas City v. Baird—98 Mo. 215; 11 S. W. 243, 562.....	287, 442, 525
Kansas City v. Block—175 Mo. 433; 74 S. W. 993.....	311
Kansas City v. Cullinan—65 Kan. 68; 68 Pac. 1099.....	274
Kansas City v. Duncan—135 Mo. 571; 37 S. W. 573.....	390
Kansas City v. Gibson—66 Kan. 501; 72 Pac. 222.....	510
Kansas City v. Hanson—60 Kan. 833; 58 Pac. 474.....	413
Kansas City Grading Co. v. Holden—107 Mo. 305; 17 S. W. 798.....	442, 746
Kansas City v. Huling—87 Mo. 203.....	350
Kansas City v. Kimball—60 Kan. 224; 56 Pac. 78.....	509
Kansas City v. Morton—117 Mo. 446; 23 S. W. 127.....	436, 638
Kansas City v. Mulkey—176 Mo. 229; 75 S. W. 973.....	431
Kansas City v. O'Connor—82 Mo. App. 655.....	227
K. C. P. & G. R. Co. v. Waterworks Imp. Dist.—68 Ark. 376; 59 S. W. 248.....	240, 682
Kansas City v. Smiley—61 Kan. 718.....	778
Kansas City v. Swope—79 Mo. 446.....	589
Kansas City v. Ward—134 Mo. 172; 35 S. W. 600.....	195, 218, 305



## TABLE OF CASES.

xlvii

(The references are to sections.)

Kay v. Penn. R. Co.—65 Pa. St. 277; 3 Am. Rep. 628.....	821, 827
Kearney v. Chicago—163 Ill. 293; 45 N. E. 224.....	390
Kearney v. Covington—1 Met. (Ky.) 339.....	661
Keasy v. Louisville—4 Dana 154; 29 Am. Dec. 395.....	124, 659
Keating v. Kansas City—84 Mo. 415.....	658, 666
Keeler v. People—160 Ill. 179; 43 N. E. 342.....	392
Keenan v. Portland—27 Ore. 544; 32 Pac. 2.....	691
Keese v. Denver—10 Colo. 112; 15 Pac. 825.. 29, 60, 135, 167, 270, 796	
Keeler v. People—160 Ill. 179; 43 N. E. 342.....	748
Kelly v. Chadwick—104 La. Ann. 719; 29 So. 295....	129, 168, 365, 427
Kelly v. Chicago—148 Ill. 90; 35 N. E. 752.....	188, 621, 649
Kelly v. Cleveland—34 Ohio St. 468.....	371, 500, 608
Kelly v. Minneapolis—57 Minn. 294; 26 L. R. A. 92; 47 Am. St. Rep. 605; 59 N. W. 304.....	104, 793
Kelly v. Mendelsohn—105 La. 490; 29 So. 894.....	652, 675
Kelso v. Cole—121 Cal. 121; 53 Pac. 353.....	135
Keigwin v. Drainage Com'rs—115 Ill. 347; 5 N. E. 575.....	753, 775
Keith v. Bingham—100 Mo. 300; 13 S. W. 683....	39, 116, 158, 697
Keith v. Boston—120 Mass. 108.....	550
Keith v. Philadelphia—126 Pa. St. 575; 17 Atl. 883....	170, 478, 551
Kelly v. Pittsburgh—104 U. S. 78; 26 L. ed. 658.....	103
Kelsey v. King—32 Barb. 410.....	225
Kemper v. King—11 Mo. App. 116.....	214
Kemper v. Louisville—14 Bush 87.....	659
Kennard v. Louisiana—92 U. S. 480; 23 L. ed. 478.....	93
Kendall, <i>In re</i> —85 N. Y. 302.....	130, 488
Kendig v. Knight—60 Iowa 29; 14 N. W. 78.....	338, 534
Kennedy v. State—109 Ind. 236; 9 N. E. 778.....	678
Kenny v. Kelly—113 Cal. 364; 45 Pac. 699.....	755
Kennedy v. Troy—77 N. Y. 493.....	740
Kepple v. Keokuk—61 Iowa 653; 17 N. W. 140.....	331
Kerfoot v. Chicago—195 Ill. 229; 63 N. E. 101.....	505
Kerr v. Waseca—88 Minn. 191; 92 N. W. 932.....	787
Kerr v. South Park Com'rs—117 U. S. 379; 29 L. ed. 924; 6 Supp. Ct. Rep. 801.....	218
Kersten v. Milwaukee—106 Wis. 200; 48 L. R. A. 851; 81 N. W. 948, 1103.....	167, 171, 175, 271, 473, 480, 608, 711, 751, 805
Kettle River Quarries Co. v. E. Grand Forks (Minn.)—104 N. W. 1077.....	427
Keyes v. Neodesha—64 Kan. 681; 68 Pac. 625.....	729
Kiernan, <i>In re</i> —62 N. Y. 457.....	279
Kilby v. Shaw—19 Pa. St. 258.....	230
Kiley v. Cranor—54 Mo. 54.....	678
Kiley v. Forsee—57 Mo. 390.....	380
Kiley v. St. Joseph—67 Mo. 491.....	658, 654
Kilgallen v. Chicago—206 Ill. 557; 69 N. E. 586.....	504
Kilgour v. Drainage Com'rs—111 Ill. 342.....	640, 793
Kilgus v. Church Home, etc.—94 Ky. 439; 22 S. W. 750.....	262
Kilgus v. Trustees, etc.—94 Ky. 439; 22 S. W. 750.....	262
Kilmer v. People—106 Ill. 529.....	617
Kimble v. Peoria—140 Ill. 157; 29 N. E. 723.....	364, 441
Kimball v. Kochersperger—160 Ill. 653; 43 N. E. 710.....	618
Kimball v. Trust Co.—89 Ill. 611.....	774
King v. Duryea—45 N. J. L. 258.....	525
King v. Portland—2 Ore. 146.....	21, 23, 77, 122, 170
King v. Portland—38 Ore. 402; 55 L. R. A. 812; 63 Pac. 2..	103, 112, 114, 122, 170, 199, 293, 301, 472



(The references are to sections.)

King v. Portland—184 U. S. 61; 46 L. ed. 431; 22 Sup. Ct. Rep. 290 .....	96, 103
Kingman, Petitioner—170 Mass. 111; 48 N. E. 1075.....	577
Kirby v. Waterman—17 S. Dak. 314; 96 N. W. 129.....	736
Kirchman v. People—159 Ill. 321; 42 N. E. 883.....	618, 620
Kirkendall v. Omaha—39 Neb. 1; 57 N. W. 752.....	627, 637
Kirkland v. Board, etc.—142 Ind. 123; 41 N. E. 374.....	168, 224, 225, 277, 327
Kirkpatrick v. Commissioners—42 N. J. L. 510.....	742
Kirkpatrick v. Taylor—118 Ind. 329; 21 N. E. 20.....	742
Kittinger v. Buffalo—148 N. Y. 332; 42 N. E. 803.....	603
Klein v. Nugent Gravel Co.—162 Ind. 509; 70 N. E. 801....	517, 524
Kline v. Commissioners—152 Ind. 321; 51 N. E. 476..	215, 831, 832, 837
Kline v. Tacoma—11 Wash. 193; 39 Pac. 453.....	290, 621
Klingman et al., Petitioners—153 Mass. 566; 12 L. R. A. 417; 27 N. E. 778.....	141
Knapp v. Brooklyn—97 N. Y. 520.....	786
Knapp v. Heller—32 Wis. 467.....	788, 789
Kneeland v. Furlong—20 Wis. 438.....	408
Kneeland v. Milwaukee—18 Wis. 411.....	138, 500, 585
Kniper v. Louisville—7 Bush 599.....	140
Koehler v. Dobberpuhl—56 Wis. 480; 14 N. W. 644.....	814
Koeffler v. Milwaukee—85 Wis. 397; 55 N. W. 400.....	804
Kokomo v. Mahon—100 Ind. 242.....	131
Koller v. La Crosse—106 Wis. 369; 82 N. W. 341.....	458, 468
Kurtz v. Gardner—18 Wash. 332; 51 Pac. 397.....	704
Kuehner v. Freeport—143 Ill. 92; 17 L. R. A. 774.....	236, 240, 460
Kuester v. Chicago—187 Ill. 21; 58 N. E. 307.....	375, 383
Kuhns v. Omaha—55 Neb. 183; 75 N. W. 562.....	502
Kunst v. Kochesperger—173 Ill. 79; 50 N. E. 168.....	614
Kunst v. People—173 Ill. 79; 50 N. E. 168.....	349
Krumberg v. Cincinnati—29 Ohio St. 69.....	570
Kyle v. Malin—8 Ind. 34.....	134

## L.

Laakman v. Pritchard—160 Ind. 24; 66 N. E. 153.....	707
Labs v. Cooper—107 Cal. 656; 40 Pac. 1042.....	521, 707
Ladd v. Portland—32 Ore. 271; 67 Am. St. Rep. 526; 51 Pac. 654..	132
Lafayette v. Cummings—3 La. Ann. 673.....	68
Lafayette v. Fowler—34 Ind. 140.....	132, 211, 727
Lafayette v. Jenners—10 Ind. 70.....	66
Lafin v. Chicago—48 Ill. 449.....	820, 824
Lake v. Decatur—91 Ill. 596.....	380, 485, 517
L. S. & M. S. R. Co. v. Grand Rapids—102 Mich. 374; 29 L. R. A. 195; 60 N. W. 767.....	265, 690
Lake St. El. R. Co. v. Chicago—183 Ill. 75; 47 L. R. A. 624; 55 N. E. 721.....	236, 338
Lamar W. & E. L. Co. v. Lamar—128 Mo. 188; 32 L. R. A. 157; 26 S. W. 1025; 31 S. W. 756.....	20
Lampher v. Chicago—212 Ill. 440; 72 N. E. 426.....	377
Lands in Flatbush, <i>In re</i> —60 N. Y. 398.....	217, 232
Lane v. Bommelmänn—21 Ill. 143.....	687
Lane Co. v. Oregon—7 Wall. 71; 19 L. ed. 101.....	677
Lansing v. Lincoln—32 Neb. 457; 49 N. W. 640.....	195, 250
Larned v. Chicago—34 Ill. 203.....	369
Larson v. Chicago—172 Ill. 298; 50 N. E. 179.....	493



## TABLE OF CASES.

xlxix

(The references are to sections.)

Larson v. People—170 Ill. 93; 48 N. E. 443.....	494
Lasbury v. McClague—56 Neb. 220; 76 N. W. 862.....	737, 786, 796
Latham v. Wilmette—168 Ill. 153; 48 N. E. 311..	355, 358, 412, 450, 489
Lathrop v. Racine—119 Wis. 461; 97 N. W. 192.....	3, 202, 209
Law v. Johnston—118 Ind. 261; 20 N. E. 745.....	103
Law v. People—87 Ill. 385.....	333
Lawrence v. Chicago—48 Ill. 292.....	489
Lawrence v. Fast—20 Ill. 340; 71 Am. Dec. 274.....	557, 687
Lawrence v. Killam—11 Kan. 499.....	175, 427, 519, 598, 793
Lawrence v. People—188 Ill. 407; 58 N. E. 991.....	697
Lawrence v. Webster—167 Mass. 513; 46 N. E. 123.....	230, 300
Leach v. Cargill—60 Mo. 316.....	696
Leake v. Orphans' Home—92 N. Y. 116.....	734
Leake v. Philadelphia—171 Pa. St. 125; 32 Atl. 1110.....	801
Leavenworth v. Jonas—69 Kan. 857; 77 Pac. 273.....	509, 510
Leavenworth v. Laing—6 Kan. 274.....	689, 719, 721
Leavenworth v. Mills—6 Kan. 238.....	660, 661
Leavenworth v. Norton—1 Kan. 432.....	139
Leavenworth v. Rankin—2 Kan. 357.....	133
Leavitt v. Bell—55 Neb. 57; 75 N. W. 524.....	271, 300, 308, 317
Lebanon v. O. & M. R. Co.—77 Ill. 539.....	774
Lee v. Mellette—15 S. Dak. 586; 90 N. W. 855.....	138, 774
Lee v. Ruggles—62 Ill. 427.....	64, 187, 593, 778, 782
Leeds, <i>In re</i> —53 N. Y. 400.....	416
Leeds v. Defrees—157 Ind. 392; 61 N. E. 930.....	96, 178, 655
Leeper v. Texas—139 U. S. 462; 35 L. ed. 225; 11 Sup. Ct. Rep. 579 .....	94
Lefevre v. Detroit—2 Mich. 586.....	260, 405
Leggett v. Detroit—137 Mich. 247; 100 N. W. 566.....	257
Lehmer v. People—80 Ill. 601.....	555, 609, 622
Lehmers v. Chicago—178 Ill. 530; 53 N. E. 394.....	357, 360
Leitch v. La Grange—138 Ill. 291; 27 N. E. 917.....	226, 713
Leitsch v. People—183 Ill. 569; 56 N. E. 127.....	285
Leman v. Lake View—131 Ill. 388; 23 N. E. 346.....	247, 521, 529
Le Moyne v. Chicago—175 Ill. 356; 51 N. E. 718.....	516
Le Moyne v. W. Chi. Park Com'rs—116 Ill. 41; 4 N. E. 498; 6 N. E. 48.....	323
Lent v. Tillson—72 Cal. 404; 14 Pac. 71.....	100, 118, 129, 319, 722
Lent v. Tillson—140 U. S. 316; 35 L. ed. 419; 11 Supp. Ct. Rep. 825 .....	210
Leopold v. Chicago—150 Ill. 568; 37 N. E. 892.....	458, 604, 605
Leslie v. St. Louis—47 Mo. 474.....	671, 804
Levee District v. Huber—57 Cal. 41.....	524
Levy v. Chicago—113 Ill. 650.....	335, 347
Levy v. Wilcox—96 Wis. 127; 70 N. W. 1109.....	508, 509
Lewis v. Albertson—23 Ind. App. 147; 53 N. E. 1071.....	717, 721
Lewis v. Eastford—44 Conn. 477.....	810
Lewis v. Seattle—5 Wash. 741; 32 Pac. 794.....	110, 518
Lewis v. Seattle—28 Wash. 639; 69 Pac. 39.....	618, 620, 830, 833
Lewis v. Symmes—61 Ohio St. 471; 76 Ann. St. Rep. 428; 56 N. E. 194 .....	802
Lewis v. Waterworks Co.—19 Colo. 236; 41 Am. St. Rep. 248; 34 Pac. 993.....	331
Lexington v. Headley—5 Bush 508.....	333
Lexington v. McQuillan's Heirs—9 Dana 513; 35 Am. Dec. 159..	68, 108, 175



(The references are to sections.)

Liebermann v. Milwaukee—89 Wis. 336; 61 N. W. 1112.....	751
134, 138, 166, 286, 455, 480, 516, 563, 564, 711, 751	
Liebman v. San Francisco—24 Fed. 706.....	274
Lien v. Commissioners—80 Minn. 58; 82 N. W. 1094.....	32
Ligare v. Chicago—139 Ill. 46; 32 Am. St. Rep. 179; 28 N. E. 934..	155
Ligare v. Chicago—157 Ill. 637; 41 N. E. 1021.....	516
Lightner v. Peoria—150 Ill. 80; 37 N. E. 69..15, 150, 163, 189, 241,	597
Lima, <i>In re</i> —77 N. Y. 170.....	702
Lima v. Cemetery Ass'n—42 Ohio St. 128; 51 Am. Rep. 809....	
11, 133, 255, 259, 676	
Lincoln v. Lincoln St. R. Co.—67 Neb. 469; 93 N. W. 766....	574, 700
Lincoln v. Street Com'rs—176 Mass. 210; 57 N. E. 350.....	606, 745
Lincoln St. R. Co. v. Lincoln—61 Neb. 109; 84 N. W. 802.....	
137, 574, 712	
Linck v. Litchfield—141 Ill. 469; 31 N. E. 123.....	554, 556, 557
Lindsay v. Chicago—115 Ill. 120; 3 N. E. 443.....	330, 381
Lingle v. Chicago—172 Ill. 170; 50 N. E. 192.....	320
Lipp v. Philadelphia—38 Pa. St. 503.....	502
Litchfield v. Vernon—41 N. Y. 123.....	128, 157, 207, 209, 657
Little, <i>In re</i> —60 N. Y. 343.....	314
Little v. Portland—26 Ore. 235; 37 Pac. 911.....	427, 661, 664, 761
Little Rock v. Board of Improvement—42 Ark. 152.....	129, 683
Little Rock v. Katzenstein—52 Ark. 107; 12 S. W. 198.....	162
Livingstone, <i>In re</i> —121 N. Y. 94; 24 N. E. 290.....	786
Livingston v. Livingston—6 Johns. Ch. 497; 10 Am. Dec. 353....	776
Livingston v. New York—8 Wend. 86; 22 Am. Dec. 622.....	197, 207
Loan Association v. Topeka—20 Wall. 655; 22 L. ed. 455.....	149
Lockwood v. St. Louis—24 Mo. 20.....	7, 262
Lodernier v. Aspinwall—43 Ill. 401.....	518
Loeb v. Trustees—179 U. S. 472; 45 L. ed. 280; 21 Sup. Ct. Rep.	
174; 91 Fed. 37.....	170, 202, 473
Lombard v. Antioch College—60 Wis. 459; 19 N. W. 367.....	793
Lombard v. Park Commissioners—181 U. S. 33; 45 L. ed. 731; 21	
Sup. Ct. Rep. 507.....	143, 657
Long Branch Commission v. Dobbins—59 N. J. L. 146; 36 Atl. 482	615
Long Branch Commission v. Dobbins—61 N. J. L. 659; 40 Atl. 599	
169, 173, 476, 607, 615	
Long Island W. S. Co. v. Brooklyn—166 U. S. 685; 41 L. ed. 1165;	
17 Sup. Ct. Rep. 718.....	96
Longworth v. Cincinnati—34 Ohio St. 101.....	501, 502, 503
Lord v. Bayonne—65 N. J. L. 127; 46 Atl. 701.....	717
Lott v. Ross—38 Ala. 156.....	134
Louisiana v. Miller—66 Mo. 467.....	360, 654
Louisville v. Bitzer—115 Ky. 359; 61 L. R. A. 434; 73 S. W. 1115	462
Louisville v. Clark—105 Ky. 392; 49 S. W. 18.....	415
Louisville v. Henderson—5 Bush 515.....	413, 659, 662
Louisville v. Hexagon Tile Co.—103 Ky. 552; 45 S. W. 667....	
657, 658, 659	
Louisville v. Hyatt—5 B. Mon. 199.....	660
Louisville v. Leatherman—99 Ky. 213; 35 S. W. 625.....	234, 661, 664
Louisville v. Louisville R. M. Co.—3 Bush 416; 96 Am. Dec. 243	
125, 627, 628, 801	
Louisville v. Lyon (Ky.)—Mss. Op. Dec. 19, 1856.....	123
Louisville v. Nevin—10 Bush 549; 19 Am. Rep. 78.....	258, 430, 691
Louisville v. Savings Bank—104 U. S. 469; 26 L. ed. 775.....	535
Louisville v. Selvage—106 Ky. 730; 51 S. W. 447; 52 S. W. 809	
383, 469	



## TABLE OF CASES.

li

(The references are to sections.)

L. & N. R. R. Co. v. Barber A. Pav. Co.—197 U. S. 430; 49 L. ed. 819; 25 Sup. Ct. Rep. 466.....	88, 91, 98, 240, 267, 450
L. & N. R. Co. v. E. St. Louis—134 Ill. 656; 25 N. E. 962.....	152, 153, 216, 233, 241, 342, 522, 523, 534
L. N. A. & R. Co. v. State—122 Ind. 443; 24 N. E. 350.....	242, 655
Louisville Steam Forge Co. v. Mehler—112 Ky. 438; 23 Ky. L. R. 1335; 64 S. W. 396.....	210
Love v. Howard—6 R. I. 116.....	255
Lovell v. Sny Id. Drainage Dist.—159 Ill. 188; 42 N. E. 600.....	532, 615
Lovell v. St. Paul—10 Minn. 290; Gil. 229.....	656, 658
Low v. Galena & C. U. R. Co.—18 Ill. 324.....	488
Lowden, <i>In re</i> —89 N. Y. 548.....	501
Lowe v. Omaha—33 Neb. 587; 50 N. W. 760.....	637
L. S. & M. S. R. Co. v. Chicago—56 Ill. 454.....	353
L. S. & M. S. R. Co. v. Chicago—144 Ill. 391; 33 N. E. 602.....	378, 407
L. S. & M. S. R. Co. v. Chicago—148 Ill. 509; 37 N. E. 88.....	640
Ludlow v. Cin. S. R. Co.—78 Ky. 358.....	241, 264
Lufkin v. Galveston—56 Tex. 522; 58 Tex. 545.....	214, 263, 542
Lumberman's Ins. Co. v. St. Paul—85 Minn. 234; 88 N. W. 749..	541
Lumsden v. Cross—10 Wis. 282.....	84, 85, 125, 209, 547
Lumsden v. Milwaukee—8 Wis. 485.....	105, 121, 513, 801
Lundberg v. Chicago—183 Ill. 572; 56 N. E. 415.....	365, 374
Lundborn v. Manistee—93 Mich. 170; 53 N. W. 161.....	722
Luscombe v. Milwaukee—36 Wis. 511.....	631
Lusk v. Chicago—176 Ill. 207; 52 N. E. 54.....	335, 375
Lusk v. Chicago—211 Ill. 183; 71 N. E. 878.....	820, 836, 839
Lutman v. L. S. & M. S. R. Co.—56 Ohio St. 433; 47 N. E. 248..	784
Lux & L. Stone Co. v. Donaldson—162 Ind. 481; 68 N. E. 1014....	726
Lyman v. Chicago—211 Ill. 209; 71 N. E. 832.....	280, 758, 787, 788
Lyman v. Gage—211 Ill. 209; 71 N. E. 832.....	617
Lyman v. Plummer—75 Iowa 353; 39 N. W. 527.....	312
Lyon v. Alley—130 U. S. 177; 32 L. ed. 899; 9 Sup. Ct. Rep. 480	387, 819
Lyon v. Tonawanda—98 Fed. 361.....	202, 284, 697, 718, 727, 732, 802

## M.

Mac Murray, etc. Co. v. St. Louis—138 Mo. 608; 39 S. W. 467...	777
Macon v. Patty—57 Miss. 378; 34 Am. Rep. 451.....	10, 31, 74, 107, 154, 159, 207, 210, 227, 229, 683 783, 784
Macon v. Wing—113 Ga. 90; 38 S. E. 392.....	760
Maddox v. Newport—12 Ky. L. Rep. 657; 14 S. W. 957.....	67
Madera Ir. Dist.—92 Cal. 296; 14 L. R. A. 755; 27 Am. St. Rep. 106; 28 Pac. 272, 675.....	104, 123, 124, 226
Magee v. Commonwealth—46 Pa. St. 358.....	170, 511, 567
Maher v. Chicago—38 Ill. 266.....	668
Mahoney v. Braverman—54 Cal. 565.....	421
M. & H. R. Co. v. Archer—6 Paige 88.....	776
M. & M. Land Co. v. Billings—50 C. C. A. 70; 111 Fed. 972..	161, 225
Makemson v. Kaufman—35 Ohio St. 444.....	272, 273, 284, 795, 802
Maloy v. Marietta—11 Ohio St. 636.....	77, 169
Manhattan, R. R. Co., <i>In re</i> —102 N. Y. 301; 6 N. E. 590....	423, 425
Manice v. Mayor—8 N. Y. 120.....	661
Manley v. Emlan—46 Kan. 655; 27 Pac. 844.....	811, 812, 820
Manning v. Den—90 Cal. 610; 27 Pac. 435.....	655
Mansfield v. People—164 Ill. 611; 45 N. E. 976.....	360, 376
Marion v. Epler—5 Ohio St. 250.....	38, 77, 199



(The references are to sections.)

Markham v. Anamosa—122 Iowa 689; 98 N. W. 493.....	629
Markley v. Chicago—167 Ill. 626; 48 N. E. 1056.....	711
Markley v. Chicago—170 Ill. 358; 48 N. E. 952.....	493, 616
Markley v. Chicago—189 Ill. 276.....	337, 820, 836, 839
Markley v. Chicago—190 Ill. 276; 60 N. E. 512.....	350, 824
Markley v. People—171 Ill. 260; 63 Am. St. Rep. 234; 49 N. E. 502.....	371
Markle v. Philadelphia—163 Pa. St. 344; 30 Atl. 149.....	645
Marsh v. Chicago—62 Ill. 115.....	322
Marsh v. Supervisors—42 Wis. 502.....	496
Marshall v. People—219 Ill. 99; 76 N. E. 70.....	622
Marshall v. Barber A. P. Co. (Ky)—66 S. W. 182.....	177
Marshall v. Barber A. P. Co. (Ky.)—23 Ky. L. Rep. 1971; 66 S. W. 734 .....	168
Marshall v. Gridley—46 Ill. 247.....	549
Marshall v. Milford—214 Ill. 388; 73 N. E. 742.....	485
Marshalltown, L. H. P. & R. Co. v. Marshalltown—127 Iowa 637; 103 N. W. 1005.....	240, 724, 748
Martin v. Oskaloosa (Ia.)—99 N. W. 557.....	120, 331, 370, 822, 829
Martin v. Oskaloosa (Ia.)—126 Iowa 680; 102 N. W. 529.....	823, 834
Martin v. Roney—41 Ohio St. 141.....	391
Martin v. Wills—157 Ind. 153; 60 N. E. 1021.....	168, 172
Mason v. Chicago—178 Ill. 499; 53 N. E. 354.....	243
Mason v. Sioux Falls—2 S. D. 640; 29 Am. St. Rep. 802; 51 N. W. 770.....	136, 290, 296
Mason v. Spencer—35 Kan. 512; 11 Pac. 402.....	179, 812
Massing v. Ames—37 Wis. 645.....	500
Masters v. Portland—24 Oreg. 161; 33 Pac. 540.....	77, 524, 579
Masters v. Seroggs—3 M. & Sel. 447.....	223
Matter of Deering—93 N. Y. 361.....	799
Matter of Dorrance St.—4 R. I. 230.....	79, 125, 201
Matter of Eager—46 N. Y. 100.....	289, 423, 424, 425, 502
Matter of First Street—66 Mich. 42; 33 N. W. 15.....	401
Matter of Klock—30 App. Div. 24; 51 N. Y. Supp. 897.....	524
Matter of Market St.—49 Cal. 546.....	149, 186
Matter of the Mayor, etc.—11 Johns. 77.....	260
Matter of opening Rogers Ave.—29 Abb. N. C. 361; 22 N. Y. Supp. 27.....	109, 112, 636
Matter of Second Ave. Church—66 N. Y. 395.....	133
Matter of Willes—30 Hun 13.....	799
Mattingly v. Dist. of Col.—97 U. S. 687.....	810
Mattson v. Astoria—39 Oreg. 577; 87 Am. St. Rep. 687; 65 Pac. 1066.....	761
May v. Holdridge—23 Wis. 93.....	84, 821
May v. Traphagen—139 N. Y. 478; 34 N. E. 1064.....	137, 138, 522
Mayall v. St. Paul—30 Minn. 294; 15 N. W. 170.....	560, 803
Mayer v. Mayor—101 N. Y. 284; 4 N. E. 336.....	616, 803
Mayo v. Haynie—50 Cal. 70.....	287
Mayor, etc., <i>In re</i> —11 Johns. 77.....	10
Mayor, etc., <i>In re</i> —178 N. Y. 421; 70 N. E. 924.....	490
Mayor v. Colgate—12 N. Y. 140.....	701
Mayor v. Cowen—88 Md. 447; 71 Am. St. Rep. 433; 41 Atl. 900..	578
Mayor v. Eschbach—18 Md. 276.....	271, 673
Mayor v. Maberry—6 Humph. 368; 44 Am. Dec. 315.....	30, 81
Mayor v. O'Callaghan—41 N. J. L. 349.....	769, 834
Mayor v. Tiffany—68 Hun. 158; 22 N. Y. Supp. 604.....	440
Mayor, etc. v. Baltimore—18 Md. 284; 79 Am. Dec. 686.....	751, 774



## TABLE OF CASES.

liii

(The references are to sections.)

Mayor, etc., v. Boyd—64 Md. 10; 20 Atl. 1028.....	272, 275
Mays v. Cincinnati—1 Ohio St. 268.....	134
Mayor, etc. v. Dargan—45 Ala. 310.....	17, 56, 273, 524
Mayor v. Green—42 N. J. L. 627.....	769
Mayor, etc. v. Green Mount Cemetery—7 Md. 517.....	30, 211, 258
Mayor, etc. v. Hartridge—8 Ga. 23.....	134
Mayor, etc. v. Harwood—32 Md. 471; 3 Am. Rep. 161.....	144
Mayor, etc. v. Hook—62 Md. 371.....	515, 808
Mayor, etc. v. Howard—6 Harr & J. 383.....	759
Mayor, etc. v. Hughes Adm'r—1 Gill & J. 480; 19 Am. Dec. 243	32, 135
Mayor, etc. v. Johns Hopkins' Hospital—56 Md. 1.....	155, 191, 297, 380, 436, 783, 785
Mayor, etc. v. Johnson—62 Md. 225.....	314, 804
Mayor, etc. v. Klein—89 Ala. 461; 8 L. R. A. 369; 7 So. 386....	17, 56, 214
Maywood Co. v. Maywood—140 Ill. 216; 29 N. E. 704....	367, 530, 584
Mayor, etc. v. Moore—6 Harr & J. 375.....	191
Mayor, etc. v. Porter—18 Md. 284; 79 Am. Dec. 686.....	387, 388, 460, 720, 780
Mayor, etc. v. Rayms—68 Md. 569; 13 Atl. 383.....	416, 692
Mayor, etc. v. Royal St. R. Co.—45 Ala. 322.....	17, 56, 263
Mayor, etc., v. Scharf—54 Md. 499.....	293, 297, 356, 380, 796
Mayor, etc. v. Smith & S. Brick Co.—80 Md. 458; 31 Atl. 423....	465, 748, 759
Mayor, etc. v. Stewart—92 Md. 535; 5 M. C. C. 59; 48 Atl. 165	168, 356, 357, 396, 403, 475
Mayor, etc. v. Ullman—79 Md. 469; 30 Atl. 43.....	654, 656, 838
Mayor, etc. v. Weeks—104 La. 489; 29 So. 252.....	353
Mauch Chunk v. Shortz—61 Pa. St. 399.....	698
Mauldin v. Greenville—42 S. C. 293; 27 L. R. A. 284; 46 Am. St. Rep. 723; 20 S. E. 842.....	79, 80, 130
Mauldin v. Greenville—53 S. C. 285; 43 L. R. A. 101; 69 Am. St. Rep. 855; 31 S. E. 252.....	132
Maxwell v. Chicago—185 Ill. 18; 56 N. E. 1101.....	336
McAllister v. Tacoma—9 Wash. 272; 37 Pac. 447, 658.....	415, 608
McAuly v. Chicago—22 Ill. 564.....	433
McBean v. Chandler—9 Heisk 349; 124 Am. Rep. 308.....	81
McBride v. Chicago—22 Ill. 574, 577.....	139, 324, 785, 793
McCain v. Des Moines (Ia.)—103 N. W. 979.....	417, 418, 562, 775
McCague v. Omaha—58 Neb. 37; 78 N. W. 463.....	737, 772
McCartney v. People—202 Ill. 51; 66 N. E. 873.....	508
McCauley v. People—87 Ill. 123.....	610
McChesney v. Chicago—152 Ill. 543; 38 N. E. 767.....	221, 292, 403
McChesney v. Chicago—159 Ill. 223; 42 N. E. 894.....	488
McChesney v. Chicago—161 Ill. 110; 43 N. E. 702.....	610, 616
McChesney v. Chicago—171 Ill. 253; 49 N. E. 548.....	335, 376, 395
McChesney v. Chicago—173 Ill. 75; 50 N. E. 191.....	338, 360, 556
McChesney v. Chicago—188 Ill. 423; 58 N. E. 982.....	831
McChesney v. Chicago—201 Ill. 344; 66 N. E. 217.....	312, 505
McChesney v. Chicago—205 Ill. 528; 69 N. E. 38.....	352
McChesney v. Chicago—205 Ill. 611; 69 N. E. 82.....	359
McChesney v. Chicago—213 Ill. 592; 73 N. E. 368.....	377
McChesney v. Hyde Park—151 Ill. 634; 37 N. E. 858.....	224, 327, 552
McChesney v. People—99 Ill. 216.....	246
McChesney v. People—145 Ill. 614; 34 N. E. 431.....	294, 312, 317, 322, 389, 390



(The references are to sections.)

McChesney v. People—148 Ill. 221; 35 N. E. 739.....	137, 312, 493
McChesney v. People—171 Ill. 267; 49 N. E. 491.....	279, 532
McChesney v. People—178 Ill. 542; 53 N. E. 356.....	323
McChesney v. People—200 Ill. 146; 65 N. E. 626.....	406, 410, 411
McChesney v. People—205 Ill. 547; 69 N. E. 80.....	687
McClellan v. Dist. of Col.—7 Mackey 94.....	521, 557
McComb v. Bell—2 Minn. 295; Gil. 256.....	38, 42, 560, 673, 675
McConville v. St. Paul—75 Minn. 383; 43 L. R. A. 584; 74 Am. St. Rep. 508; 77 N. W. 993.....	766
McCormack v. Patchin—53 Mo. 33, 36; 14 Am. Rep. 440.....	107, 131, 132
McCrea v. Leavenworth—46 Kan. 767; 27 Pac. 129.....	798
McCullough v. Campbellsport—123 Wis. 334; 101 N. W. 709....	114
McCullough v. Maryland—4 Wheat 316, 428; 4 L. ed. 579, 607....	43, 50
McCullough v. Mayor &c.—23 Wend. 458.....	757
McDonald v. Conniff—99 Cal. 386; 34 Pac. 71.....	289, 501, 518
McDonald v. Littlefield—5 Mack 574.....	293
McDonald v. Mezes—107 Cal. 492; 40 Pac. 808.....	423, 425, 426
McDonald v. People—204 Ill. 499; 68 N. E. 379.....	376, 561, 596
McDonald v. People—206 Ill. 624; 69 N. E. 509.....	732
McDonald v. Poole—113 Cal. 437; 45 Pac. 702.....	405
McDonnell v. Gillon—134 Cal. 329; 66 Pac. 314.....	390, 421
McFarlane v. Chicago—185 Ill. 242; 57 N. E. 12..	216, 339, 341, 516, 517
McEmery v. Sullivan—125 Ind. 407; 25 N. E. 540.....	278, 293, 807
McEwan v. Spokane—16 Wash. 212; 47 Pac. 433.....	662
McGehee v. Mathis—21 Ark. 40.....	17, 173
McGehee v. Mathis—4 Wall. 143.....	57
McGettigan v. Potts—149 Pa. St. 159; 24 Atl. 198.....	628
McGhee v. Commissioners—84 Minn. 472; 88 N. W. 6.....	32
McGonigle v. Allegheny—44 Pa. St. 118.....	170, 210
McGonigle v. Arthur—27 Ohio St. 251.....	215
McGrew v. Kansas City—64 Kan. 61; 67 Pac. 438.....	253
McGrew v. Stewart—51 Kan. 185; 32 Pac. 896.....	514
McGuire v. Brockman—58 Mo. App. 307.....	42
McInerny v. Reed—23 Ia. 410.....	689, 703, 707
McKee v. Pendleton—154 Ind. 652; 57 N. E. 532.....	783
McKeesport v. Fidler—147 Pa. 532; 23 Atl. 799.....	11, 15
McKeesport v. Soles—165 Pa. St. 628; 30 Atl. 1019.....	170, 473
McKnight v. Pittsburg—91 Pa. St. 273.....	720
McKusick v. Stillwater—44 Minn. 372; 46 N. W. 769.....	36, 753
McLaughlin v. Chicago—198 Ill. 518; 64 N. E. 1036.....	350
McLaughlin v. Miller—124 N. Y. 510; 26 N. E. 1104....	100, 124, 764
McLaughlin v. Municipality No. Two—5 La. Ann. 504.....	137, 636
McLauren v. Grand Forks—6 Dak. 397; 43 N. W. 710....	287, 312, 720
McLean Co. v. Bloomington—106 Ill. 209.....	234, 255, 653, 682
McManus v. Hornaday—99 Iowa 507; 68 N. W. 812.....	137, 141, 330, 331, 568
McManus v. Hornaday—124 Iowa 267; 104 Am. St. Rep. 316; 100 N. W. 33.....	818, 824, 829
McManus v. People—183 Ill. 391; 55 N. E. 886.....	323, 612
McMasters v. Commonwealth—3 Watts 292.....	78, 207
McMillen v. Anderson—95 U. S. 37; 24 L. ed. 335.....	8, 93
McMillen v. Butte—30 Mont. 220; 76 Pac. 203.....	112, 178
McNamee v. Tacoma—24 Wash. 591; 64 Pac. 791.....	618, 620, 779, 782, 821, 830
McNair v. Ostrander—1 Wash. 110; 23 Pac. 414.....	399
McNulty v. California—149 U. S. 645; 37 L. ed. 882; 13 Sup. Ct. Rep. 959.....	94



## TABLE OF CASES.

lv

(The references are to sections.)

McSherry v. Wood—102 Cal. 647; 36 Pac. 1010.....	596, 672
McVerry v. Boyd—89 Cal. 304; 26 Pac. 885.....	211, 421, 547, 723
McVey v. Danville—188 Ill. 428; 58 N. E. 955.....	273, 283, 285
McVicker v. Commissioners—250 Ohio St. 608.....	213
Mead, <i>In re</i> —74 N. Y. 216.....	127
Mead v. Chicago—186 Ill. 54; 57 N. E. 824.....	354, 359, 746
Meadowcraft v. Kochesperger—170 Ill. 356; 48 N. E. 987..	791, 792, 806
Meadowcroft v. People—154 Ill. 416, 417; 40 N. E. 442..	343, 617, 619
Medical Lake v. Smith—7 Wash. 195; 34 Pac. 835.....	719, 816
Medland v. Connell—57 Neb. 10; 77 N. W. 437.....	300
Medland v. Linton—60 Neb. 249; 82 N. W. 866.....	135, 286, 305, 438, 451, 454, 499
Meggett v. Eau Claire—81 Wis. 326; 51 N. W. 566.....	96, 170, 472, 792, 798
Meinzer v. Racine—68 Wis. 241; 32 N. W. 139.....	631
Meinzer v. Racine—70 Wis. 561; 36 N. W. 260.....	631, 762
Meinzer v. Racine—74 Wis. 166; 42 N. W. 230.....	540
Melrose Park v. Dunnebecke—210 Ill. 422; 71 N. E. 431....	484, 485
Menges v. Deutler—33 Pac. 495; 75 Am. Dec. 616.....	821, 827
Mercer v. Kelly—20 Oreg. 86; 25 Pac. 73, 77.....	28
Mercy Hospital v. Chicago—187 Ill. 404; 58 N. E. 353.....	382
Meredith v. Perth Amboy—63 N. J. L. 523; 44 Atl. 1101.....	371
Merriam, <i>In re</i> —84 N. Y. 596.....	404, 417, 423, 425, 427, 493, 498, 540, 612
Merriam v. Moody's Ex'rs—25 Iowa 163.....	393, 676, 689
Merrick v. Amherst—12 Allen 500.....	71, 231
Merrill v. Shields—57 Neb. 78; 77 N. W. 368.....	135, 460
Merritt v. Farriss—22 Ill. 303.....	790
Merritt v. Kewanee—175 Ill. 537; 51 N. E. 867.....	270, 271, 275, 276, 327, 368
Met. Board of Works v. Vauxhall Bridge Co.—7 El. & B. 964....	223
Met. Gas L. Co., <i>In re</i> —85 N. Y. 526.....	498
Met. W. S. E. R. Co. v. Stickney—150 Ill. 362; 26 L. R. A. 773; 37 N. E. 1098.....	442, 639
Meyer v. Covington—103 Ky. 546; 46 S. W. 769.....	208, 252, 653
Meyer v. Fromm—108 Ind. 208; 9 N. E. 84.....	419
Michael v. Mattoon—172 Ill. 394; 50 N. E. 155.....	311, 371
Michel v. Police Jury—3 La. Ann. 123.....	765
Michel v. Police Jury—9 La. Ann. 67.....	135, 660, 765
Michener v. Philadelphia—118 Pa. St. 535; 12 Atl. 174.....	46, 170, 464, 577, 592
Mich. Cent. R. Co. v. Huehn—59 Fed. 335.....	288
Middleton v. St. Augustine—42 Fla. 287; 89 Am. St. Rep. 287; 29 So. 421.....	816
Millard v. Presbury—14 Wall 676; 20 L. ed. 719.....	131
Millard v. Webster City—113 Ia. 220; 84 N. W. 1044.....	629, 760
Mill Creek Sewer—196 Pa. St. 183; 46 Atl. 312.....	134
Miller v. Amsterdam—149 N. Y. 288; 43 N. E. 632..	271, 388, 392, 728
Miller v. Graham—17 Ohio St. 1.....	314, 543
Miller v. Milwaukee—14 Wis. 699.....	220, 660
Mills v. Charlton—29 Wis. 400; 9 Am. Rep. 578....	791, 821, 825, 830
Mills v. Chicago—182 Ill. 249; 54 N. E. 987.....	375
Mills v. Gleason—11 Wis. 470; 78 Am. Dec. 721.....	791
Milwaukee St. R. Co. v. Anderson—90 Wis. 550.....	750
Milwaukee, etc., Co. v. Milwaukee—95 Wis. 42; 69 N. W. 796....	84
Miner v. Vedder—66 Mich. 101; 33 N. W. 47.....	713



(The references are to sections.)

Minnesota Linseed Oil Co. v. Palmer—20 Minn. 468; Gil. 424....	133, 180, 193, 778, 781, 803
Minn. & St. Louis R. Co. v. Lindquist—119 Iowa 144; 93 N. W. 103 .....	172, 178, 190, 580, 691, 752
Minnetonka, etc., Imp. Co., <i>In re</i> —56 Minn. 513; 45 Am. St. Rep. 494; 58 N. W. 295.....	133
Minor v. Daspit—43 La. Ann. 337; 9 So. 49.....	123, 191
M., K. & T. Trust Co. v. Smart—51 La. Ann. 416; 25 So. 443.....	69
Miservey v. People—208 Ill. 646; 70 N. E. 678.....	599
Missouri v. Lewis—101 U. S. 22; 25 L. ed. 989.....	93
Mitchell v. Milwaukee—18 Wis. 93....84, 296, 397, 429, 736, 779, 780	
Mitchell v. Peru—163 Ind. 17; 71 N. E. 132.....	598, 799
Mix v. Ross—57 Ill. 121.....	21, 135, 652, 689
Moale v. Baltimore—61 Md. 224, 225.....	168, 173, 298, 656
Moale v. Mayor, etc.—5 Md. 314; 61 Am. Dec. 276.....	191, 192, 207
Moberly v. Hogan—131 Mo. 19; 32 S. W. 1014.....	169, 173, 475, 654, 656, 669
Mobile v. Dargan—45 Atl. 310.....	170
Mock v. Muncie (Ind.)—32 N. E. 718.....	252
Moffitt v. Jordan—127 Cal. 622; 60 Pac. 173.....	286
Moll v. Chicago—194 Ill. 28, 29; 61 N. E. 1012.....	311, 375
Monroe County v. Rochester—154 N. Y. 570, 571; 49 N. E. 139....	603, 779, 781, 788, 799, 809
Montgomery Ave. Case—54 Cal. 579.....	437
Monticello v. Banks—48 Ark. 251; 2 S. W. 852.....	524
Moody v. Chadwick—52 La. Ann. 1888; 28 So. 361.....	653
Moore v. Albany—98 N. Y. 396.....	762
Moore v. Mattoon—163 Ill. 622; 45 N. E. 567.....	286, 491
Mo. Pac. R. Co. v. Humes—115 U. S. 519; 29 L. ed. 465; 6 Sup. Ct. Rep. 110.....	93
Moore v. Mayor—73 N. Y. 238; 29 Am. Rep. 134.....	319
Moore v. People—106 Ill. 376.....	594
Morange v. Mix—44 N. Y. 315.....	702
Moran v. Lindell—52 Mo. 229.....	252, 354, 396
Morewood Ave., <i>In re</i> —159 Pa. St. 20; 28 Atl. 123, 132.....	201, 211, 249, 252, 490, 821
Morey v. Duluth—75 Minn. 221; 77 N. W. 829.....	699, 700
Morgan Pk. v. Gahan—136 Ill. 515; 26 N. E. 1089.....	431
Morgan Park v. Wiswall—135 Ill. 262; 40 N. E. 611, 613.....	25, 134, 152, 221, 649
Morley v. Carpenter—22 Mo. App. 640.....	131
Morris v. Chicago—11 Ill. 650.....	501
Morris v. Council Bluffs—67 Iowa 343; 56 Am. Rep. 343; 25 N. W. 274 .....	625
Morris & E. R. Co. v. Jersey City—36 N. J. L. 56.....	266
Morrison v. Chicago—142 Ill. 660; 32 N. E. 172.....	531, 532
Morrison v. Hershire—32 Iowa 271.....	252, 791, 792
Morrison v. St. Paul—5 Minn. 108; Gil. 83.....	175
Morse v. Buffalo—35 Hun 613.....	775, 799, 808
Morse v. Omaha—67 Neb. 426; 93 N. W. 734, 739.....	137, 195, 275, 276, 282, 383, 434, 473, 718
Morse v. West Port—110 Mo. 502; 19 S. W. 831.....	339, 413, 566
Moser v. White—29 Mich. 59.....	400
Moss v. Fairburg—66 Neb. 671; 92 N. W. 721.....	293
Mott v. Hubbard—59 Ohio St. 199; 53 N. E. 47.....	726
Motz v. Detroit—18 Mich. 495.....	71, 72, 158, 168, 172, 175, 180, 470, 720



(The references are to sections.)

Mound City, etc., Co. v. Miller—170 Mo. 240; 60 L. R. A. 190; 94 Am. St. Rep. 727; 70 S. W. 721.....	223
Mount Auburn v. Cambridge—150 Mass. 12; 4 L. R. A. 836; 22 N. E. 66.....	259
Mt. Carmel v. Friedrich—141 Ill. 369; 31 N. E. 21.....	611
Mount Pleasant v. B. & O. R. Co.—138 Pa. St. 365; 11 L. R. A. 520; 20 Atl. 1052.....	208, 240, 464, 594
Mt. Pleasant Cemetery Co. v. Newark—50 N. J. L. 66; 11 Atl. 147.	259
Mount Vernon, <i>In re</i> —147 Ill. 359; 23 L. R. A. 807; 35 N. E. 533 256, 611, 653, 758	
Mudge v. Walker (Ky.)—92 S. W. 1046.....	460
Mullen v. Clifford (Ind. App.)—76 N. E. 1009.....	700
Mulligan v. Smith—59 Cal. 206.....	270, 274, 277, 281
Municipality No. 2 v. Duncan—2 La. Ann. 182.....	68
Municipality No. 2 v. Dunn—10 La. Ann. 57.....	131, 211, 212
Municipality No. 2 v. Guillothe—14 La. Ann. 295.....	416
Municipality No. 2 v. White—9 La. Ann. 446...69, 177, 179, 191, 207	
Munn, <i>In re</i> —165 N. Y. 149; 58 N. E. 881.....	763
Munson v. Commissioners—43 La. Ann. 15; 8 So. 906....	23, 176, 219
Munson v. Minor—22 Ill. 595.....	793
Munger v. St. Paul—57 Minn. 9; 58 N. W. 601.....	210, 626
Murdock v. Cincinnati—39 Fed. 891.....	293
Murphy v. Chicago—186 Ill. 59; 57 N. E. 847.....	493
Murphy v. Louisville—9 Bush. 189.....	426, 429, 430
Murphy v. People—120 Ill. 234; 11 N. E. 202.....	65, 615
Murphey v. Peoria—119 Ill. 509; 9 N. E. 895.....	235, 528, 732
Murphy v. Wilmington—6 Houst (Del.) 108; 22 Am. St. Rep. 345.	61
Murphy v. Wilmington—5 Del. Ch. 281.....	809
Murr v. Naperville—210 Ill. 371; 71 N. E. 380.....	486, 487
Murray v. Chicago—175 Ill. 340; 51 N. E. 654.....	371, 832
Murray v. Hoboken L. & I. Co.—18 How. 272; 15 L. ed. 372....	93, 97
Murray v. Tucker—10 Bush. 240.....	135, 403, 416, 417
Murtland v. Pittsburg—189 Pa. St. 371; 41 Atl. 1113.....	703
Muscatine v. C., R. I. & P. R. Co.—79 Iowa 645; 44 N. W. 909.... 241, 510, 676, 714, 727	
Muscatine v. C., R. I. & P. R. Co.—88 Iowa 291; 55 N. W. 100.. 250, 338, 571	
Muskego v. Drainage Com'rs—78 Wis. 40; 47 N. W. 11..	244, 321, 794
Musselman v. Logansport—29 Ind. 533.....	811, 820
Mut. Life Ins. Co., <i>In re</i> —89 N. Y. 530.....	416
Mut. Life Ins. Co. v. Sage—41 Hun 535.....	654
Mut. Life Ins. Co. v. Mayor—144 N. Y. 494; 39 N. E. 386...	765, 767
Myers v. Chicago—196 Ill. 591; 63 N. E. 1037.....	339, 340
Myrick v. La Crosse—17 Wis. 443.....	500, 791, 800, 804

## N.

Nashville v. Weiser—54 Ill. 245.....	307
National Bank v. Petterson—200 Ill. 215; 65 N. E. 687.....	710
Naugatuck R. Co. v. Waterbury (Conn.)—61 Atl. 474...238, 267, 450	
Neenan v. Smith—50 Mo. 525.....	168, 175, 477
Neenan v. Smith—60 Mo. 292.....	477, 602, 674, 681
Neff v. Bates—25 Ohio St. 169.....	337
Nehasane Park Assn. v. Lloyd—167 N. Y. 431; 60 N. E. 741.....	736
Neill v. Gates—152 Mo. 585; 54 S. W. 460.....	369, 403, 422
Nevada v. Eddy—123 Mo. 546; 27 S. W. 471.....	240, 265, 331
Nevin v. Allen—15 Ky. L. Rep. 836; 26 S. W. 180.....	263



(The references are to sections.)

Nevin v. Roach—86 Ky. 492; 5 S. W. 546.....	100, 330, 439, 444
Nevens, etc., Co. v. Alkire—36 Ind. 189.....	524
Newberry v. Fox—37 Minn. 141; 5 Am. St. Rep. 830; 33 N. W. 333 .....	133
Newby v. Platte Co.—25 Mo. 258.....	40, 179, 194, 467
Newcomb v. Police Jury—4 Rob. (La.) 233.....	765
Newell v. Cincinnati—45 Ohio St. 407; 15 N. E. 196.....	591
Newman v. Chicago—153 Ill. 469; 38 N. E. 1053.....	189, 209, 441, 521
Newman v. Emporia—32 Kan. 456; 4 Pac. 815.....	331, 820, 838, 843
Newman v. Emporia—41 Kan. 583; 21 Pac. 593.....	179, 820, 838
Newport v. Ringos Extr'x—87 Ky. 636; 10 S. W. 2.....	770
New Albany v. Cook—29 Ind. 220.....	190
New Albany v. Sweeney—13 Ind. 245.....	425
New Brunswick R. Co. v. Commissioners—38 N. J. L. 190; 20 Am. Rep. 380.....	171, 177, 192, 193
New Castle v. Stone Church Graveyard—172 Pa. St. 86; 33 Atl. 236 .....	259
New England Hospital v. Street Comr's—188 Mass. 88; 74 N. E. 294 .....	503
New Haven v. Fair Haven & N. R. Co.—38 Com. 422; 9 Am. Rep. 399 .....	235, 722, 750
New Iberia v. Weeks—104 La. 489; 29 So. 252.....	133
N. J. M. R. Co. v. Jersey City—42 N. J. L. 97.....	240
N. J. R. & T. Co. v. Elizabeth—37 N. J. L. 330.....	240
N. J. S. R. Co. v. Jersey City—68 N. J. L. 140; 52 Atl. 300.....	236, 238
New London v. Miller—60 Conn. 112; 22 Atl. 499.....	38, 523
New Orleans v. Dunn—10 La. Ann. 57.....	53
New Orleans v. Elliott—10 La. Ann. 59.....	69
New Orleans v. Warner—175 U. S. 120; 44 L. ed. 96; 20 Sup. Ct. Rep. 44.....	233
New Orleans v. Wire—20 La. Ann. 500.....	627
New Whatcom v. Bellingham, etc. Co.—9 Wash. 639; 38 Pac. 163 .....	175, 539, 618, 803
New Whatcom v. Bellingham, etc. Co.—16 Wash. 131, 137; 47 Pac. 236, 237.....	104, 170, 240, 473, 545, 617, 619, 620, 705, 821, 843
New Whatcom v. Bellingham, etc. Co.—16 Wash. 138; 47 Pac. 1102 .....	680
New Whatcom v. Bellingham, etc. Co.—18 Wash. 181; 51 Pac. 360 .....	617, 619, 620, 723
N. Y. & G. L. R. Co. v. Kearney—55 N. J. L. 463; 26 Atl. 800 .....	197, 480, 742
N. Y. N. H. & H. R. Co. v. New Britain—49 Conn. 40.....	240
N. Y. & N. H. R. Co. v. New Haven—42 Conn. 279; 19 Am. Rep. 534 .....	240, 242
N. Y. Prot. Ep. School, <i>In re</i> —46 N. Y. 178.....	398, 585
N. Y. Prot. Ep. School, <i>In re</i> —75 N. Y. 324.....	429
N. Y. Life Ins. Co. v. Prest.—71 Fed. 815.....	228
Nolan v. Reese—32 Cal. 484.....	674
Noonan v. People—183 Ill. 52; 55 N. E. 679.....	518, 569
Noonan v. Stillwater—33 Minn. 198; 53 Am. Rep. 23; 22 N. Y. 444 .....	40
Norfolk v. Chamberlain—89 Va. 196; 16 S. E. 730.....	36
Norfolk v. Ellis—26 Gratt. 224.....	28, 82, 170, 172
Norfolk v. Virginia—89 Va. 196; 16 S. E. 730.....	82
Norfolk v. Young—97 Va. 728; 47 L. R. A. 574; 34 S. E. 886.....	41, 107, 301
North Beach & M. R. Co., <i>In re</i> and appeal of—32 Cal. 499.....	240, 241
N. Chic. Park Com. v. Baldwin—62 Ill. 87; 44 N. E. 404.....	498



## TABLE OF CASES.

lix

(The references are to sections.)

Nor. Ind. R. Co. v. Connelly—10 Ohio St. 159.....	77, 169, 241, 471
Northern Liberties v. Swain—13 Pa. St. 113.....	221, 701
Northern Liberties v. St. Johns Church—13 Pa. 104..	21, 199, 210, 263
Northport v. Northport T. S. Co.—27 Wash. 543; 68 Pac. 204....	727
In re Norton—61 Minn. 542; 64 N. W. 190.....	168
Norton v. Courtney—53 Cal. 691.....	512
Norton v. Fisher—33 Ind. App. 132; 71 N. E. 51.....	507
Northwestern, etc. Bank v. Spokane—18 Wash. 456; 51 Pac. 1070	179, 458
N. W. Lumber Co. v. Aberdeen—20 Wash. 102; 54 Pac. 935....	659, 666
N. W. Lumber Co. v. Aberdeen—22 Wash. 404; 60 Pac. 1115, ..	659
	662, 663
Norwood v. Baker—172 U. S. 269, 278, 279, 291; 43 L. ed. 443, 447.	
452, 453; 19 Sup. Ct. Rep. 187..	3, 50, 96, 106, 109, 183, 192,
	210, 445, 481, 783, 790
Nottgae v. Portland—35 Oreg. 539; 76 Am. St. Rep. 513; 58 Pac.	
883 .....	669, 770, 811, 812, 813, 818, 821
Nowlen v. Benton Harbor—134 Mich. 401; 96 N. W. 450.....	537, 722
Nowlin v. People—216 Ill. 543; 75 N. E. 209.....	622
Sackett, etc. Streets, <i>In re</i> —74 N. Y. 95.....	123, 453, 811

## O.

O. & C. R. Co. v. Portland—25 Oreg. 229; 22 L. R. A. 713; 35 Pac.	
452 .....	448, 669
Oak Park v. Schosenski—215 Ill. 229; 74 N. E. 135.....	794
O'Brien v. Baltimore Co.—51 Md. 15.....	811
O'Brien v. Philadelphia—150 Pa. St. 589; 30 Am. St. Rep. 832;	
24 Atl. 1047.....	634
O'Brien v. Wheelock—184 U. S. 450; 46 L. ed. 636; 22 Sup. Ct.	
Rep. 354.....	726
O'Connor v. Pittsburg—18 Pa. St. 187.....	42
O'Dea v. Mitchell—144 Cal. 374; 77 Pac. 1020.....	
	89, 282, 439, 525, 699, 722
Ogden City v. Armstrong—168 U. S. 224; 42 L. ed. 444; 18 Sup.	
Ct. Rep. 98.....	
Ogden v. Lake View—121 Ill. 422; 13 N. E. 159.....	277, 284, 378
Ogden v. Philadelphia—143 Pa. St. 430; 22 Atl. 694.....	634
O'Hara v. Scranton—54 Atl. 713; 205 Pa. St. 142.....	660
Oil City v. Oil City Boiler Works—152 Pa. St. 348; 25 Atl. 549	
	577, 579, 580, 746
O'Kane v. Treat—25 Ill. 557.....	798
Olcott v. State—10 Ill. 481.....	556, 652
O'Leary v. Sloo—7 La. Ann. 25.....	211
Olive Cemetery Co. v. Philadelphia—93 Pa. St. 129; 39 Am. Rep.	
732 .....	11, 15, 259
Olney v. Harvey—50 Ill. 453; 99 Am. Dec. 530.....	682
Olsson v. Topeka—42 Kan. 709; 21 Pac. 219....	250, 253, 500, 570, 572
Omaha v. Clarke—66 Neb. 33; 92 N. W. 146.....	719
Omaha v. Croft—60 Neb. 57; 82 N. W. 120.....	763
Omaha v. Flood—57 Neb. 124; 77 N. W. 379.....	559, 625, 638
Omaha v. Granter—4 Neb. (Unof.) 52; 93 N. W. 407.....	282, 728
Omaha v. Megeath—46 Neb. 502; 64 N. W. 1091..	257, 598, 788, 790
Omaha v. State (Neb.)—94 N. W. 929.....	654
Omaha v. Williams—52 Neb. 40; 71 N. W. 970.....	632
Omega St.—152 Pa. St. 129; 25 Atl. 528.....	490, 821
O'Neil v. People—166 Ill. 561; 46 N. E. 1096.....	361, 388, 392, 710



(The references are to sections.)

Opening of Park Ave., <i>In re</i> —83 Pa. St. 167.....	440
Oregon R. E. Co. v. Gambell—41 Oreg. 61; 66 Pac. 441.....	811, 816
Oregon R. E. Co. v. Portland—40 Oreg. 56; 66 Pac. 442.....	529, 811, 816
Oregon Transfer Co. v. Portland (Or.)—81 Pac. 575.....	136, 529
O'Reilly v. Kankakee &c. Drainage Co.—32 Ind. 169.....	32
O'Reilly v. Holt—4 Woods 645; Fed. Cas. No. 10, 563.....	176
O'Reilly v. Kingston—114 N. Y. 439; 21 N. E. 1004.....	121, 167, 169, 238, 474, 564
Orkney St., <i>In re</i> —194 Pa. St. 425; 48 L. R. A. 274; 45 Atl. 314.....	207, 247
Orr v. Omaha—2 Neb. (Unof.) 771; 90 N. W. 301.....	282, 728
Orth v. Park—117 Ky. 779; 79 S. W. 206; 80 S. W. 1108; 81 S. W. 251.....	838
Osborn v. Lyons—104 Iowa 160; 73 N. W. 650.....	412
Oshkosh City R. Co. v. Winnebago Co.—89 Wis. 435; 61 N. W. 1107.....	240, 250, 266, 267
Oster v. Jefferson City—57 Mo. App. 485.....	658
Oswald v. Gilbert—11 Johns. 443.....	714
Otis v. Chicago—62 Ill. 299.....	685
Otis v. Chicago—161 Ill. 199; 43 N. E. 715.....	368
Otis v. Sullivan—219 Ill. 365; 76 N. E. 487.....	522
Ottawa v. Barney—10 Kan. 270.....	791, 792
Ottawa v. C. R. I. & P. R. Co.—25 Ill. 43.....	324, 738, 787, 793
Ottawa v. Macy—20 Ill. 413.....	302
Ottawa v. Spencer—40 Ill. 211.....	35, 63, 64, 187, 210, 370, 481
Ottawa v. Trustees, etc.—20 Ill. 423.....	260
Ottumwa Brick, etc. Co. v. Ainley—109 Iowa 386; 80 N. W. 510.....	249, 389, 661, 711
Overman v. St. Paul—39 Minn. 120; 39 N. W. 66.....	294, 750
Owen v. Chicago—53 Ill. 95.....	295
Owens v. Marion—127 Iowa 469; 103 N. W. 381.....	94, 306, 309, 389, 397, 554, 735, 748, 753, 786
Owens v. Milwaukee—47 Wis. 461; 3 N. W. 3.....	576, 631, 696, 723, 757
Owners of Ground v. Mayor—15 Wend. 374.....	98, 113, 197, 218

## P.

Pabst Brewing Co. v. Milwaukee—105 N. W. 563.....	554, 711, 725, 748, 754
Pacific Paving Co. v. Geary—136 Cal. 373; 68 Pac. 1028.....	558
Page v. Chicago—60 Ill. 441.....	236, 524
Paine v. Spratley—5 Kan. 525.....	689
Paine Lumber Co. v. Oshkosh—86 Wis. 397; 56 N. W. 1088.....	804
Palmer v. Danville—154 Ill. 156; 38 N. E. 1067.....	175, 221, 376, 377, 578
Palmer v. Danville—166 Ill. 42; 46 N. E. 629.....	189, 395, 461, 589, 667
Palmer v. Stumpf—29 Ind. 329.....	22, 65, 168, 676, 727
Palmer v. Taylor—31 Cal. 240.....	420
Palmer v. Way—6 Colo. 106, 116.....	18, 29, 60, 186, 442
Palmyra v. Morton—25 Mo. 593.....	168
Pardridge v. Hyde Park—131 Ill. 537; 23 N. E. 345.....	432, 820
Park Ave. Sewers—169 Pa. St. 433; 32 Atl. 574.....	226, 580
Park Co. Coal Co. v. Campbell—140 Ind. 28; 39 N. E. 149, 558.....	244
Parke v. Boston—8 Pick. 218; 19 Am. Dec. 322.....	601
Parke v. Seattle—5 Wash. 1; 20 L. R. A. 68; 34 Am. St. Rep. 839; 31 Pac. 310; 32 Pac. 82.....	625, 626
Parker v. Altschul—60 Cal. 381.....	687
Parker v. Atchison—48 Kan. 574; 30 Pac. 20.....	572, 820



# TABLE OF CASES.

lxi

The references are to sections.)

Parker v. Catholic Bishop—146 Ill. 158; 34 N. E. 473.....	624, 646
Parker v. Challis—9 Kan. 155.....	130, 168, 175, 698
Parker v. La Grange—171 Ill. 344; 49 N. E. 550.....	279
Parker v. Reay—76 Cal. 103; 18 Pac. 124.....	599
Parkersburg v. Tavenner—42 W. Va. 486; 26 S. E. 179.....	83
Parmelee v. Chicago—60 Ill. 267.....	264
Parmelee v. Thompson—7 Hill 80.....	158
Parmelee v. Youngstown—43 Ohio St. 162; 1 N. E. 319.....	526
Parrotte v. Omaha—61 Neb. 96; 84 N. W. 602.....	797
Parsons v. Columbus—50 Ohio St. 460; 34 N. E. 677.....	127, 404
Parsons v. Dist. of Col.—170 U. S. 45; 42 L. ed. 943; 18 Sup. Ct. Rep. 521.....	170, 221
Parsons v. Grand Rapids (Mich.)—104 N. W. 730.....	523
Partridge v. Lucas—99 Cal. 519; 33 Pac. 1082.....	290, 327, 392, 566, 670
Paterson, etc. Co. v. Nutley (N. J. L.)—59 Atl. 1032.....	458
Patterson v. Barber A. P. Co. (Minn.)—104 N. W. 566.....	777
Patterson v. Maccomb—129 Ill. 163; 53 N. E. 617.....	279
Paulsen v. City of Portland—16 Oreg. 450; 1 L. R. A. 673; 19 Pac. 450.....	103, 133, 449, 579, 783, 784
Paulsen v. City of Portland—149 U. S. 41; 37 L. ed. 641; 13 Sup. Ct. Rep. 754.....	94
Paxton v. Bogardus—201 Ill. 628; 66 N. E. 853.....	330, 334, 337, 368, 405
Payne v. S. Springfield—161 Ill. 285; 44 N. E. 105.....	168, 292, 345, 363, 364, 583, 597
Payson v. People—175 Ill. 267; 51 N. E. 588.....	389, 515, 592
Peake v. New Orleans—139 U. S. 342; 35 L. ed. 131; 11 Sup. Ct. Rep. 541.....	24, 431, 657, 659
Pearce v. Hyde Park—126 Ill. 287; 18 N. E. 824.....	336, 342, 364, 487
Pearce v. Milwaukee—18 Wis. 420.....	631
Pearson v. Chicago—162 Ill. 383; 44 N. E. 739.....	354, 431, 432
Pearson v. Yewdall—95 U. S. 294; 24 L. ed. 436.....	94
Pearson v. Zable—78 Ky. 170.....	443, 660
Pease v. Chicago—21 Ill. 500.....	714
Peay v. Little Rock—32 Ark. 31.....	57, 58, 170
Peck v. Chicago—22 Ill. 578.....	714
Peek v. Grand Rapids—125 Mich. 410, 416; 84 N. W. 614.....	808
Peek v. Sherwood—56 N. Y. 615.....	714
Pells v. Paxton—176 Ill. 318; 52 N. E. 64.....	331, 365, 408
Pells v. People—159 Ill. 580; 42 N. E. 784.....	615, 623
Pells v. People—174 Ill. 580.....	345
Pelton, <i>In re</i> —85 N. Y. 651.....	498
Penn. Co. v. Cole—132 Fed. 668.....	370, 520, 721
Pennock v. Hoover—5 Rawle 291.....	170, 701
Peoria v. Kidder—26 Ill. 351.....	19, 793
Pepper v. Philadelphia—114 Pa. St. 96; 6 Atl. 899.....	416, 417, 418, 673, 720, 724
Perine v. Erzbacher—102 Cal. 234; 36 Pac. 585.....	248
Perine v. Forbush—97 Cal. 305; 32 Pac. 226.....	263
Perine v. Lewis—128 Cal. 236; 60 Pac. 422, 772.....	318, 705, 752
Perisho v. People—185 Ill. 334; 56 N. E. 1134.....	283
Perkins v. People—27 Mich. 336.....	647
Perrine N. P. etc. Co. v. Pasadena—116 Cal. 6; 47 Pac. 777.....	403
Perry v. People—155 Ill. 299; 40 N. E. 599.....	619
Perry v. People—155 Ill. 307; 40 N. E. 468.....	311, 322
Perry v. People—206 Ill. 334; 69 N. E. 63.....	359, 611
Peru v. Bartels—214 Ill. 515; 73 N. E. 755.....	459
Peters v. Chicago—192 Ill. 437; 61 N. E. 438.....	343, 363



(The references are to sections.)

Petition of Astor—50 N. Y. 363.....	316
Petition of New Orleans—11 La. Ann. 338.....	122, 128, 191, 226
Petition of New Orleans—20 La. Ann. 497.....	68
Pettibone v. Smith—150 Pa. 118; 17 L. R. A. 423; 24 Atl. 639....	11, 21, 254
Pettigrew v. Evansville—25 Wis. 223; 3 Am. Rep. 50.....	113, 647
Pettit v. Duke—10 Utah 311; 37 Pac. 568, 569..	24, 26, 227, 779, 780
Peysner v. Mayor, etc.—70 N. Y. 497; 26 Am. Rep. 624.....	767
Peyton v. Morgan Park—172 Ill. 102; 49 N. E. 1003.....	340, 492
Pfeiffer v. People—170 Ill. 347; 48 N. E. 979....	190, 381, 458, 523
Phelan v. Dunne—72 Cal. 229; 13 Pac. 662.....	704
Phelps v. Mattoon—177 Ill. 169; 52 N. E. 288.....	621
Phelps v. Mayor—112 N. Y. 216; 2 L. R. A. 626; 19 N. E. 408..	371, 771
Philadelphia v. Baker—140 Pa. St. 11; 21 Atl. 238.....	694
Philadelphia v. Ball—147 Pa. St. 243; 23 Atl. 564.....	696
Philadelphia v. Bowman—166 Pa. St. 393; 31 Atl. 142.....	694
Philadelphia v. Bradfield—159 Pa. St. 517; 28 Atl. 360.....	677
Philadelphia v. Cooper—212 Pa. 306; 61 Atl. 926.....	700
Philadelphia v. Dibeler—147 Pa. St. 261; 23 Atl. 567.....	675
Philadelphia v. Eastwick—35 Pa. St. 75.....	252
Philadelphia v. Ehret—153 Pa. St. 1; 25 Atl. 888.....	212
Philadelphia v. Evans—139 Pa. St. 483; 21 Atl. 200.....	674
Philadelphia v. Field—58 Pa. St. 320.....	43, 122, 216
Philadelphia v. Greble—38 Pa. St. 339.....	698
Philadelphia v. Henry—161 Pa. St. 38; 28 Atl. 946.....	597
Philadelphia v. Hill—166 Pa. St. 211; 30 Atl. 1134.....	675
Philadelphia v. Hood—211 Pa. 186, 189; 60 Atl. 721.....	698, 700
Philadelphia v. Jenkins—162 Pa. St. 451; 29 Atl. 794.....	312
Philadelphia v. Market Co.—161 Pa. St. 522; 29 Atl. 286....	566, 694
Philadelphia v. Muklee—159 Pa. St. 515; 28 Atl. 360.....	677
Philadelphia v. Odd Fellows etc. Asso.—168 Pa. St. 105; 31 Atl.	917
Philadelphia v. Penna. Hospital—143 Pa. St. 367; 22 Atl. 744....	263
Philadelphia v. P. W. & B. R. Co.—33 Pa. St. 41, 43.....	241, 242
Philadelphia v. Rule—93 Pa. St. 15.....	165
Philadelphia v. Schofield—166 Pa. St. 389; 31 Atl. 119....	324, 754
Philadelphia v. St. James Church—124 Pa. St. 207; 19 Atl. 497..	263
Philadelphia v. Tryon—35 Pa. St. 401.....	78, 170, 213
Philadelphia v. Yewdall—190 Pa. St. 412; 42 Atl. 956.....	132
Phila. etc. Coal Co. v. Chicago—158 Ill. 9; 41 N. E. 1102.....	820
Philadelphia M. & T. Co. v. New Whatcom—19 Wash. 225; 52 Pac.	1063
P. W. & B. R. Co. v. Shipley—72 Md. 88; 19 Atl. 1.....	317
Phillips, <i>In re</i> —60 N. Y. 16.....	316
Phillips v. Olympia—21 Wash. 153; 57 Pac. 347.....	821, 832
Phillips v. People—218 Ill. 450; 75 N. E. 1016.....	621
Phillips Academy v. Andover—175 Mass. 118; 48 L. R. A. 550; 55	N. E. 841.....
Pidgeon v. State—36 Ill. 249.....	227, 262
Piedmont Ave., <i>In re</i> —59 Minn. 522; 61 N. W. 678.....	652
Piedmont Pav. Co. v. Allman—136 Cal. 88; 68 Pac. 493.....	820
Pier v. Fond du Lac—38 Wis. 470.....	555
Pierson v. People—204 Ill. 456; 68 N. E. 383.....	519, 749, 751, 779, 782
	306, 335, 345, 347, 382, 383, 459, 597
Pike v. Chicago—55 Ill. 656; 40 N. E. 567.....	394, 450, 550, 552, 649
Pipers Appeal—32 Cal. 530.....	118, 438, 449, 450
Pipher v. People—183 Ill. 436; 56 N. E. 84.....	285



# TABLE OF CASES.

lxiii

(The references are to sections.)

Pittelkow v. Herman—94 Wis. 666; 69 N. W. 805.....	318, 325
Pittelkow v. Milwaukee—94 Wis. 651; 69 N. W. 803.....	291, 325, 383, 480, 497
Pittsburg v. Maxwell—179 Pa. St. 553; 36 Atl. 158.....	756
Pittsburg v. MacConnell—130 Pa. St. 463; 18 Atl. 645.....	576
Pittsburg etc. R. Co. v. Fish—158 Ind. 525; 63 N. E. 454.....	706
Pittsburg etc. R. Co. v. Machles—158 Ind. 159; 63 N. E. 210.....	297, 318
Pittsburg etc. R. Co. v. Oglesby (Ind.)—76 N. E. 165.....	267, 522
Pittsburg F. W. & C. R. Co. v. Chicago—53 Ill. 80.....	558, 687
Pittsburg's Appeal—111 Pa. St. 458; 12 Atl. 366.....	784
Plumstead Board of Works v. Ingolby—L. R. 8 Exch. 63.....	210
Poilon v. Brunner—66 N. J. L. 116; 48 Atl. 541.....	618
Poilon v. Rutherford—65 N. J. L. 538; 47 Atl. 439.....	308, 454
Polk v. McCartney—104 Iowa 567; 73 N. W. 1067.....	307
Polk Co. etc. Bank v. State—69 Iowa 24; 28 N. W. 416.....	234, 430
Pond v. Negus—3 Mass. 230; 3 Am. Dec. 131.....	135
Pontiac v. Talbot Paving Co.—48 L. R. A. 326; 36 C. C. A. 88; 94 Fed. 65.....	682
Pooley v. Buffalo—122 N. Y. 592; 26 N. E. 16.....	771
Pooley v. Buffalo—124 N. Y. 206; 26 N. E. 624.....	771
Port Angeles v. Lauridsen—26 Wash. 153; 66 Pac. 403.....	821, 823, 834
Porter v. Chicago—176 Ill. 605; 52 N. E. 318.....	611
Porter v. Tipton—141 Ind. 347; 40 N. E. 802.....	125, 657, 666
Porter v. Waterman (Ark.)—91 S. W. 754.....	450
Portland v. Baker—8 Oreg. 356.....	411
Portland v. Bituminous Pav. Co.—33 Oreg. 307; 72 Am. St. Rep. 713; 44 L. R. A. 527; 52 Pac. 28.....	414, 415, 429, 718
Portland v. Kamm—10 Oreg. 383.....	640
Portland v. Lee Sam—7 Oreg. 397.....	638
Portsmouth Sav. Bank v. Omaha—67 Neb. 50; 93 N. W. 231.....	276, 281, 305, 314, 478, 620
Poth v. Mayor—151 N. Y. 16; 45 N. E. 372.....	696, 766, 767
Potter v. Ames—43 Cal. 75.....	154
Potter v. Whatcom—25 Wash. 207; 65 Pac. 197.....	618, 619, 620, 659, 663
Potwin v. Johnson—106 Ill. 532.....	15
Potwin v. Oades—45 Ill. 366.....	557
Pound v. Supervisors—43 Wis. 63.....	500
Powell v. St. Joseph—31 Mo. 347.....	168
Powelton Ave., <i>In re</i> —11 Phila. 447.....	345
Praigg v. Western P. & S. Co.—143 Ind. 358; 42 N. E. 750.....	117, 239
Pratt v. Lincoln Co.—61 Wis. 62; 20 N. W. 726.....	798
Pratt v. Milwaukee—93 Wis. 658; 68 N. W. 392.....	328, 509, 792, 793
Pray v. Northern Liberties—31 Pa. 69.....	210
Prescott v. Chicago—60 Ill. 121.....	529
Preston v. Roberts—12 Bush 570.....	177, 731
Preston v. Rudd—84 Ky. 150, 156.....	444
Pretzenger v. Sutherland—63 Ohio St. 132; 57 N. E. 1097.....	505
Primm v. Belleville—59 Ill. 142.....	161, 256
Prindiville v. Jackson—79 Ill. 337.....	221
Prior v. Construction Co.—170 Mo. 439; 71 S. W. 205.....	129
P. & R. C. & I. Co. v. Chicago—158 Ill. 9; 41 N. E. 1102.....	343, 432, 549, 826
Protestant etc. Home v. Newark—36 N. J. L. 478; 13 Am. Rep. 464.....	257
Protestant etc. Home v. Newark—52 N. J. L. 138; 18 Atl. 572.....	821
Protestant Orphan Asylum Appeal—111 Pa. St. 135; 3 Atl. 217.....	132, 518
Prout v. People—83 Ill. 154.....	600



(The references are to sections.)

Providence Bank v. Billings—4 Pet. 514; 7 L. ed. 939.....	123
Provident Inst. for Savings v. Jersey City—113 U. S. 506; 28 L. ed. 1102; 5 Sup. Ct. Rep. 612.....	699
Power v. Detroit (Mich.)—102 N. W. 288.....	438, 458, 555, 712, 713
Powers Appeal—29 Mich. 504.....	111, 160, 207, 307, 400, 648
Powers v. Grand Rapids—98 Mich. 393; 57 N. W. 250....	155, 245, 433
Public Clearing House v. Coyne—194 U. S. 497; 48 L. ed. 1092; 24 Sup. Ct. Rep. 789.....	97, 98
Pudney v. Passaic—37 N. J. L. 65.....	169, 475
Pueblo v. Robinson—12 Colo. 593, 596; 21 Pac. 899....	29, 60, 167, 171
Pumpelly v. G. B. & M. Canal Co.—13 Wall 166, 180; 20 L. ed. 557, 561; 4 L. R. A. 37; 15 L. R. A. 556; 20 L. R. A. 77.....	647
Pursell v. Mayor—85 N. Y. 330.....	768, 773
Pusey v. Allegheny City—98 Pa. St. 522.....	633
Plymouth R. Co. v. Colwell—39 Pa. St. 337; 80 Am. Dec. 322....	243
People v. Adams—88 Hun, 122; 34 N. Y. Supp. 579.....	607, 740
People v. Austin—47 Cal. 353.....	18, 86, 503
People v. Board—50 Ill. 213.....	682
People v. Bridgeman—218 Ill. 568; 75 N. E. 1057.....	622
People v. Brighton—20 Mich. 57.....	111
People v. Brislin—80 Ill. 423.....	64, 154, 217, 219, 484, 615
People v. Brooklyn—23 Barb. 166.....	453, 469, 578
People v. Brooklyn—65 N. Y. 349.....	238, 387
People v. Brooklyn—71 N. Y. 495.....	815
People v. Brown—218 Ill. 375; 75 N. E. 989.....	700
People v. Buffalo—54 App. Div. 629; 147 N. Y. 675; 42 N. E. 344..	740
People v. Buffalo—166 N. Y. 604; 59 N. E. 1128; affirming S. C. 52 App. Div. 157; 63 N. Y. Supp. 163....	132, 177, 229, 245, 437
People v. Burke—206 Ill. 358; 69 N. E. 45.....	333, 335, 347, 371
People v. Cash—207 Ill. 405; 69 N. E. 904.....	598, 671, 684
People v. Chapman—127 Ill. 387; 19 N. E. 872.....	324
People v. Chicago—51 Ill. 17; 2 Am. Rep. 278.....	154
People v. Chicago—152 Ill. 546; 38 N. E. 744.....	142
People v. Church—192 Ill. 302; 61 N. E. 496.....	343
People v. Clark—1 Cal. 406.....	535
People v. Clifford—166 Ill. 165; 46 N. E. 770.....	614, 730
People v. Coffey—66 Hun 160; 21 N. Y. Supp. 34.....	133
People v. Cohen—219 Ill. 200; 76 N. E. 388.....	724
People v. Cole—128 Ill. 158; 21 N. E. 6.....	524
People v. Colvin—165 Ill. 67; 46 N. E. 14.....	612
People v. Common Council—54 N. Y. 507.....	229
People v. Cook—180 Ill. 341; 54 N. E. 173.....	526
People v. County Court—55 N. Y. 604.....	158, 440, 495
People v. Desmond—97 N. Y. Supp. 795.....	583
People v. Drainage District—115 Ill. 45; 39 N. E. 613.....	592
People v. Eggers—164 Ill. 515; 45 N. E. 1074.....	521, 616, 618
People v. Fuller—204 Ill. 290; 68 N. E. 371.....	610, 616
People v. Gary—105 Ill. 332.....	611
People v. Gillen—41 Hun, 510.....	208
People v. Gilon—126 N. Y. 147; 27 N. E. 282.....	239, 240, 243, 742
People v. Givens—123 Ill. 352; 15 N. E. 23.....	685
People v. Green—158 Ill. 594; 42 N. E. 163.....	507, 520, 615
People v. Hagar—49 Cal. 229.....	490, 496, 497
People v. Hagar—52 Cal. 171.....	670, 680
People v. Haggin—57 Cal. 579.....	678
People v. Hills—193 Ill. 281; 61 N. E. 1061.....	376
People v. Houston—54 Cal. 536.....	436



## TABLE OF CASES.

lxv

(The references are to sections.)

People v. Hurford—167 Ill. 226; 47 N. E. 368.....	367, 371
People v. Hyde Park—117 Ill. 462; 6 N. E. 33.....	141, 330, 339, 684, 757
People v. Ill. Cent. R. Co.—213 Ill. 367; 72 N. E. 1069.....	305, 322, 613, 616
People v. Jones—137 Ill. 35; 27 N. E. 294.....	749
People v. Keener—194 Ill. 16; 61 N. E. 1069.....	681
People v. Kingston—39 App. Div. 80; 56 N. Y. Supp. 606.....	502
People v. Kinsman—51 Cal. 92.....	810
People v. Latham—203 Ill. 9; 67 N. E. 403.....	334
People v. Lawrence—41 N. Y. 137.....	157, 209
People v. Lingle—165 Ill. 65; 46 N. E. 10.....	336, 486, 618
People v. Lynch—51 Cal. 15; 21 Am. Rep. 677.....	8, 86, 167, 474, 524, 810, 815
People v. Lyon—218 Ill. 577; 78 N. E. 1017.....	622
People v. Maher—56 Hun, 81; 9 N. Y. Supp. 94.....	414
People v. Many—89 Hun, 138; 35 N. Y. Supp. 78.....	723
People v. Markley—166 Ill. 48; 46 N. E. 742.....	355, 451, 495, 615, 710
People v. Mayor, etc.—6 Barb. 209.....	37
People v. Mayor, etc.—4 N. Y. 449; 55 Am. Dec. 266.....	36, 38, 158, 160, 197, 211, 260, 314, 547, 740
People v. Mayor, etc.—63 N. Y. 291.....	451, 485, 493
People v. Mayor, etc.—144 N. Y. 63; 38 N. E. 1006.....	684
People v. McCain—50 Cal. 210.....	317
People v. McWethy—165 Ill. 222; 46 N. E. 187.....	338, 344, 365, 379, 402, 616
People v. McWethy—177 Ill. 334; 52 N. E. 479.....	695, 805
People v. Miner—46 Ill. 374.....	770
People v. Meyers—124 Ill. 95; 16 N. E. 89.....	593
People v. Nearing—27 N. Y. 306.....	109
People v. Nibbe—150 Ill. 269; 37 N. E. 217.....	223
People v. Olvera—43 Cal. 492.....	654
People v. O'Neil—51 Cal. 91.....	703, 749, 810, 815
People v. Otis—74 Ill. 384.....	135
People v. Parks—58 Cal. 624.....	120
People v. Pitt—169 N. Y. 521; 58 L. R. A. 372; 62 N. E. 662....	100, 165, 169
People v. Pontiac—185 Ill. 437; 56 N. E. 1114.....	682, 683, 820
People v. Quackenbush—53 Cal. 52.....	519
People v. Record—212 Ill. 62; 72 N. E. 7.....	381, 459, 680
People v. Ryan—156 Ill. 620; 41 N. E. 180.....	309, 447, 622
People v. Salomon—51 Ill. 37.....	139, 140, 154, 161, 217, 257, 757
People v. Sass—171 Ill. 357; 49 N. E. 501.....	515, 758
People v. Shuman—83 Ill. 165.....	63, 64, 221, 323, 361, 684
People v. Smith—21 N. Y. 595.....	36
People v. Springer—106 Ill. 542.....	15
People v. Supervisors—20 Mich. 95.....	811
People v. Supervisors—26 Mich. 22.....	820, 826
People v. Syracuse—2 Hun, 433.....	263
People v. Talmadge—194 Ill. 67; 61 N. E. 1049.....	386, 506
People v. Tax Commissioners—144 N. Y. 483; 39 N. E. 385.....	738
People v. Trustees of Schools—118 Ill. 52; 7 N. E. 262.....	261
People v. Walsh—96 Ill. 232; 36 Am. Rep. 135.....	433, 757
People v. Warnek—173 Ill. 40; 50 N. E. 221.....	380
People v. Whidden—191 Ill. 374; 61 N. E. 133; 56 L. R. A. 905	419, 622, 692, 777
People v. Williams—51 Ill. 63.....	458
People v. Wilson—119 N. Y. 515; 23 N. E. 1064.....	758



(The references are to sections.)

People v. Whyler—41 Cal. 351.....	18
People v. Yancey—167 Ill. 255; 47 N. E. 521.....	146
People v. Yonkers—39 Barb. 266.....	346

## Q.

Quaker City Nat'l Bk. v. Tacoma—27 Wash. 259; 67 Pac. 710....	667
Quick v. River Forest—130 Ill. 323; 22 N. E. 816.....	496, 732
Quill v. Indianapolis—124 Ind. 292; 7 L. R. A. 681; 23 N. E. 788	190, 288
Quinlom v. Myers—29 Ohio St. 500.....	722
Quinn v. Cambridge—187 Mass. 507; 73 N. E. 661.....	535
Quint v. Hoffman—103 Cal. 506; 37 Pac. 514, 777.....	600, 791
Quirk v. Seattle—38 Wash. 25; 80 Pac. 207.....	458, 635

## R.

Radeliff's Ex'rs v. Mayor, etc.—4 N. Y. 195; 53 Am. Dec. 357..	113, 761
R. R. Co. v. New Britain—49 Conn. 40.....	238
R. R. Co. v. New Haven—42 Conn. 279; 19 Am. Rep. 534.....	238
Railway Co. v. Jacksonville—114 Ill. 562; 2 N. E. 478.....	241
Raisch v. Hildebrandt—146 Cal. 721; 81 Pac. 21.....	547
Raisch v. San Francisco—80 Cal. 1; 22 Pac. 22.....	421
Raleigh v. Peace—110 N. C. 32; 17 L. R. A. 330; 14 S. E. 521,	522
.....27, 76, 86, 139, 169, 198, 287,	654
Ramish v. Hartwell—126 Cal. 443; 58 Pac. 920.....	543
Ramsey v. Buffalo—97 N. Y. 114.....	779, 781
Ransom v. Burlington—111 Ia. 77; 82 N. W. 427.....	249
Rasmussen v. People—155 Ill. 70; 39 N. E. 606.....	317
Rawson v. Chicago—185 Ill. 87; 57 N. E. 35.....	358
Ray v. Jeffersonville—90 Ind. 567.....	250, 537
Raymond v. Cleveland—42 Ohio St. 522.....	11, 161, 821, 823
Raymonds Est. v. Rutherford—55 N. J. L. 441; 27 Atl. 172..	169, 173
Raymonds Est. v. Rutherford—56 N. J. L. 340; 29 Atl. 156.....	169
Reading v. United Traction Co.—202 Pa. St. 571; 52 Atl. 106...	239
Reclamation District v. Evans—61 Cal. 104, 107.....	99, 176
Reclamation Dist. v. McCullah—124 Cal. 175; 56 Pac. 887.....	303
Reclamation Dist. No. 108 v. Hagar—6 Sawy. 567, 569; 4 Fed. 366	59, 96, 465
Rector v. Board of Improvement—50 Ark. 116; 6 S. W. 519.....	819
Redmond v. Mayor—125 N. Y. 632; 26 N. E. 727.....	766, 771
Red River Bank v. Fargo (N. D.)—103 N. W. 390.....	661, 663
Reed v. Sexton—20 Kan. 195.....	291, 325
Reed v. Tyler—56 Ill. 288.....	790
Reelfoot, etc., District v. Dawson—97 Tenn. 151; 34 L. R. A. 725;	36 S. W. 1041.....
Reeves v. Grottendick—131 Ind. 107; 30 N. E. 889.....	41, 81, 220
.....533, 537, 543, 791, 792	
Reeves v. Wood Co.—8 Ohio St. 333.....	77, 138, 169
Reid v. Clay—134 Cal. 207; 66 Pac. 262.....	289, 820
Reid v. Toledo—18 Ohio 161.....	199
Reilly v. Albany—19 N. E. 508; 112 N. Y. 30.....	660, 843
Reilly v. Fort Dodge—118 Iowa, 633; 92 N. W. 887.....	331, 544, 628, 629, 632
Reinken v. Fuehring—130 Ind. 382; 15 L. R. A. 624; 30 Am. St.	Rep. 247; 30 N. E. 414.....
Reiss v. Graff—51 Cal. 86, 96.....	19, 33, 66, 227
.....313, 703, 810, 815	



## TABLE OF CASES.

lxvii

(The references are to sections.)

Regents v. Williams—9 Gill. & J. 365; 31 Am. Dec. 72.....	226
Remsen v. Wheeler—105 N. Y. 573; 12 N. E. 564.....	300
Remsen v. Wheeler—121 N. Y. 685; 24 N. E. 704.....	764
Rentz v. Detroit—48 Mich. 544; 12 N. W. 694, 911.....	524, 636
Rex v. Commissioners of Tower Hamlets—9 B. & Cr. 517.....	223
Reyburn v. Wallace—93 Mo. 326; 3 S. W. 482.....	703
Reynolds v. Schweinefuss—27 Ohio St. 311.....	387, 435, 551
Rice v. Danville & D. L. & N. Turnpike Co.—7 Dana, 81.....	68
Rich v. Chicago—59 Ill. 286.....	111, 320, 321, 368, 488
Rich v. Chicago—152 Ill. 18; 38 N. E. 255..	189, 236, 241, 251, 364, 524
Rich v. Chicago—187 Ill. 396; 58 N. E. 306.....	375, 383, 649
Rich v. Minneapolis—37 Minn. 423; 5 Am. St. Rep. 861; 85 N. W. 2.....	648
Rich v. People—152 Ill. 18; 38 N. E. 255.....	351
Richards v. Cincinnati—31 Ohio St. 506.....	211, 499, 558, 603
Richards v. Jerseyville—214 Ill. 67; 73 N. E. 370.....	284, 548
Richardson v. Denver—17 Colo. 398; 30 Pac. 333.....	737
Richardson v. Morgan—16 La. Ann. 429.....	68
Richardson v. Omaha (Neb.)—104 N. W. 172.....	402
Richardson v. Webster City—111 Ia. 427; 82 N. W. 920.....	630
Richcreek v. Moorman—14 Ind. App. 370; 42 N. E. 943.....	723
Richie v. So. Topeka—38 Kan. 368; 16 Pac. 332.....	719, 722
Richman v. Muscatine Co.—77 Ia. 513; 14 Am. St. Rep. 308; 4 L. R. A. 445; 42 N. W. 422.....	810
Richmond v. Daniel—14 Gratt 385.....	134
R. & A. R. Co. v. Lynchburg—81 Va. 473.....	82, 258
Ricketts v. Hyde Park—85 Ill. 110.....	317, 343, 466, 528, 713
Ricketts v. Spraker—77 Ind. 371.....	215, 618, 791, 792
Riebling v. People—145 Ill. 120; 33 N. E. 1090.....	706
Rigney v. Chicago—102 Ill. 64.....	109, 116, 646, 647
Rhineland, <i>In re</i> —68 N. Y. 105.....	587
R. I. & A. R. Co. v. Lynch—23 Ill. 645.....	485
R. I. Mortgage & Trust Co. v. Spokane—19 Wash. 616; 53 Pac. 1104	659, 663
Rhodes v. Denver—10 Colo. App. 99; 49 Pac. 430.....	757
River Forest v. C. & N. W. R. Co.—197 Ill. 344; 64 N. E. 364....	241
Riverside Co. v. Howell—113 Ill. 256.....	139
Robbins, <i>In re</i> —82 N. W. 141.....	423, 425
Roberts, <i>In re</i> —81 N. Y. 62.....	350, 491
Roberts v. Evansville—218 Ill. 296; 75 N. E. 923.....	94, 188, 267
Roberts v. First Natl. Bank—8 N. D. 504; 79 N. W. 1049....	169, 471
Roberts v. Smith—115 Mich. 5; 72 N. W. 1091.....	113
Robertson v. Omaha—55 Neb. 718; 44 L. R. A. 534; 76 N. W. 442	415, 572
Robinson v. Logan—31 Ohio St. 466.....	284
Robinson v. Milwaukee—61 Wis. 585; 21 N. W. 610.....	799
Robinson v. Valparaiso—136 Ind. 616; 36 N. E. 644.....	657, 659, 787, 788
Rochester v. Rochester R. R. Co.—109 App. Div. 638; 96 N. Y. Supp. 152.....	657
Rochester v. Rochester R. R. Co.—182 N. Y. 99; 74 N. E. 953....	267
Rockwell v. Bowers—88 Ia. 88; 55 N. W. 1.....	787, 788
Rogers v. Randall—29 Mich. 41.....	761
Rogers v. St. Paul—22 Minn. 494.....	151, 153, 162, 210, 396
Rogers v. St. Paul—79 Minn. 5; 47 L. R. A. 537; 81 N. W. 539..	766
Rogers v. St. Paul—86 Minn. 98; 90 N. W. 155.....	766
Rogers v. Voorhees—124 Ind. 469; 24 N. E. 374.....	831



(The references are to sections.)

Roggs v. Elizabeth—64 N. J. L. 492; 46 Atl. 164.....	731
Rolph v. Fargo—7 N. Dak. 640; 42 L. R. A. 646; 76 N. W. 242....	77, 169, 204, 471
Ronan v. People—193 Ill. 631; 61 N. E. 1042.....	346
Rooks' Case—5 Co. 203.....	223
Roosevelt Hospital v. Mayor, etc.—84 N. Y. 108.....	263, 586
Rork v. Smith et al.—55 Wis. 67; 12 N. W. 408....	296, 822, 823, 843
Rosell v. Neptune City—68 N. J. L. 509; 53 Atl. 199....	454, 741, 742
Rosetta Gravel, etc. Co. v. Jollisaint—51 La. Ann. 804; 25 So. 477	699
Ross v. Clinton—46 Ia. 606; 26 Am. Rep. 169.....	625
Ross v. Oskaloosa (Ia.)—99 N. W. 557.....	332, 370, 829
Ross v. Portland—105 Fed. 682.....	724, 732
Ross v. Stackhouse—114 Ind. 200; 16 N. E. 501.....	190, 360, 399, 721, 722
Ross v. Van Natta—164 Ind. 557; 74 N. E. 10.....	306, 622, 706
Ross v. Wright Co. Supervisors (Iowa)—104 N. W. 506.....	94, 724
Rossitee v. Lake Forest—151 Ill. 491; 38 N. E. 359.....	605
Roter v. Superior—91 N. W. 651; 115 Wis. 243.....	659, 665
Roudebush v. Mitchell—154 Ind. 616; 57 N. E. 570.....	224
Roundtree v. Galveston—42 Tex. 612.....	42, 81, 127
Royal Ins. Co. v. So. Park Comr's—175 Ill. 491; 51 N. E. 558..	317, 352
Royce v. Aplington—90 Ia. 352; 57 N. W. 868.....	806
Rue v. Chicago—57 Ill. 435.....	321
Rue v. Chicago—66 Ill. 256.....	320, 496, 741
Ruppert v. Mayor, etc.—23 Md. 184.....	230, 673
Russell, etc., Dist. v. Benson—125 Ill. 490; 17 N. E. 814....	820, 827
Rutherford v. Hamilton—97 Mo. 543; 11 S. W. 249.....	169, 583
Rutherford v. Maynes—97 Pa. St. 78.....	136, 220
Ryan v. Altschul—103 Cal. 174, 177; 73 Pac. 339..	523, 536, 707, 747
Ryan v. Gallatin Co.—14 Ill. 78.....	670
Ryan v. People—207 Ill. 74; 69 N. E. 638.....	506
Ryan v. Sumner—17 Wash. 228; 49 Pac. 487..	170, 448, 473, 821, 830

S.

Sample v. Carroll—132 Ind. 496; 32 N. E. 220.....	396, 521
Samuel v. Drainage Comr's—125 Ill. 536; 17 N. E. 829.....	558
Sanborn v. Mason City—114 Iowa 189; 83 N. W. 286.....	531
Sanders v. Brown—65 Ark. 498; 47 S. W. 461.....	17
Sanderson v. Herman—95 Wis. 48; 69 N. W. 977.....	542, 552
Sanderson v. Herman—108 Wis. 662; 84 N. W. 890; 85 N. W. 141	479, 822, 824
San Diego v. Linda Vista Ir. Dist.—108 Cal. 189; 35 L. R. A. 33; 41	291
San Diego Im. C. v. Shaw—129 Cal. 273; 61 Pac. 1082....	137, 441, 605
Sandroek v. Columbus—51 Ohio St. 317; 42 N. E. 255....	169, 173, 477
Sands v. Richmond—31 Gratt. 571; 31 Am. Rep. 742.....	82, 172
San Francisco Paving Co. v. Bates—134 Cal. 39; 66 Pac. 2.....	89
San Francisco Paving Co. v. Bates—146 Cal. 635; 80 Pac. 1076....	167
San Francisco Pav. Co. v. Egan—146 Cal. 635; 80 Pac. 1076..	528, 569, 790
San Francisco Pav. Co. v. Dubois (Cal. App.)—83 Pac. 72.....	267
San Francisco v. Kiernan—98 Cal. 614; 33 Pac. 720.....	645
S. F. & W. R. Co. v. Savannah—96 Ga. 680; 23 S. E. 847.....	96, 99
Sanger v. Rice—43 Kan. 580; 23 Pac. 633.....	690
Sanitary District v. Cullerton—146 Ill. 385.....	639



## TABLE OF CASES.

lxix

(The references are to sections.)

Sanitary District v. Joliet—189 Ill. 270; 59 N. E. 566.....	456
Sargent v. Evanston—154 Ill. 269; 40 N. E. 440.....	302, 335, 367
Sargent v. New Haven—62 Conn. 510; 26 Atl. 1057.....	586
Sargent v. Tuttle—67 Conn. 162; 32 L. R. A. 822; 34 Atl. 1028..	24
St. Charles v. Deemar—174 Mo. 122; 73 S. W. 469.....	169
St. George v. Young—45 La. Ann. 1232; 14 So. 137.....	191
St. John v. E. St. Louis—50 Ill. 92.....	369
St. John v. E. St. Louis—136 Ill. 207; 27 N. E. 543.....	330, 353, 432
St. Joseph v. Anthony—30 Mo. 537.....	135, 168, 672
St. Joseph v. Farrell—106 Mo. 437; 17 S. W. 497...39, 177, 432,	592, 669
St. Joseph v. O'Donoghue—31 Mo. 343.....	168, 194
In re St. Joseph's Orphan Asylum—69 N. Y. 353.....	258, 263, 554
St. Joseph v. Owen—110 Mo. 445; 19 S. W. 713.....	74, 363, 587
St. Louis v. Allen—53 Mo. 44.....	654
St. Louis v. Armstrong—38 Mo. 29.....	194
St. Louis v. Bressler—56 Mo. 350.....	652
St. Louis v. Brown—155 Mo. 545; 56 S. W. 298.....	233
St. Louis v. Buss—159 Mo. 9; 59 S. W. 969.....	36
St. Louis v. Clemens—36 Mo. 467.....	194, 656
St. Louis v. Clemens—49 Mo. 552.....	168, 175
St. Louis v. Clemens—52 Mo. 133.....	818
St. Louis v. De Noue—44 Mo. 136.....	533, 654
St. Louis v. Excelsior Br. Co.—96 Mo. 677; 10 S. W. 477....	447, 581
St. Louis v. Glenvitz—148 Mo. 210; 49 S. W. 1000.....	467
St. Louis v. Koch—169 Mo. 487; 70 S. W. 143...135, 436, 540,	652
St. Louis v. Lane—10 Mo. 254; 19 S. W. 533.....	142, 248
St. Louis v. Lang—131 Mo. 412; 33 S. W. 54.....	756
St. Louis v. Meier—77 Mo. 13.....	267, 467
St. Louis v. Oeters—36 Mo. 456.....	577
St. Louis v. Provenchere—92 Mo. 66; 4 S. W. 410.....	465
St. Louis v. Rankin—96 Mo. 497; 9 S. W. 910....300, 447, 581,	671
St. Louis v. Schoenemann—52 Mo. 348.....	590
St. Louis Public Schools v. St. Louis—26 Mo. 468.....	234
St. Paul v. District Court—51 Minn. 539; 53 N. W. 800; 55 N. W.	122 ..... 618
St. Paul v. Mullen—27 Minn. 78; 6 N. W. 424...501, 502, 820, 823,	839
St. Paul v. St. P. & P. R. Co.—23 Minn. 469.....	265
St. P. & P. R. Co. v. St. Paul—21 Minn. 526.....	265
Savannah v. Weed—96 Ga. 670; 23 S. E. 900.....	167, 440, 477
Sawyer v. Chicago—183 Ill. 57; 55 N. E. 645.....	347, 568, 570, 573
Saxton v. Beach—50 Mo. 488.....	552
Saxton v. St. Joseph—60 Mo. 153.....	658
Saxton Nat. B'k v. Bennett—138 Mo. 494; 40 S. W. 97.....	40
Scammon v. Chicago—40 Ill. 146.....	135, 317
Scammon v. Chicago—42 Ill. 192.....	234
Scanlon v. Childs—33 Wis. 663.....	142
Schaefer v. Werling—188 U. S. 516; 47 L. ed. 570; 23 Sup. Ct. Rep.	449 ..... 88, 146, 170, 468, 473, 567
Schemick v. Chicago—151 Ill. 336; 37 N. E. 888.....	
Schenectady v. Trustees—144 N. Y. 241; 26 L. R. A. 614; 39 N. E.	67 ..... 248, 534
Schenectady v. Union College—66 Hun 179; 21 N. Y. Supp. 147	103, 413, 566
Schenley v. Allegheny—25 Pa. St. 128.....	41, 170, 201
Schenley v. Allegheny—36 Pa. St. 29; 78 Am. Dec. 359.....	78



(The references are to sections.)

Schenley v. Commonwealth—36 Pa. St. 29; 78 Am. Dec. 357..	170,
172, 175, 201, 213, 333, 388, 418, 551, 566, 567, 811, 813,	821, 827
Schertz v. People—105 Ill. 27.....	610, 614
Schmelz v. Giles—12 Bush 491.....	247
Schneider v. Dist. of Col.—7 Mackey 252.....	505
Schintgen v. La Crosse—117 Wis. 158; 94 N. W. 84..	287, 386, 505,
	575, 822, 840
Schirmer v. Hoyt—54 Cal. 280.....	676
Schofield v. Watkins—22 Ill. 66.....	785, 810
Schroeder v. Overman—61 Ohio St. 1; 47 L. R. A. 156; 76 Am. St.	
Rep. 354; 55 N. E. 158.....	169, 476, 482, 527
Schumin v. Seymour—24 N. J. Eq. 149.....	417
Scofield v. Council Bluffs—68 Iowa 695; 28 N. W. 20..	430, 567,
	656, 658, 660
School District v. Board of Improvement—65 Ark. 343; 46 S. W.	
418 .....	261
School Magnetic Healing v. McAnnuty—187 U. S. 94; 47 L. ed. 90;	
23 Sup. Ct. Rep. 33.....	98
Schumacher v. Toberman—56 Cal. 508.....	122, 328, 796, 810, 814
Schwiesau v. Mahon—110 Cal. 543; 42 Pac. 1065.....	674, 702
Schwiesau v. Mahon—128 Cal. 114; 60 Pac. 683.....	290, 405
Scott v. Hayes—162 Ind. 548; 70 N. E. 879.....	502, 712
Scott v. Hinds—50 Minn. 204; 52 N. W. 523.....	214, 247, 602
Scott v. People—120 Ill. 129; 11 N. E. 408.....	610
Scott v. Toledo—36 Fed. 385; 1 L. R. A. 688.....	89, 101
Scotten v. Detroit—106 Mich. 564; 64 N. W. 579.....	619
Seovill v. Cleveland—1 Ohio St. 126.....	38, 49, 77, 156, 199, 295
Scranton v. Barnes—147 Pa. St. 461; 23 Atl. 777.....	369, 353
Scranton v. Bush—160 Pa. St.; 28 Atl. 926.....	170, 448, 694
Scranton v. Jermyn—156 Pa. St. 107; 27 Atl. 66.....	692
Scranton v. Koehler—200 Pa. St. 126; 49 Atl. 792.....	170, 478
Scranton v. Levers—200 Pa. St. 56; 49 Atl. 980.....	525
Scranton v. Penn. Coal Co.—105 Pa. St. 445.....	165
Scranton v. Sturges—202 Pa. St. 182; 51 Atl. 764.....	573
Seruggs v. Huntsville—45 Ala. 220.....	170
Seaboard Nat. Bank v. Woesten—147 Mo. 467; 48 L. A. 279; 48 N.	
W. 939 .....	413, 414
Seaboard Nat. Bank v. Woesten—176 Mo. 491; 75 S. W. 49...	413, 414
Seaman v. Camden—66 N. J. L. 516; 49 Atl. 977.....	457
Seaman v. Washington—172 Pa. St. 467; 33 Atl. 759.....	643
Seanor v. County Commissioners—13 Wash. 48; 42 Pac. 552....	215
Seanor v. Whatcom Co. Com'rs—13 Wash. 48; 42 Pac. 552.....	28
Sears v. Atlantic City (N. J. L.)—60 Atl. 1093.....	307, 384
Sears v. Boston—173 Mass. 71; 43 L. R. A. 834; 53 N. E. 138....	227
Sears v. Street Com'rs—173 Mass. 350; 53 N. E. 876..	106, 192, 208, 501
Sears v. Street Com'rs—180 Mass. 274; 62 L. R. A. 144, 397.....	528
Seattle, <i>In re</i> —26 Wash. 602; 67 Pac. 250.....	645
Seattle v. Doran—5 Wash. 482; 32 Pac. 105, 1002....	333, 382, 551
Seattle v. Hill—14 Wash. 487; 35 L. R. A. 372; 45 Pac. 17.....	700
Seattle v. Hill—23 Wash. 92; 62 Pac. 446.....	677, 715, 720
Seattle v. Kelleher—195 U. S. 351; 49 L. ed. 232; 25 Sup. Ct. Rep....	
44 .....	88, 657, 701, 823
Seattle v. O'Connell—16 Wash. 625; 48 Pac. 412.....	678
Seattle v. Smith—8 Wash. 387; 36 Pac. 280.....	706
Seattle v. Jesler—1 Wash. Ter. 572.....	175
Seattle v. Board of Home Missions, etc.—138 Fed. 307.....	642, 644



(The references are to sections.)

Seattle Tr. Co. v. Seattle—27 Wash. 520; 68 Pac. 90.....	786
Seavey v. Seattle—17 Wash. 361; 49 Pac. 517.....	659, 664
Second Ave. Church, <i>In re</i> —66 N. Y. 395; 25 N. E. 207.....	137, 263, 606, 607, 688
Second Nat. Bank v. Lansing—25 Mich. 207.....	606, 658, 664
Second Universalist Society v. Providence—6 R. I. 235....	260, 263, 773
Security Trust Co. v. Heyderstædt—64 Minn. 409; 67 N. W. 219..	169
Sedalia v. Coleman—82 Mo. App. 560.....	169
Sedalia v. Montgomery (Mo. App.)—88 S. W. 1014.....	622
Seely v. Pittsburgh—82 Pa. St. 364; 22 Am. Rep. 760....	165, 166, 401
Seibert v. Linton—5 W. Va. 57.....	817
Selby v. Levee Commissioners—14 La. Ann. 437.....	177, 219
Seneca Road Co. v. Auburn, etc. R. R. Co.—5 Hill 170.....	150
Sessions v. Crunkilton—20 Ohio St. 349.....	32
Sewall v. St. Paul—20 Minn. 511; Gil. 459....	293, 294, 295, 317, 660, 778, 780, 803
Shamokin v. Shamokin E. R. Co.—206 Pa. St. 625.....	239
Shank v. Smith—157 Ind. 401; 55 L. R. A. 564; 61 N. E. 932..	210
Shannon v. Hinsdale—180 Ill. 202; 54 N. E. 181...213,	352, 357, 398, 412, 684
Shannon v. Omaha (Neb.)—100 N. W. 208; 103 N. W. 53...293,	359, 360, 758
Shannon v. Portland—38 Ore. 382; 62 Pac. 50....	304, 388, 389, 735
Sharp, <i>In re</i> —56 N. Y. 259; 15 Am. Rep. 415.....	284
Sharp v. Johnson—4 Hill 92; 40 Am. Dec. 259....	136, 522, 689, 762
Sharp v. Speir—4 Hill 76.....	21, 107, 133, 136, 137, 230, 271, 689
Shawneetown v. Mason—82 Ill. 337; 25 Am. Rep. 321.....	643
Sheafe v. Seattle—18 Wash. 298; 51 Pac. 385.....	662, 665
Sheehan v. Gleeson—46 Mo. 100.....	130, 359
Sheehan v. Good Samaritan Hospital—50 Mo. 155; 11 Am. Rep. 412	20, 260, 262
Sheeley v. Detroit—45 Mich. 431; 8 N. W. 52..	123, 131, 168, 193, 211, 212, 470
Shepard v. Barron—194 U. S. 553; 48 L. ed. 1115; 24 Sup. Ct. Rep.	721, 723
Shepard v. People—200 Ill. 508; 65 N. E. 1068.....	521, 545
Shepherd v. Sullivan—166 Ill. 78; 46 N. E. 720.....	653
Sheridan v. Chicago—175 Ill. 421; 51 N. E. 898.....	311
Sheriffs v. Chicago—213 Ill. 620; 73 N. E. 367.....	616, 837
Sherlock v. K. City B. R. Co.—142 Mo. 172; 64 Am. St. Rep. 551	43 S. W. 629.....
Sherman v. Omaha (Neb.)—103 N. W. 53.....	624
Sherwood v. Duluth—40 Minn. 22; 41 N. W. 234.....	585
Sherwood v. Rynearson (Mich.)—104 N. W. 392.....	236
Shoemaker v. Cincinnati—68 Ohio St. 603; 68 N. E. 1....	169, 476, 482, 794
Shoemaker v. Harrisburg—122 Pa. St. 285; 16 Atl. 266.....	133, 706
Sidway v. Lawson—58 Ark. 117; 23 S. W. 648.....	816
Sims v. Hines—121 Ind. 534; 23 N. E. 515.....	125
Simpson v. Commissioners—84 N. C. 158.....	231
Simpson v. Kansas City—46 Kan. 438; 26 Pac. 721.....	133, 190
Simpson v. Kansas City—52 Kan. 88; 34 Pac. 406.....	757
Simpson v. Kinsas City—111 Mo. 237; 20 S. W. 38.....	431
Sinclair v. Learned—51 Mich. 335; 16 N. W. 672.....	811, 814
Sinclair v. W. Hoboken—58 N. J. L. 129; 32 Atl. 65.....	490
Singer v. Chicago—169 Ill. 286; 48 N. E. 309.....	353



(The references are to sections.)

Sioux City v. School District—55 Iowa 150; 7 N. W. 488.....	262
Shoemaker v. United States—147 U. S. 282; 37 L. ed. 170; 13 Sup. Ct. Rep. 361.....	203, 218, 247, 602
Shiloh St.—152 Pa. St. 136; 25 Atl. 530.....	490, 821
Shimmons v. Saginaw—104 Mich. 511; 62 N. W. 725.....	158, 398, 433, 568, 602
Shinkel x. Essex, etc. Board—47 N. J. L. 93.....	454
Shirley v. Waukesha—124 Wis. 239; 102 N. W. 576.....	711, 725
Shreve v. Cicero—129 Ill. 226; 21 N. E. 815.....	486, 487, 584
Shreveport v. Prescott—51 La. Ann. 1895; 46 L. R. A. 193; 26 So. 664, 672.....	25, 236, 365
Shreveport v. Shreveport, etc. Co.—104 La. 260; 29 So. 129.....	236
Shuford v. Commissioners—86 N. C. 552.....	76, 198, 231
Shultes v. Eberly—82 Ala. 242; 2 So. 345.....	56
Shumate v. Heman—181 U. S. 402; 45 L. ed. 922; 21 Sup. Ct. Rep. 645.....	98, 195
Shurtleff v. Chicago—190 Ill. 473; 60 N. E. 870.....	25
Skinker v. Heman—148 Mo. 350; 49 S. W. 1026.....	131, 340
Sleeper v. Bullen—6 Kan. 300.....	719, 729, 795
Sligh v. Grand Rapids—84 Mich. 497; 47 N. W. 1093.....	144, 300
Smith, <i>In re</i> —52 N. Y. 526.....	291
Smith v. Aberdeen—25 Miss. 458.....	73, 129, 176
Smith v. Buffalo—90 Hun 118; 35 N. Y. Supp. 635.....	194, 235, 525, 733
Smith v. Buffalo—159 N. Y. 427; 54 N. E. 62.....	441, 811
Smith v. Chicago—57 Ill. 497.....	544
Smith v. Chicago—169 Ill. 257; 48 N. E. 445.....	332, 344
Smith v. Cofran—34 Cal. 310.....	534, 575
Smith v. Davis—30 Cal. 536.....	137, 534
Smith v. Des Moines—106 Iowa 590; 76 N. W. 836.....	522
Smith v. Detroit—120 Mich. 572; 79 N. W. 808.....	820
Smith v. Eau Claire—78 Wis. 457; 47 N. W. 830.....	113, 117, 631, 633, 645, 647
Smith v. Farrelly—52 Cal. 77.....	17, 678
Smith v. Hard—59 Vt. 13; 8 Atl. 317.....	814
Smith v. Kingston—120 Pa. St. 357; 14 Atl. 170.....	594
Smith v. Kochesperger—173 Ill. 201; 50 N. E. 187.....	796
Smith v. Milwaukee—18 Wis. 69.....	231, 559, 787, 808
Smith v. Minto—30 Ore. 351; 48 Pac. 166.....	136, 388, 384, 721
Smith v. Omaha—49 Neb. 883; 69 N. W. 402.....	135, 137, 195, 433
Smith v. Portland—25 Ore. 297; 35 Pac. 665.....	501, 505
Smith v. Seattle—25 Wash. 300; 65 Pac. 612.....	221
Smith v. St. Joseph—122 Mo. 643; 27 S. W. 344.....	451
Smith v. Toledo—24 Ohio St. 126.....	288
Smythe v. Chicago—197 Ill. 311; 64 N. E. 361.....	341, 364
Snell v. Chicago—133 Ill. 413; 8 L. R. A. 858; 24 N. E. 532.....	325
Snow v. Boston—188 Mass. 77; 74 N. E. 292.....	458
Snow v. Fitchburg—136 Mass. 183.....	179, 549
Soens v. Racine—10 Wis. 271.....	41, 85, 149, 155, 220, 404, 508
Soule v. Seattle—6 Wash. 315; 33 Pac. 384, 1080.....	658, 664, 821
Southerin v. Chicago—56 Ill. 429.....	695
Southern, etc. Co. v. Mayor—(Tenn. ch. app.) 48 S. W. 92.....	415
S. Chi. City. R. Co. v. Chicago—196 Ill. 490; 63 N. E. 1013, 1135.....	521, 559
South Omaha v. McGavock (Neb.)—100 N. W. 805.....	764
South Omaha v. Ruthjen (Neb.)—99 N. W. 240.....	640
South Omaha v. Lighe—67 Neb. 572; 93 N. W. 946.....	282
S. Park Com'rs v. C. B. & Q. R. Co.—107 Ill. 105.....	241, 249



## TABLE OF CASES.

lxxiii

(The references are to sections.)

S. Park Com'rs v. Dunlevy—91 Ill. 49.....	639, 640
Spalding v. Denver—33 Colo. 172; 80 Pac. 126....	271, 283, 426, 441, 522, 787, 791, 792
Spangler v. Cleveland—35 Ohio St. 469.....	169, 504, 505, 526
Spangler v. Cleveland—43 Ohio St. 526; 3 N. E. 365.....	796, 802
Spaulding v. Bradley—79 Cal. 449; 22 Pac. 47.....	604
Spear v. Drainage Com'rs—113 Ill. 632.....	640
Speer v. Athens—85 Ga. 49; 6 L. R. A. 402; 11 S. E. 802..	62, 186, 214
Speer v. Essex, etc. Board—47 N. L. 101.....	447
Speer v. Pittsburgh—166 Pa. St. 86; 30 Atl. 1013.....	277
Spelman v. Portage—41 Wis. 144.....	647
Spencer v. Merchant—100 N. Y. 585; 3 N. E. 682....	127, 185, 203, 211
Spencer v. Merchant—125 U. S. 345; 31 L. ed. 763; 8 Sup. Ct. Rep. 921 .....	94, 98, 112, 118, 657, 819, 822
Sperry v. Flygare—80 Minn. 327; 49 L. R. A. 757; 81 Am. St. Rep. 261; 83 N. W. 177.....	215
Spokane Falls v. Brown—3 Wash. 84; 27 Pac. 1077...	83, 537, 554, 671
Spokane Falls v. Brown—8 Wash. 317; 36 Pac. 26....	354, 537, 673
Springer v. Chicago—135 Ill. 552; 12 L. R. A. 609; 26 N. E. 514..	549
Springer v. Walters—139 Ill. 419; 28 N. E. 761.....	41, 73, 776
Springfield v. Green—120 Ill. 269; 11 N. E. 261.....	65, 167, 205, 248, 249, 345, 351, 597
Springfield v. Green—123 Ill. 395; 14 N. E. 871.....	345
Springfield v. Mathus—124 Ill. 88; 16 N. E. 92.....	336, 364
Springfield v. Sale—127 Ill. 359; 20 N. E. 86..	168, 175, 225, 450, 456, 492, 533
Springfield v. Weaver—137 Mo. 650; 37 S. W. 509; 39 S. W. 276 406, 675	
Springfield Steel, etc. Co. v. Anderson—32 Ind. App. 138; 69 N. E. 404 .....	392
Spring Garden v. Wistar—18 Pa. St. 195.....	170, 271
Stansburg v. White—121 Cal. 433; 53 Pac. 940.....	403
Stadler v. Milwaukee—34 Wis. 98.....	641, 645, 666
Stanton v. Chicago—154 Ill. 24; 39 N. E. 987.....	302, 343
Starr v. Burlington—45 Iowa, 87.....	391, 721
State v. Aetna Life Ins. Co.—117 Ind. 251; 20 N. E. 144.....	653, 700
State v. Anderson—89 Wis. 550; 63 N. W. 746.....	236, 722
State v. Angert—127 Mo. 456.....	654
State v. Ashland—71 Wis. 502; 37 N. W. 809.....	134, 217, 738, 739
State v. Ashland—88 Wis. 599; 60 N. W. 1001.....	173
State v. Atlantic City—34 N. J. L. 99.....	210, 574, 732
State v. Ballard—16 Wash. 418; 47 Pac. 970.....	821, 829, 840
State v. Bayonne—49 N. J. L. 311; 8 Atl. 295.....	286, 312, 366, 499
State v. Bayonne—51 N. J. L. 428; 17 Atl. 971.....	324
State v. Bayonne—52 N. J. L. 503; 20 Atl. 69.....	519
State v. Bayonne—53 N. J. L. 299; 21 Atl. 453.....	582
State v. Bayonne—54 N. J. L. 293; 23 Atl. 648.....	372, 562
State v. Bayonne—54 N. J. L. 474; 24 Atl. 448.....	276
State v. Bayonne—55 N. J. L. 102; 25 Atl. 267.....	523, 526
State v. Bayonne—56 N. J. L. 268; 28 Atl. 381.....	131, 418
State v. Bayonne—56 N. J. L. 463; 29 Atl. 168.....	511
State v. Bayonne—60 N. J. L. 406; 38 Atl. 761.....	525
State v. Bayonne—63 N. J. L. 202; 42 Atl. 773..	467, 469, 553, 731, 742
State v. Beverly—53 N. J. L. 560; 22 Atl. 340.....	656, 669, 742
State v. Blake—86 Minn. 37; 90 N. W. 5.....	529, 608
State v. Brill—58 Minn. 152; 59 N. W. 989.....	606
State v. Charleston—12 Rich L. 702.....	121



(The references are to sections.)

State v. Circuit Court—64 N. J. L. 536; 45 Atl. 981.....	485
State v. Clinton—26 La. Ann. 561.....	219
State v. Commissioners—38 N. J. L. 190; 20 Am. Rep. 380.....	134, 538, 730
State v. County of Bergen—44 N. J. L. 599.....	821, 828
State v. Dean—23 N. J. L. 335.....	75, 207, 210
State v. District Court—27 Minn. 442; 8 N. W. 161.....	741
State v. District Court—29 Minn. 62; 11 N. W. 133.....	171, 193, 346, 489, 495, 542
State v. District Court—33 Minn. 164; 22 N. W. 295.....	542
State v. District Court—33 Minn. 235; 22 N. W. 625.....	73, 154, 302
State v. District Court—33 Minn. 295; 23 N. W. 222, 229.....	26, 153, 247, 252, 346, 435, 489, 528, 738
State v. District Court—40 Minn. 5; 41 N. W. 235.....	711
State v. District Court—51 Minn. 539; 53 N. W. 800; 55 N. W. 122.....	419
State v. District Court—55 Minn. 278; 56 N. W. 1006.....	820, 824
State v. District Court—61 Minn. 542; 64 N. W. 190.....	73, 161, 733
State v. District Court—66 Minn. 161; 68 N. W. 860.....	121
State v. District Court—68 Minn. 147; 70 N. W. 1088.....	546
State v. District Court—68 Minn. 242; 71 N. W. 27.....	240, 820, 828, 830, 831, 832
State v. District Court—72 Minn. 226; 71 Am. St. Rep. 480; 75 N. W. 224.....	607
State v. District Court—75 Minn. 292; 77 N. W. 968.....	218, 622
State v. District Court—77 Minn. 248; 79 N. W. 971.....	820
State v. District Court—80 Minn. 293; 83 N. W. 183.....	131, 168, 211, 212, 213, 497, 519, 602
State v. District Court—83 Minn. 170; 86 N. W. 115.....	257
State v. District Court—90 Minn. 294; 96 N. W. 737.....	305, 745
State v. District Court—90 Minn. 540; 97 N. W. 425.....	306, 577
State v. District Court (Minn.)—103 N. W. 744.....	435, 466, 821, 839
State v. District Court (Minn.)—103 N. W. 881.....	821, 822, 826
State v. District Court (Minn.)—104 N. W. 553.....	306, 607, 833, 834
State v. District Court (Minn.)—106 N. W. 306.....	812
State v. Dodge Co.—8 Neb. 124; 30 Am. Rep. 819.....	85, 195
State v. Dunnellen—80 N. J. L. 565; 15 Atl. 529.....	365, 722
State v. Egan—64 Minn. 331, 334; 67 N. W. 77.....	820, 826, 839
State v. Elizabeth—30 N. J. L. 365.....	169, 567
State v. Elizabeth—31 N. J. L. 547.....	297
State v. Elizabeth—37 N. J. L. 330.....	238, 582
State v. Elizabeth—42 N. J. L. 56.....	323
State v. Elizabeth—50 N. J. L. 347; 13 Atl. 5.....	738
State v. Elizabeth—51 N. J. L. 485; 18 Atl. 302.....	772
State v. Elizabeth—56 N. J. L. 119; 27 Atl. 801.....	169, 475
State v. Engelmann—106 Mo. 628; 17 S. W. 759.....	287
State v. Ensign—54 Minn. 372; 56 N. W. 41.....	602
State v. Ensign—55 Minn. 278; 56 N. W. 1006.....	820, 824
State v. Essex Board—51 N. J. L. 166; 16 Atl. 695.....	454
State v. Fairview—62 N. J. L. 621; 43 Atl. 378.....	274, 275
State v. Farrier—47 N. J. L. 75.....	712
State v. Fond du Lac—42 Wis. 287.....	516, 739, 743
State v. Frazier—113 Ind. 267; 14 N. E. 561.....	736
State v. Fuller—34 N. J. L. 227.....	41, 113, 153, 169, 196, 214
State v. Gosnell—116 Wis. 606; 61 L. R. A. 33; 93 N. W. 542.....	788, 789
State v. Hackensack, etc. Com'rs—45 N. J. L. 113.....	161



## TABLE OF CASES.

lxxv

(The references are to sections.)

State v. Harland—74 Wis. 11.....	753
State v. Hartford—50 Conn. 89; 47 Am. Rep. 622.....	233
State v. Hobe—106 Wis. 411; 82 N. W. 336.....	670
State v. Hoboken—36 N. J. L. 293; 51 N. J. L. 267; 17 Atl. 110..	107
State v. Hotaling—44 N. J. L. 347.....	131, 235, 437
State v. Hoboken—45 N. J. L. 482.....	131, 132, 244, 563, 590
State v. Hoboken—57 N. J. L. 330; 31 Atl. 278.....	739, 742
State v. Hudson—27 N. J. L. 214.....	167, 172
State v. Hudson—29 N. J. L. 104.....	172, 447, 455, 484
State v. Hudson Co.—53 N. J. L. 67; 20 Atl. 894.....	579
State v. Ironton—63 Minn. 497; 65 N. W. 935.....	677
State v. Jersey City—24 N. J. L. 662.....	171, 309, 488, 496, 521
State v. Jersey City—25 N. J. L. 309.....	301
State v. Jersey City—25 N. J. L. 315.....	485
State v. Jersey City—29 N. J. L. 441.....	416, 585, 589, 590
State v. Jersey City—34 N. J. L. 390.....	560, 738
State v. Jersey City—35 N. J. L. 381.....	606, 732, 737
State v. Jersey City—36 N. J. L. 188.....	538, 688
State v. Jersey City—37 N. J. L. 128.....	479, 539
State v. Jersey City—41 N. J. L. 489.....	323
State v. Jersey City—42 N. J. L. 97.....	265, 492
State v. Jersey City—42 N. J. L. 575.....	410
State v. Jersey City—68 N. J. L. 140; 52 Atl. 300.....	236
State v. Judges of Dis't Court—51 Minn. 539; 53 N. W. 800; 55 N. W. 122.....	489, 606
State v. La Crosse—101 Wis. 208.....	662, 723, 744, 788, 789, 792
State v. Leffingwell—54 Mo. 458, 477.....	195, 217, 227
State v. Loveless—133 Ind. 600; 33 N. W. 622.....	700
State v. Maginnis—26 La. Ann. 558.....	219
State v. Mayor—35 N. J. L. 168.....	132
State v. Mayor—37 N. J. L. 415; 18 Am. Rep. 729.....	107, 132
State v. Michigan City—138 Ind. 435, 455; 37 N. E. 1041.....	237, 246, 426, 428, 673
State v. Mitchell—31 Ohio St. 592.....	727
State v. Morristown—34 N. J. L. 445.....	309
State v. Mounts—36 W. Va. 179, 186; 15 L. R. A. 243; 14 S. E. 407.....	535
State v. Mudgett—21 Wash. 99; 57 Pac. 351.....	83
State v. Nelson—41 Minn. 25; 4 L. R. A. 300; 42 N. W. 548....	763
State v. Newark—25 N. J. L. 413.....	485
State v. Newark—27 N. J. L. 185.....	196
State v. Newark—31 N. J. L. 360.....	179
State v. Newark—34 N. J. L. 236.....	811, 821
State v. Newark—35 N. J. L. 168.....	38, 41, 131, 799
State v. Newark—36 N. J. L. 170.....	485
State v. Newark—37 N. J. L. 415; 18 Am. Rep. 729.....	197
State v. Newark—48 N. J. L. 101; 2 Atl. 627.....	131, 132, 233, 442
State v. New Brunswick—30 N. J. L. 395.....	215, 401
State v. New Brunswick—38 N. J. L. 190; 20 Am. Rep. 380....	491, 578
State v. New Brunswick—42 N. J. L. 510.....	539, 731
State v. New Brunswick—44 N. J. L. 116.....	596
State v. North Plainfield—63 N. J. L. 61; 42 Atl. 805.....	485, 741, 794
State v. Norton—63 Minn. 497; 65 N. W. 935.....	73, 161, 733, 746
State v. Oshkosh—84 Wis. 548; 54 N. W. 1095.....	36, 96, 303, 513, 516, 624
State v. Otis—53 Minn. 318; 55 N. W. 143.....	294, 436



(The references are to sections.)

State v. Passaic—37 N. J. L. 65.....	456, 602
State v. Passaic—38 N. J. L. 171.....	485
State v. Passaic—41 N. J. L. 90.....	130, 491
State v. Passaic—42 N. J. L. 524.....	544, 607
State v. Passaic—44 N. J. L. 171.....	489
State v. Passaic—47 N. J. L. 273.....	731
State v. Passaic—54 N. J. L. 340; 23 Atl. 945.....	236, 244
State v. Paterson—37 N. J. L. 412.....	437
State v. Paterson—42 N. J. L. 615.....	442
State v. Paterson—48 N. J. L. 435; 5 Atl. 896.....	594
State v. Perth Amboy—29 N. J. L. 259.....	296, 324
State v. Perth Amboy—59 N. J. L. 335; 36 Atl. 666.....	831
State v. Pillsbury—82 Minn. 359; 85 N. W. 175.....	303, 579
State v. Plainfield—63 N. J. L. 61; 42 Atl. 805.....	489, 742
State v. Portage—12 Wis. 563.....	125, 170, 175, 354, 481, 597
State v. Rapp—39 Minn. 65; 38 N. W. 926.....	36, 513
State v. Reis—38 Minn. 371; 38 N. W. 97.....	45, 153, 227
State v. Road Commissioners—41 N. J. L. 83.....	127, 129, 159, 163, 302
State v. Robt. P. Lewis Co.—72 Minn. 87; 42 L. R. A. 639; 75 N. W. 108.....	119, 168, 221, 222, 326, 526
State v. Robt. P. Lewis Co.—82 Minn. 390, 401; 53 L. R. A. 421; 85 N. W. 207; 86 N. W. 611.....	168, 446, 482
State v. Robertson—24 N. J. L. 504.....	262
State v. Rutherford—52 N. J. L. 501; 20 Atl. 60.....	722
State v. Rutherford—55 N. J. L. 441; 27 Atl. 172.....	475
State v. Rutherford—55 N. J. L. 450; 26 Atl. 933.....	331, 730
State v. Rutherford—57 N. J. L. 619; 31 Atl. 228.....	505
State v. Rutherford—58 N. J. L. 113; 32 Atl. 688.....	502
State v. South Amboy—62 N. J. L. 197; 40 Atl. 637.....	310, 336, 595
State v. So. Orange—49 N. J. L. 104; 6 Atl. 312.....	826
State v. St. Louis—52 Mo. 574.....	439
State v. St. Louis—56 Mo. 277.....	585, 586
State v. St. Louis—62 Mo. 244.....	42
State v. Stockton—61 N. J. L. 520; 39 Atl. 921.....	271, 728, 811, 814
State v. St. Paul—36 Minn. 529; 32 N. W. 781.....	259
State v. Stuart—74 Wis. 620; 43 N. W. 947; 6 L. R. A. 394.....	99
State v. Superior—81 Wis. 649; 51 N. W. 1014.....	113, 759
State v. Superior—108 Wis. 16; 83 N. W. 1100.....	731
State v. Topeka—36 Kan. 76; 59 Am. Rep. 529; 12 Pac. 310.....	119
State v. Trenton—40 N. J. L. 89.....	276
State v. Truscott—87 Minn. 165; 91 N. W. 484.....	482
State v. Trustees—87 Minn. 165; 91 N. W. 484.....	481
State v. U. S. & Can. Ex. Co.—60 N. H. 219, 243.....	75
State v. Vineland—60 N. J. L. 264; 37 Atl. 625.....	309, 310, 594
State v. Warren Co.—17 Ohio St. 558.....	77
State v. W. Hoboken—51 N. J. L. 267; 17 Atl. 110.....	207, 467, 468
State v. W. U. Tel. Co.—73 Maine 518.....	43
Steam Forge Co. v. Anderson—22 Ky. L. R. 397; 57 S. W. 617....	230
Stebbins v. Kay—51 Hun 589; 4 N. Y. Supp. 566.....	169
Stebbins v. Kay—123 N. Y. 31; 26 N. E. 207.....	136, 137, 541
Steckert v. E. Saginaw—22 Mich. 104.....	193, 400, 484, 531, 570, 720, 727
Steele v. River Forest—141 Ill. 302; 30 N. E. 1034.....	342, 362, 364, 379
Steele v. Varney El. Supply Co.—160 Ind. 338; 98 Ant. S. Rep. 325; 61 L. R. A. 154; 66 N. E. 895.....	411
Steenberg v. People—164 Ill. 478; 45 N. E. 970.....	353, 392, 506, 613
Steese v. Oviatt—24 Ohio St. 249.....	503, 794



# TABLE OF CASES.

lxxvii

(The references are to sections.

Steffen v. Fox—124 Mo. 630; 28 S. W. 70.....	597
Steffen v. St. Louis—135 Mo. 44; 36 S. W. 31.....	674
Stengel v. Preston—89 Ky. 616; 13 S. W. 839.....	768
Stephen v. Daniels—27 Ohio St. 527.....	770
Stephens v. Spokane—11 Wash. 41; 39 Pac. 266.....	140, 659, 662
Stephens v. Spokane—14 Wash. 298; 44 Pac. 541; 45 Pac. 31.....	659, 662, 663, 666
Sterling v. Galt—117 Ill. 11; 7 N. E. 471.....	14, 335, 367
Stetler v. E. Rutherford—65 N. J. L. 528; 47 Atl. 489.....	732
Stewart v. Mayor, etc.—7 Md. 500.....	70, 110
Stevens v. Cedar Rapids (Iowa)—103 N. W. 363.....	629, 634
Stewart v. Detroit—137 Mich. 381; 100 N. W. 613.....	723
Stimson v. Smith—8 Minn. 366; Gil. 326.....	42, 120
Stockton v. Chicago—136 Ill. 434; 26 N. E. 1095.....	640, 645
Stockton v. Clark—53 Cal. 82.....	512
Stockton v. Skinner—53 Cal. 691.....	512
Stockton v. Whitmore—50 Cal. 554.....	135, 385
Stoddard v. Johnson—75 Ind. 20.....	215, 618
Stone v. Chicago—218 Ill. 348; 75 N. E. 980.....	724
Stone v. Viele—38 Ohio St. 314.....	418
Storrs v. Chicago—200 Ill. 364; 70 N. E. 347.....	595
Storrs v. Chicago—208 Ill. 364; 120 N. E. 347.....	361, 547
Stowell v. Milwaukee—31 Wis. 523.....	632, 641, 644
Strassheim v. Jerman—56 Mo. 105.....	350
Stretch v. Hoboken—47 N. J. L. 268.....	309
Strickland v. Stillwater—63 Minn. 43; 65 N. W. 131.....	773
Stritesky v. Cedar Rapids—98 Iowa 373; 67 N. W. 271.....	634
Stroud v. Philadelphia—61 Pa. St. 255.....	170
Strout v. Portland—26 Ore. 294; 39 Pac. 126.....	721, 733
Strowbridge v. Portland—8 Ore. 67.....	103, 362
Strusburgh v. Mayor—87 N. Y. 452.....	765
Stuart v. Palmer—74 N. Y. 183; 30 Am. Rep. 289.....	36, 93, 96, 98, 99, 101, 118, 149, 158, 198, 437, 778, 779
Stutsman v. Burlington—127 Iowa 563; 103 N. W. 800.....	450, 469
Summer v. Milford—214 Ill. 388; 73 N. E. 742.....	383, 485, 794
Sutton's Heirs v. Louisville—5 Dana, 28.....	68, 110, 653
Swain v. Comstock—18 Wis. 463.....	142
Swain v. Fulmer—135 Ind. 8; 34 N. E. 639.....	104, 177
Swamp, etc. District v. Feek—60 Cal. 403.....	680
Swamp Land Dist. v. Silva—98 Cal. 51; 32 Pac. 866.....	502
Swan Point Cemetery v. Tripp—14 R. I. 199.....	259
Sweet v. W. Chi. Park Com'rs—177 Ill. 492; 53 N. E. 74.....	650
Swift v. Williamsburgh—24 Barb. 427.....	698
Swigert, <i>In re</i> —123 Ill. 267; 14 N. E. 32.....	254
Swinton v. Asbury—41 Cal. 525.....	155, 162

## T.

Taber v. Grafmiller—109 Ind. 206; 9 N. E. 721.....	243, 288, 327, 512
Tacoma Land Co. v. Tacoma—15 Wash. 133; 45 Pac. 733.....	723
Tacoma, etc., Co. v. Sternberg—26 Wash. 84; 66 Pac. 121.....	618, 620, 684
Talcott v. Noyall—107 Iowa, 470; 78 N. W. 30.....	671
Tallant v. Burlington—39 Ia. 543.....	729
Tarlton v. Peggs—18 Ind. 24.....	535
Tarman v. Atchison—69 Kan. 483; 7 Pac. 111.....	282
Taylor v. Bloomington—186 Ill. 497; 58 N. E. 216.....	272, 353



(The references are to sections.)

Taylor v. Boyd—63 Tex. 533.....	81
Taylor v. Chandler—9 Heisk. 352; 24 Am. Rep. 308.....	81
Taylor v. Crawfordville—155 Ind. 403; 58 N. E. 490.....	785
Taylor v. Palmer—31 Cal. 240.....	
8, 17, 22, 23, 59, 287, 318, 405, 652, 654, 753	
Taylor v. Patten—160 Ind. 4; 66 N. E. 91.....	373, 718, 722
Taylor v. People—66 Ill. 322.....	653
Teegarden v. Racine—56 Wis. 545; 14 N. W. 614....	220, 750, 751, 755
Terre Haute v. Mack—139 Ind. 99; 38 N. E. 468.....	690, 809
Terry v. Hartford—39 Conn. 286.....	267
Terry v. Milwaukee—15 Wis. 490.....	142, 425, 555
Thaler v. Chi. Park Com'rs—174 Ill. 211; 52 N. E. 116.....	330, 405
Thayer v. Grand Rapids—82 Mich. 298; 46 N. W. 228.....	404, 759
The Mayor, etc., <i>Ex parte</i> —22 Wend. 277.....	539
Thomas v. Chicago—152 Ill. 292; 38 N. E. 923.....	550
Thomas v. Gain—35 Mich. 155; 24 Am. Rep. 535.....	
100, 107, 177, 193, 538, 778	
Thomas v. Leeland—24 Wend. 65.....	150
Thomas v. Olympia—12 Wash. 465; 41 Pac. 191.....	657, 664
Thomas v. Portland—40 Ore. 50; 66 Pac. 439.....	688, 811, 813, 816
Thomason v. Ruggles—69 Cal. 465; 11 Pac. 20.....	500
Thompson v. Highland Park—187 Ill. 265; 58 N. E. 328.....	337
Thompson v. People—207 Ill. 354; 69 N. E. 843.....	411, 505, 613
Thomson v. Booneville—61 Mo. 282.....	129, 135, 400
Thorn v. W. Chi. Park Com'rs—130 Ill. 594; 22 N. E.....	616
Thornton v. Clinton—148 Mo. 648; 50 S. W. 295.....	658
Tide-Water Co. v. Coster—18 N. J. Eq. 518; 90 Am. Dec. 634.....	
36, 107, 151, 196	
Tift v. Buffalo—82 N. Y. 204; 7 N. Y. Supp. 633.....	119, 227, 811
Tingue v. Port Chester—101 N. Y. 294; 4 N. E. 625.....	
280, 420, 724, 795, 821, 823	
Title Guaranty & Trust Co. v. Chicago—162 Ill. 505; 44 N. E. 416	
358, 841	
Toberg v. Chicago—164 Ill. 572; 45 N. E. 1010.....	321, 613
Todemier v. Aspinwall—43 Ill. 401.....	519
Toledo v. Board of Education—48 Ohio St. 83; 26 N. E. 403....	234
Toledo v. Sheill—53 Ohio St. 447; 30 L. R. A. 598; 42 N. E. 323..	326
Tonawanda v. Lyon—181 U. S. 389; 45 L. ed. 908; 21 Sup. Ct.	
Rep. 609.....	98, 170
Tone v. Columbus—39 Ohio St. 281; 48 Am. Rep. 438.....	
284, 725, 726, 727	
Topeka v. Gage—44 Kan. 87; 24 Pac. 82.....	509
Topliff v. Chicago—196 Ill. 215; 63 N. E. 692.....	353
Tournier v. Municipality No. 1—5 La. Ann. 298.....	214, 661, 665
Touzalín v. Omaha—25 Neb. 817; 41 N. W. 796.....	
776, 778, 788, 791, 793	
Townsend v. Hoyle—20 Conn. 1.....	601
Townsend v. Mayor—77 N. Y. 542.....	779
Townsend v. Manistee—88 Mich. 408; 50 N. W. 321.....	820
Townsend v. Wilson—9 Pa. St. 270.....	811, 814
Traction Co. v. Board of Works—56 N. J. L. 431; 29 Atl. 163;	
57 N. J. L. 710.....	309, 594
Traphagen v. South Omaha (Neb.)—96 N. W. 248.....	274
Treaner v. Houghton—103 Cal. 53; 36 Pac. 1081.....	405, 679, 753
Treat v. People—195 Ill. 196; 62 N. E. 891.....	410, 441
Treat v. Chicago—125 Fed. 644.....	388, 723
Treat v. Chicago—64 C. C. A. 645; 130 Fed. 443.....	146



## TABLE OF CASES.

lxxix

(The references are to sections.

Trenton v. Coyle—107 Mo. 193; 17 S. W. 643.....	137, 331
Trester v. Sheboygan—87 Wis. 496; 58 N. W. 747.....	513, 815
Twenty-sixth St., <i>In re</i> —12 Wend. 203.....	204, 207
Twenty-Eighth St.—158 Pa. St. 464; 27 Atl. 1109.....	821
Trigger v. Drainage Dist. No. 1—159 Ill. 230.....	724
Trimble v. Chicago—168 Ill. 567; 48 N. E. 416.....	358, 841
Trimmer v. Rochester—130 N. Y. 401; 29 N. E. 746.....	768, 771
Trimmer v. Rochester—134 N. Y. 76; 31 N. E. 255.....	765
Trinity College v. Hartford—32 Conn. 452.....	186, 207, 488
Tripler v. Mayor—125 N. Y. 617; 26 N. E. 721.....	770, 771
Tripler v. Mayor—139 N. Y. 1; 34 N. E. 729.....	769
Tripp v. Yankton—10 S. Dak. 516; 74 N. W. 447.....	170, 173
Trowbridge v. Detroit—99 Mich. 443; 58 N. W. 368.....	145, 399
Troy & L. R. Co. v. Kane—72 N. Y. 614.....	770
Trustees Griswold College v. Davenport—65 Iowa 633; 22 N. W. 904.....	105
Trustees, etc. v. Anamosa—76 Iowa 538; 2 L. R. A. 606; 41 N. W. 313.....	540
Trustees M. E. Church v. Atlanta—76 Ga. 181.....	262
Trustees Y. M. C. A. v. Patterson—61 N. J. L. 420; 39 Atl. 655.....	262
Trustees Union College, <i>In re</i> —129 N. Y. 308; 29 N. E. 460.....	163, 300
Tucker v. People—156 Ill. 108; 40 N. E. 451.....	618
Tull v. Royston—30 Kan. 617; 2 Pac. 866.....	697
Tumwater v. Pix—15 Wash. 324; 46 Pac. 388.....	303, 310, 315, 428
Tumwater v. Pix—18 Wash. 153; 51 Pac. 353.....	821, 835, 840
Turlock Ir. Dist. v. Williams—76 Cal. 360; 18 Pac. 379.....	226
Turney v. Dougherty—53 Cal. 619.....	147
Turpin v. Eagle Creek, etc., Co.—48 Ind. 45.....	66, 215
Turpin v. Lemon—187 U. S. 51; 47 L. ed. 70; 23 Sup. Ct. Rep. 20..	95
Turrill v. Grafton—52 Cal. 97.....	287
Tusting v. Ashbury Park (N. J. L.)—62 Atl. 183.....	531, 753
Tuttle v. Polk—84 Iowa 12; 50 N. W. 38.....	681, 682, 810, 820
Tuttle v. Polk—92 Iowa 433; 60 N. W. 733.....	544
Twiss v. Port Huron—63 Mich. 528; 30 N. W. 177.....	407

## U.

Uhrig v. St. Louis—47 Mo. 458.....	194, 347, 439
Ulman v. Mayor, etc.—72 Md. 593; 11 L. R. A. 224; 20 Atl. 141; 21 Atl. 709.....	94, 294, 298
Uncas Nat. B'k v. Superior—115 Wis. 340; 91 N. W. 1104.....	662, 664
Union Cemetery Ass'n v. McConnell—124 N. Y. 88; 26 N. E. 330...	734
Union, etc., Ass'n v. Chicago—61 Ill. 439.....	87, 487, 506, 772, 835
University of Chicago v. People—118 Ill. 565; 9 N. E. 189.....	256
United States v. Fort Scott—99 U. S. 152; 25 L. ed. 248.....	661
Updike v. Wright—81 Ill. 49.....	133, 146, 220, 224
Upington v. Oviatt—24 Ohio St. 232.....	169, 335, 538, 608, 811, 814
Upson, <i>In re</i> —89 N. Y. 67.....	511
Upton v. People—176 Ill. 632; 52 N. E. 358.....	519, 520, 711
Ure v. Reichenberg—63 Neb. 899; 89 N. W. 414.....	548

## V.

Vacation of Centre St., <i>In re</i> —113 Pa. St. 247; 8 Atl. 56.....	200, 657
Vaile v. Independence—116 Mo. 333; 22 S. W. 695.....	720
Valentine v. St. Paul—34 Minn. 446; 26 N. W. 457.....	433, 767
Van Antwerp, <i>In re</i> —56 N. Y. 261.....	86, 821, 827



(The references are to sections.)

Van Buren, <i>In re</i> —79 N. Y. 384.....	59, 592, 593
Vancouver v. Wintler—8 Wash. 378; 36 Pac. 278, 685.....	252, 387, 671, 707
Vanderbeck v. Rochester—122 N. Y. 285; 25 N. E. 408.....	772
Vandersyde v. People—195 Ill. 200; 61 N. E. 1050; 62 N. E. 806..	362
Van Derwyter v. Long Island City—139 N. Y. 133; 34 N. E. 774	258, 740, 811
Vane v. Evanston—150 Ill. 616; 37 N. E. 901.....	394, 419
Van Sant v. Portland—6 Ore. 395.....	308
Van Sickle v. Belknap—129 Ind. 558; 28 N. E. 305.....	679
Van Tassel v. Jersey City—37 N. J. L. 128.....	175
Van Wagoner v. Patterson—67 N. J. L. 455; 51 Atl. 922.....	29, 455, 459, 589, 732
Vasser v. George—47 Miss. 713.....	73
Vaughn v. Port Chester—135 N. Y. 460; 32 N. E. 137.....	770
Velhage v. Stanley (Conn.)—63 Atl. 347.....	724
Vennum v. Milford—202 Ill. 423; 66 N. E. 1040.....	272
Verdin v. St. Louis—131 Mo. 26; 33 S. W. 480; 36 S. W. 52....	413, 414, 424, 429, 721, 729, 778, 783, 791, 799
Vernon v. Litchfield—41 N. Y. 123.....	151
Vestry of Bermondsey v. Ramsey—L. R. 6; C. P. 247.....	210
Vickrey v. Sioux City—104 Fed. 164.....	671
Vicksburg S. & P. R. Co. v. Goodenough—108 La. 442; 66 L. R. A. 314; 32 So. 404.....	26
Vieley v. Thompson—44 Ill. 9.....	785
Violet v. Alexandria—92 Va. 561; 31 L. R. A. 382; 53 Am. St. Rep. 825; 23 So. 909.....	41, 107, 167, 172
Virginia v. Hall—96 Ill. 278.....	652, 653
Voght v. Buffalo—133 N. Y. 463; 31 N. E. 340.....	318, 570, 571
Voight v. Detroit—123 Mich. 547; 82 N. W. 253.....	111
Voigt v. Detroit—184 U. S. 115; 46 L. ed. 459; 22 Sup. Ct. Rep. 337.....	104, 203, 495
Von Steen v. Beatrice—36 Neb. 421; 54 N. W. 677.....	275, 277
Voorhis, <i>In re</i> —90 N. Y. 668.....	433
Voris v. Pittsburgh, etc., Glass Co.—163 Ind. 599; 70 N. E. 249	90, 143, 305, 733
Voris Ex'rs v. Gallaher—25 Ky. L. R. 1001; 87 S. W. 775.....	700
Vrana v. St. Louis—164 Mo. 146; 64 S. W. 180.....	467, 619
Vreeland v. Bayonne—54 N. J. L. 488; 24 Atl. 486.....	485
Vreeland v. Bayonne—58 N. J. L. 126; 32 Atl. 68.....	589
Vreeland v. Bayonne—60 N. J. L. 168; 37 Atl. 737.....	457, 582, 583

## W.

Wabash E. R. Co. v. Commissioners, etc.—134 Ill. 384; 10 L. R. A. 285; 25 N. E. 781.....	39, 699, 749
Waco v. Chamberlain—(Tex. Civ. App.) 45 S. W. 191.....	288
Wadlow v. Chicago—159 Ill. 176; 42 N. E. 866.....	337
Wagg v. People—218 Ill. 337; 75 N. E. 977.....	753
Waggener v. N. Peoria—155 Ill. 545; 40 N. E. 485.....	110, 548, 605
Wahle v. Mehan—97 Ky. 351; 41 S. N. 1040.....	247
Wahlgren v. Kansas City—42 Kan. 243; 21 Pac. 1068....	271, 349, 509
Wakely v. Omaha—58 Neb. 245; 78 N. W. 511.....	300, 434, 720, 764
Waldron v. Snohomish (Wash.)—83 Pac. 1106.....	758
Wales v. Warren—66 Neb. 455; 92 N. W. 590.....	548, 574
Walish v. Milwaukee—95 Wis. 16; 69 N. W. 818.....	632, 634, 646
Walker v. Ann Arbor—118 Mich. 251; 76 N. W. 394.....	179, 440



## TABLE OF CASES.

LXXXI

(The references are to sections.)

Walker v. Aurora—140 Ill. 402; 22 N. E. 741.....	168, 323, 453, 481 486, 588, 608
Walker v. Chicago—62 Ill. 286.....	366
Walker v. Chicago—202 Ill. 531; 67 N. E. 369.....	339, 362, 364
Walker v. Detroit—136 Mich. 6; 98 N. W. 744.....	532, 538
Walker v. Dist. of Col.—6 Mackey, 352.....	308, 494, 557, 693, 741
Walker v. Morgan Park—175 Ill. 570; 51 N. E. 636.....	395, 597
Walker v. People—166 Ill. 96; 46 N. E. 761.....	364
Walker v. People—169 Ill. 473; 48 N. E. 694.....	489, 622
Walker v. People—170 Ill. 410; 48 N. E. 1010.....	285, 349, 351, 363, 489, 506
Walker v. People—202 Ill. 34; 66 N. E. 827.....	393, 613
Walker v. Rogan—1 Wis. 597.....	404
Walker v. Sarwinet—92 U. S. 90; 23 L. ed. 678.....	93
Walker v. Sedalia—74 Mo. App. 70.....	639
Wall, <i>Ex parte</i> —107 U. S. 288; 27 L. ed. 562; 2 Sup. Ct. Rep. 569.....	93
Wall v. Monroe Co.—103 U. S. 77; 26 L. ed. 432.....	713
Wall v. Portland—35 Ore. 89; 56 Pac. 654.....	712
Wall v. Wall—124 Mass. 65.....	690
Wallace v. Shelton—14 La. Ann. 498.....	68, 177, 219
Waller v. Chicago—53 Ill. 88.....	302, 308
Wallich v. Manitowoc—57 Wis. 91; 14 N. W. 812.....	114, 116
Walsh v. Barron—61 Ohio St. 211; 55 N. E. 164..	169, 199, 464, 476, 482
Walsh v. Matthews—29 Cal. 123.....	59, 167, 652
Walsh v. Mayor—113 N. Y. 142; 20 N. E. 825.....	407
Walsh v. Sims—65 Ohio St. 211; 62 N. E. 120..	169, 477, 482, 685, 728
Walston v. Nevin—128 U. S. 578; 32 L. ed. 544; 9 Sup. Ct. Rep. 192.....	88
Ward v. Walters—63 Wis. 44; 22 N. W. 844.....	325
Walters, <i>In re</i> —75 N. Y. 354.....	528
Walters v. Lake—129 Ill. 23; 21 N. E. 556.	323, 441, 489, 518, 550, 649
Wamelink v. Cleveland—40 Ohio St. 381.....	281
Ward, <i>In re</i> —52 N. Y. 395.....	251, 252
Wardens, etc., v. Burlington—39 Iowa 224.....	428
Ware v. Jerseyville—158 Ill. 234; 41 N. E. 736.....	65
Warren v. Barber A. P. Co.—115 Mo. 572; 22 S. W. 490..	340, 406, 724
Warren v. Chandos—115 Cal. 382; 47 Pac. 132.....	135, 564
Warren v. Chicago—118 Ill. 329; 9 N. E. 883.....	527, 605
Warren v. Commissioners—187 Mass. 290; 72 N. E. 1022.....	823
Warren v. Grand Haven—30 Mich. 24.....	167, 168, 225, 391, 471, 503, 542, 606, 703
Warren v. Henley—31 Iowa 31.....	128, 175, 564, 565, 566, 568, 672
Warren v. Mayor, etc.—187 Mass. 290; 72 N. E. 1022....	820, 825, 838
Warren v. Riddell—106 Cal. 352; 26 L. Ed. 432.....	713
Warren v. Russell—129 Cal. 381; 62 Pac. 75.....	561
Warren v. Warren—148 Ill. 641; 36 N. E. 611.....	534
Warner v. Knox—50 Wis. 429; 7 N. W. 372.....	125, 132, 146
Washburn v. Chicago—198 Ill. 506; 64 N. E. 1064.....	341, 451
Washburn v. Chicago—202 Ill. 210; 66 N. E. 1033.....	377
Washington Avenue, <i>In re</i> —69 Pac. St. 352; 8 Am. Rep. 255....	150, 154, 157, 165, 170, 200, 215, 245
Washington v. Bassett—15 R. I. 563; 2 Am. St. Rep. 929; 10 Atl. 625.....	317
Washington v. Mayor—1 Swan 117.....	30, 81, 307
Washington v. State—13 Ark. 752.....	57



(The references are to sections.)

Washington Ice. Co. v. Chicago—147 Ill. 327; 37 Am. St. Rep. 222; 35 N. E. 378.....	188, 354, 367, 395, 456, 635
Watkins v. Milwaukee—52 Wis. 598; 8 N. W. 823.....	751
Watkins v. Zwietusch—47 Wis. 513; 3 N. W. 35.....	202, 497, 505, 608, 736
Watson v. Chicago—115 Ill. 78; 3 N. E. 430.....	345, 360, 370
Wayne Co. S. B'k v. Gas City L. Co.—156 Ind. 662; 59 N. E. 1048..	655
Wells v. Buffalo—80 N. Y. 253.....	779
Wells v. Burnham—20 Wis. 113.....	138, 407, 420, 500, 585
Wells v. Chicago—156 Ill. 148; 40 N. E. 567.....	546, 737, 820
Wells v. Chicago—202 Ill. 448; 66 N. E. 1056.....	382, 649
Wells v. People—201 Ill. 435; 66 N. E. 210.....	351, 382
Wells v. Street Com'rs—187 Mass. 451; 73 N. E. 554.....	528, 590
Wells v. Western P. & S. Co.—96 Wis. 116; 70 N. W. 1071.....	774, 792, 793
Wells v. Wood—114 Cal. 225; 46 Pac. 96.....	420, 753
Weaver v. Templin—113 Ind. 298; 14 N. E. 600.....	224, 294, 606
Weber v. Reinhard—73 Pa. St. 370; 13 Am. Rep. 747.....	230
Weber v. San Francisco—1 Cal. 455.....	777
Weber v. Schergens—59 Mo. 389.....	168, 477, 678
Webster v. Chicago—62 Ill. 302.....	685
Webster v. Fargo—9 N. Dak. 208; 56 L. R. A. 156; 82 N. W. 732	169, 204, 471
Webster v. Fargo—181 U. S. 394; 45 L. ed. 912; 21 Sup. Ct. Rep. 623 .....	88, 98, 170, 177
Webster v. People—98 Ill. 343.....	15, 139
Weckler v. Chicago—61 Ill. 142.....	345, 527
Weed v. Boston—172 Mass. 28; 42 L. R. A. 642; 51 N. E. 204...	192, 587, 740, 744
Weeks v. Milwaukee—10 Wis. 242.....	20, 22, 41, 84, 86, 120, 125, 175, 209, 231, 559, 823
Wegeman v. Jefferson—61 Mo. 55.....	625
Weise v. Chicago—200 Ill. 339; 65 N. E. 648.....	747
Weismer v. Douglass—64 N. Y. 91; 21 Am. Rep. 586.....	128, 149
Weld v. People—149 Ill. 257; 36 N. E. 1006.....	331, 382
Welker v. Potter—18 Ohio St. 85.....	288
Weller v. St. Paul—5 Minn. 95; Gil. 70.....	175, 500
Wellman, <i>In re</i> —20 Vt. 653; Fed. Cases, No. 17,407.....	528, 590
Wermer v. Bruneberg—30 Mich. 201.....	93, 97
West v. Bancroft—32 Vt. 367.....	225
Westall v. Altschul—126 Cal. 164; 58 Pac. 458.....	820
W. Chi. Park Comrs. v. Chicago—152 Ill. 392; 38 N. E. 697.....	257, 516, 699
W. Chic. Park Com'rs v. Chicago—171 Ill. 146; 49 N. E. 427....	610
W. Chi. Park Com'rs v. Farber—171 Ill. 146; 49 N. E. 427.....	460, 820, 836, 839, 841
W. Chi. Park Com'rs v. Met. W. S. E. R. Co.—182 Ill. 246; 55 N. E. 344.....	831
W. Chi. Park Com'rs v. Sweet—167 Ill. 326; 47 N. E. 728.....	325, 389, 393, 601
W. Chi. Park Com'rs v. W. U. Tel. Co.—103 Ill. 33.....	326
W. Chi. St. R. Co. v. People—155 Ill. 299; 40 N. E. 599.....	211, 343, 557, 618, 619
W. Chi. St. R. Co. v. People—156 Ill. 18; 40 N. E. 605.....	532, 618
W. Chi. St. R. Co. v. Chicago—178 Ill. 339; 53 N. E. 112....	236, 239
Western Springs v. Hill—177 Ill. 634; 52 N. E. 959.....	369
Westlake Avenue, <i>In re</i> (Wash.)—82 Pac. 279.....	522



(The references are to sections.)

Weston v. Syracuse—158 N. Y. 274; 43 L. R. A. 678; 70 Am. St. Rep. 472; 53 N. E. 12.....	408, 409, 543, 674, 663.
W. S. E. R. Co. v. Stickney—150 Ill. 362; 26 L. R. A. 773; 37 N. E. 1098.....	449
West Third St. Sewer—187 Pa. St. 565; 41 Atl. 476.....	577
Wetherell v. Devine—116 Ill. 631; 6 N. E. 24.....	325
Wetmore v. Chicago—206 Ill. 367; 69 N. E. 234.....	379
Whalen v. La Crosse—16 Wis. 271.....	659, 664, 682
Whaples v. Waukegan—179 Ill. 310; 53 N. E. 618..	272, 278, 283, 344
Wheeler v. Chicago—57 Ill. 415.....	487
Wheeler v. People—158 Ill. 480; 39 N. E. 123.....	302
Wheeler v. Poplar Bluff—149 Mo. 36; 49 S. W. 1088.....	135, 658, 665, 719
Whitaker v. Beach—12 Kan. 492.....	317
White v. Alton—149 Ill. 626; 37 N. E. 96.....	323, 346, 347, 532, 545, 564
White v. Bayonne—49 N. J. L. 311; 8 Atl. 295.....	294
White v. Chicago—188 Ill. 392; 58 N. E. 917.....	311, 360
White v. Harris—103 Cal. 528; 37 Pac. 502.....	585
White v. Harris—116 Cal. 470; 48 Pac. 382.....	304
White v. Knowlton—84 Minn. 141; 86 N. W. 755.....	700
White v. McKeesport—101 Pa. St. 394.....	100
White v. People—94 Ill. 604.....	13, 63, 110, 187, 214, 596, 597
White v. Saginaw—67 Mich. 33; 34 N. W. 255.....	288, 606
White v. Snell—5 Pick. 425; 9 Pick. 16.....	667
White v. Tacoma—109 Fed. 32.....	202, 473, 604, 774
Whiteford v. Phinney—53 Mich. 130; 18 N. W. 593.....	738
Whiting v. Quackenbush—54 Cal. 306....	18, 167, 171, 288, 512, 556
Whiting v. Townsend—57 Cal. 515.....	167, 288, 669, 670, 678, 680
Whiting v. West Point—88 Va. 905; 15 L. R. A. 860; 29 Am. St. Rep. 750; 14 So. 698.....	134
Wick Street—184 Pa. St. 93; 39 Atl. 3.....	561
Wiles v. Hoss—114 Ind. 371; 16 N. E. 800.....	405
Wilbur v. Ft. Dodge—120 Iowa, 555; 95 N. W. 186....	626, 627, 629
Wilbur v. Springfield—123 Ill. 395; 14 N. E. 871.....	65, 167, 168, 338, 346, 352, 365
Wilcoxon v. San Luis Obispo—101 Cal. 508; 35 Pac. 988.....	409
Wilder v. Cincinnati—26 Ohio St. 284.....	169, 337
Wilkin v. St. Paul—33 Minn. 181; 22 N. W. 249.....	805
Wilkins v. Detroit—46 Mich. 120; 8 N. W. 701; 9 N. W. 427....	132, 211, 301, 557, 797
Wilkinsburg v. Home for Women—131 Pa. St. 109; 6 L. R. A. 531; 18 Atl. 937.....	263.
Wilkinson v. Trenton—36 N. J. L. 499.....	308.
Willard v. Albertson—23 Ind. App. 162; 53 N. E. 1076.....	721
Willard v. Presbury—14 Wall. 676; 20 L. ed. 719.....	210
Williams v. Bergin—116 Cal. 56; 47 Pac. 877.....	289, 421, 752
Williams v. Bisnago (Cal.)—34 Pac. 640.....	213
Williams v. Cammack—27 Miss. 209; 61 Am. Dec. 508.....	73, 113, 179, 219
Williams v. Detroit—2 Mich. 560.....	71, 110, 131, 168, 176, 312, 561, 570, 668, 677, 788
Williams v. Mayor—2 Mich. 560.....	532
Williams v. McDonald—58 Cal. 527.....	670
Williams v. Monk—179 Mass. 22; 60 N. E. 394.....	16
Williams v. Supervisors—58 Cal. 237.....	317
Williams v. Viselich—121 Cal. 314; 53 Pac. 807.....	735.



(The references are to sections.)

Williamson v. Berry—8 How. 543; 12 L. ed. 1191.....	751
Williamson v. Joyce—137 Cal. 107; 69 Pac. 854.....	421
Williamson v. Joyce—140 Cal. 669; 74 Pac. 290.....	290
Willis v. Chicago—189 Ill. 103; 59 N. E. 543.....	375
Willis v. Winona—59 Minn. 27; 26 L. R. A. 142; 60 N. W. 814..	794
Wilmette v. People—214 Ill. 107; 73 N. E. 327.....	710, 842
Wilmington v. Yopp—71 N. C. 76.....	138
Wilson v. Aberdeen—52 Pac. 524; 19 Wash. 89.....	659, 663
Wilson v. Auburn—27 Neb. 435; 43 N. W. 257.....	26
Wilson v. Bank—121 Cal. 631; 54 Pac. 119.....	699
Wilson v. Board of Trustees—133 Ill. 443; 27 N. E. 203.....	140, 152
Wilson v. Chilcott—12 Colo. 600; 21 Pac. 901.....	60, 213
Wilson v. Lambert—168 U. S. 611; 42 L. ed. 599; 18 Sup. Ct. Rep. 217.....	219
Wilson v. McKenna—52 Ill. 43.....	790
Wilson v. Philippi—39 W. Va. 75; 19 S. E. 553.....	83
Wilson v. Salem—24 Ore. 504; 34 Pac. 9, 691..170, 293, 294, 472, 722	
Wilson v. Seattle—2 Wash. 543; 27 Pac. 474...121, 316, 536, 551, 739	
Wilson v. Simpson—9 How. 109; 13 L. ed. 66.....	572
Wilson v. State—42 N. J. L. 612.....	301, 323
Wilson v. Trenton—53 N. J. L. 645; 16 L. R. A. 200; 23 Atl. 278	310, 319
Windsor v. Des Moines—101 Ia. 343; 70 N. W. 214.....	306, 811, 813
Wingate v. Astoria—39 Ore. 603; 65 Pac. 982.....	619, 793
Wingate v. Tacoma—13 Wash. 603; 43 Pac. 874.....	720
Winkelmann v. Moredock, etc., Dr. Dist.—170 Ill. 37; 48 N. E. 715.....	593
Winnebago Fur Co. v. Fond du Lac Co.—113 Wis. 72; 88 N. W. 1018.....	730
Winona & St. P. R. Co. v. Watertown—1 S. Dak. 46; 44 N. W. 1072.....	28, 80, 170, 266, 472
Winslow v. Cincinnati—6 Ohio N. P. 47.....	209
Wis. Cent. R. Co. v. Ashland Co.—81 Wis. 1; 50 N. W. 937.....	798
Wisner v. People—156 Ill. 180; 40 N. E. 574.....	343, 546, 623
Wistar v. Philadelphia—80 Pac. St. 505; 21 Am. Rep. 112.....	133, 170, 200, 567, 575, 597
Wistar v. Philadelphia—111 Pa. St. 604; 4 Atl. 511.....	132, 213, 575
Witman v. Reading—169 Pa. St. 375; 32 Atl. 576...170, 226, 472, 478	
Wolf v. Keokuk—48 Iowa, 129.....	518
Wolf v. Philadelphia—105 Pa. St. 25.....	654, 674
Wolfe v. McHargue—88 Ky. 251; 10 S. W. 809.....	68
Wolfert v. St. Louis—115 Mo. 139; 21 S. W. 912.....	251
Wolff v. Mayor, etc.—49 Md. 446.....	656
Wolff v. Denver (Colo.)—77 Pac. 364.....	129, 331, 442, 584
Wood v. Brady—68 Cal. 78; 5 Pac. 623; 8 Pac. 590.....	702
Woods v. Chicago—153 Ill. 582; 26 N. E. 608.....	345, 358
Wood v. Curran—99 Cal. 137; 33 Pac. 774.....	704
Wood v. Strother—76 Cal. 545; 9 Am. St. Rep. 249; 18 Pac. 766..	820, 835
Woodbridge v. Detroit—8 Mich. 274.....	72, 157, 158, 210
Woodruff v. Fisher—17 Barb. 225.....	776
Woodruff v. Paterson—36 N. J. L. 159.....	171
Woodruff Pl. v. Raschig—147 Ind. 517; 46 N. E. 990.....	249, 267
Workman v. Chicago—61 Ill. 463.....	135, 500, 820, 823, 835
Workman v. Worcester—118 Mass. 168.....	179
Worthington v. Covington—82 Ky. 265.....	286, 429, 671
Wray v. Fry—158 Ind. 92; 62 N. E. 1004.....	583, 618



# TABLE OF CASES.

lxxxv

(The references are to sections.)

Wray v. Pittsburgh—46 Pa. St. 365.....	170, 201, 207, 210, 466, 646
Wright v. Boston—9 Cush. 233.....	179, 192, 233, 764
Wright v. Butler—64 Mo. 165.....	718
Wright v. Chicago—20 Ill. 252.....	135, 154, 229, 495
Wright v. Chicago—46 Ill. 44.....	35, 63, 64, 481
Wright v. Chicago—48 Ill. 285.....	489, 496
Wright v. Forrestal—65 Wis. 341; 27 N. W. 52.....	142, 291, 315, 318, 325, 418, 448, 545, 547
Wright v. People—87 Ill. 582.....	217
Wright v. St. Louis—135 Mo. 144.....	674
Wright v. Tacoma—3 Wash. Ter. 410; 19 Pac. 42.....	778, 790
Wright v. Thomas—26 Ohio St. 346.....	229
Writter v. Bachman—117 Cal. 318; 49 Pac. 202.....	706
Wulzen v. Supervisors—101 Cal. 15; 40 Am. St. Rep. 17; 35 Pac. 353.....	94, 99, 741
Wurtz v. Hoalland—114 U. S. 606; 29 L. ed. 229; 5 Sup. Ct. Rep. 1086.....	224
Whyte v. Mayor—2 Swan 364.....	30, 81, 403

## Y.

Yaggy v. Chicago—194 Ill. 88; 62 N. E. 316.....	389
Yarnold v. Lawrence—15 Kan. 126.....	425
Yates v. Milwaukee—92 Wis. 352; 66 N. W. 248.....	84, 253, 254, 792
Yates v. Omaha—58 Neb. 817; 80 N. W. 1134.....	382
Yeatman v. Crandall—11 La. Ann. 220... 16, 68, 69, 122, 176, 191, 219	
Yellow River Imp. Co. v. Wood Co.—81 Wis. 562; 17 L. R. A. 92 51 N. W. 1004.....	243, 690
Young v. People—155 Ill. 247; 40 N. E. 604.....	687
Young v. People—196 Ill. 603; 63 N. E. 1075.....	301, 343, 345, 618
Young v. People—171 Ill. 299; 49 N. E. 503.....	613, 614, 618, 619
Young v. Tacoma—31 Wash. 153; 71 Pac. 742.....	415, 518, 545, 824, 833, 840
Younglove v. Hackman—43 Ohio St. 69; 1 N. E. 230.....	526, 690
York v. Cedar Rapids (Iowa)—103 N. W. 791.....	634
Young v. Borzone—26 Wash. 4; 66 Pac. 135, 421.....	714
Yunker v. Nichols—1 Colo. 567.....	155

## Z.

Zable v. Louisville Orphan Home—92 Ky. 89; 13 L. R. A. 668; 17 S. W. 212.....	253, 254, 262
Zabriskie v. Jersey City—24 N. J. L. 108.....	171
Zahn v. Rutherford (N. J. L.)—60 Atl. 1123.....	746
Zalesky v. Cedar Rapids—118 Ia. 714; 92 N. W. 659.....	331, 596, 822
Zanesville v. Richards—5 Ohio St. 589.....	138
Zborowski, <i>In re</i> —68 N. Y. 88.....	129, 295
Zehnder v. Barber A. Pav. Co.—106 Fed. 103.....	88, 790
Zeigler v. Chicago—213 Ill. 61; 72 N. E. 719.....	289, 293
Zeigler v. Hopkins—117 U. S. 683; 29 L. ed. 1019; 6 Sup. Ct. Rep. 919.....	728
Zeigler v. People—156 Ill. 133; 40 N. E. 607.....	546
Zeigler v. People—164 Ill. 531; 45 N. E. 965.....	323
Zeli v. City—94 Ia. 393; 62 N. W. 796.....	135, 331, 365
Zion Church v. Mayor, etc.—71 Md. 524; 18 Atl. 895.....	192, 534
Zottman v. San Francisco—20 Cal. 96; 81 Am. Dec. 96.....	287
Zwietusch v. Milwaukee—55 Wis. 369; 13 N. W. 227.....	734







# LAW OF SPECIAL ASSESSMENTS.

## CHAPTER I.

### ORIGIN, HISTORY AND DEFINITION.

- Introductory, 1.
- Municipal revenues classified, 2.
- Theory of equivalents, 3.
- Comparison of amounts of general and special taxes, 4.
- Origin and history, 5-6.
- Origin in America, 7.
- English precedents, 8.
- Distinction between special assessment and tax, 9.
  - U. S. supreme court, 10.
  - California, 11.
  - Illinois, 12.
  - Mississippi, 12*a*.
  - New York, 13.
  - Ohio, 14.
  - Pennsylvania, 15.
  - Washington, 16.
  - Wisconsin, 17.
- Comparative definitions, 18.
- Distinction between special assessment and special taxation, 19.
- When the word "tax" includes "special assessments," 20.
- When the word "tax" does not include "special assessments," 21.
  - Alabama, 22.
  - Arkansas, 23.
  - California, 24.
  - Colorado, 25.
  - Connecticut, 26.
  - Georgia, 27.
  - Illinois, 28.
  - Indiana, 28*a*.
  - Kansas, 29.
  - Louisiana, 30.
  - Maryland, 31.
  - Missouri, 32.
  - New York, 33.
  - Pennsylvania, 34.
  - Texas, 35.
- Taxes and assessments defined, 36-38.
- Legal theories of the power of special assessment, 39.
  - Under the police power, 40-44.
  - Under the power of eminent domain, 45-47.
  - Under the power of taxation, 48-49.
- Of the power to levy special assessments — constitutional authorization unnecessary, 50-53.
- Restraints upon power to levy special assessments, 54.
- What is meant by "taxation by special assessment," 55.
- Definition, 56.
- Objections to the system, 57.
- Assessment of cost of work, 58.
- Further objections, 59-64.
- Merits of the system, 65-66.



### Introductory.

1. Under the highly complex conditions of modern municipal life and government, new methods of taxation, or modifications of old ones, are constantly sought by those who charge themselves with the duty of spending the people's money. The requirements of modern civilization, the necessity for rigid sanitary supervision in urban affairs, and the application of new inventions to urban management, all require the expenditure of immense sums of money, and one American city raises more in one year by taxation than did England, during the same period, in the reign of Elizabeth. The old methods of taxation having proved insufficient, new methods became necessary.

### Municipal revenues classified.

2. The revenues derived by the municipality of the present day, other than from fees and licenses, may be divided into three classes: General Taxation, Local or Special Taxation, and Taxation by Special Assessment. Under the first head are embraced those taxes which are levied on the *ad valorem* principle, upon all taxable property, for general governmental purposes. Under the second head come those occasional imposts levied by special legislative authority, for purely local purposes, within the limits of, and subject to acceptance by the people of the locality, such as subscriptions to railway stock, payment of principal and interest of the funded debt, or construction of court house and other public buildings. The third subdivision, Taxation by Special Assessment, is the subject of the present work, and will be hereafter discussed and defined.

### Theory of equivalents.

3. It was for a long time a theory of the economists that all taxes rested upon the principle of equivalents, and that for every dollar of tax yielded to the authorities, an equivalent was received by the rate payer in protection to life, lib-



erty or property, or in some other manner. But that position, so far as general taxation is concerned, has long been abandoned, and the only limit to legislative exaction in this direction, where not controlled by some inhibition of the organic law, is the ability to pay. It may amount to confiscation, but when levied within constitutional limits, and where the law of procedure is strictly followed, the judiciary are unable to afford any relief, no matter how severe or destructive the effect. But in the case of special assessments, which had their origin in the theory of benefits received, it is believed that the only logical, just or economic authority for the exercise of the power is the special benefit received by the property taxed, by reason of the improvement. This view has been sustained upon the highest of authority, as well as upon reason, and it has been authoritatively determined that the exaction from the owner of private property of the cost of a public improvement, in substantial excess of the special benefits accruing to him, is, to the extent of such excess, a taking, under the guise of taxation, of private property for public use, without due process of law.<sup>1</sup> Where there is no benefit, there is no ground for the imposition of a tax. If all courts would finally accept this doctrine, so overwhelmingly supported by authority, much of the actual injustice now committed under the guise of special assessments would be abated; and many objections to the exercise of the power would cease to be made.

### Comparison of amounts of general and special taxes.

4. The tremendous importance of special assessments, as a means of raising revenue for municipal purposes, is apparent from an inspection of the following table, showing

<sup>1</sup> *Norwood v. Baker*, 172 U. S. 269, 43 L. ed. 443, 19 Sup. Ct. Rep. 187; *French v. Barber Asphalt Paving Co.*, 181 U. S. 324, 45 L. ed. 879, 21 Sup. Ct. Rep. 625; *Iowa Pipe & Tile Co. v. Callanan*, 125 Iowa, 358, 67 L. R. A. 408, 106 Am. St. Rep. 311, 101 N. W. 141; *Lathrop v. Racine*. 119 Wis. 461, 97 N. W. 192.



the comparative amounts raised for general and special taxes in a few cities in 1905.

	<i>Total General Tax.</i>	<i>Special Assessments.</i>
New York.....	\$81,744,865.85	\$5,990,596.97
Chicago .....	16,845,974.19	5,026,521.91
St. Louis.....	8,563,109.00	2,402,814.94
Minneapolis .....	3,713,379.87	643,954.98
Milwaukee .....	3,379,394.52	415,667.16
St. Paul.....	2,122,873.33	378,483.27
Tacoma .....	352,497.25	500,787.50

### Original history.

5. Before attempting to define and limit the term "special assessment," it will be well to briefly glance at its history. That the principle was known to the civilians is evident from the statement in Puffendorf that "It is agreeable to natural equity that when contributions are to be made for the preservation of a particular thing by such as enjoy it in common, that every man should only pay his quota, and that one should not be forced to bear more of the burthen than another, and the same holds in commonwealths; but because the state of the commonwealth may often be such that either some pressing necessity will not give leave that every particular subject's share should be collected, or else that the public should have necessary occasion to make use of something in the possession of one or more of the private subjects, the sovereign power may seize upon it for the necessities of the commonwealth; but, then, all that was above the proportion that was due from the proprietors must be refunded to them by the rest of the subjects." <sup>2</sup>

6. The power which we now denominate as local, or special, assessment was recognized by Blackstone,<sup>3</sup> and the statutory giving to commissioners the authority to "assess such

<sup>2</sup> Puffendorf, Book 8, Ch. 3.

<sup>3</sup> Book 3, p. 73.



rates, or scots, upon the owners of lands within their district, as they shall judge necessary." And by stat. 23, of Henry VIII, the cost of building sewers was assessed by the commissioners according to special benefits, but only after notice to the land owner, and a hearing; otherwise the assessment was void.

The system of constructing special taxing districts for local assessments has prevailed in London since 1531; every new quarter has been provided with streets and sewers as the necessity arose, by the creation of a separate taxing district, and under a separate board.<sup>4</sup>

Pepys notes in his "Diary," under the date of Dec. 3, 1667, in connection with the making of King Street from the Guildhall to Cheapside that the owners of a piece of ground through which the street would pass asked at first two hundred pounds for the part taken; but, as there remained ground enough on each side to build a house fronting the street, the court allowed the city a counterclaim for "melioration," and in the end the owner consented to give his ground for nothing, on condition that he paid nothing for the benefit the rest of the property received from the new street.

### Origin in America.

7. The power to impose such an assessment was given to a Highway Board in Ulster County, in the then colony of New York, in 1691, for the purpose of making public roads; and the same power was that year given to the corporation of the city of New York for the construction of the public streets. These acts were still in force in 1773, and the betterment clauses were re-affirmed in 1787, when the old colonial statutes were revised for the new State Constitution under the Republic.<sup>5</sup> As the city grew, fresh Improvement

<sup>4</sup> A Reply to the Duke of Argyll on the Betterment Tax; by John Rae, Cont. Review, July, 1890.

<sup>5</sup> The Betterment Tax in America; by John Rae, Contemporary Review, May, 1890.



Acts were required, and obtained in successive statutes in 1793, 1795, 1796, 1801 and 1813.<sup>6</sup>

An American historian has written regarding the power of special assessment, that it originated in the very infancy of New York, and has continued ever since one of the ordinary ways and means of meeting the cost of city improvements. It was a common custom there, even before it was sanctioned by any statute, for when the city fathers caused a new well to be dug, they always laid one-half of its cost upon the city generally, and the other one-half upon "the owners of property nearest the well." This was done in the case of public wells in Broadway, Pearl Street, and other parts of the city in 1676.<sup>7</sup>

### English precedents.

8. It might be inferred from this early appearance of the principle of local assessment for benefits in New Amsterdam that it was of Dutch origin, but the better opinion is that such was not the case. It probably arose spontaneously, because of the innate and manifest equity of the proceeding, although the seeds of the idea may have been brought from England, where the application of the principle was at least a century or more old, as we have seen, and the maintaining of the repairs of the streets in London and Westminster in front of his own property "to the channel running in the middle of the street," and the construction of embankments against the "outrageousness of the river," at Plumstead and Eirth, was imposed by statute on the adjacent land owner as far back as the days of Henry the Eighth.<sup>8</sup>

<sup>6</sup> Angell & Durfee's Law of Highways, 158.

<sup>7</sup> Watson's Annals of New York, 157.

<sup>8</sup> 1 Clifford's Private Bill Legislation, 28.

"These special assessments are found in the English law, and

have prevailed, it is believed, in most, if not all, of our American states, and their validity when assessed as in this instance cannot be questioned under our constitution. Their intrinsic justice strikes every one. If an improvement is to be made, the benefit of which



Enough has been stated to show the origin of this principle of law, which is now so thoroughly incorporated into American jurisprudence as to become a distinct feature thereof, and finally acknowledged as constitutional by the courts of last resort in every state where the question has been raised except in South Carolina.<sup>9</sup>

### **Distinction between special assessment and tax.**

9. The difficulty in defining what is a "special assessment," as distinguished from a tax, is as great as in actually defining the meaning of the phrase "due process of law," and may perhaps be best illustrated by pointing out some of the differences between them as laid down in the adjudicated cases.<sup>10</sup>

### **— U. S. Supreme Court.**

10. "Taxes proper, or general taxes, proceed upon the theory that the existence of government is a neces-

is local, it is but just that the property benefited should bear the burden. While the few ought not to be taxed for the benefit of the whole, the whole ought (not) to be taxed for the benefit of the few. A single township in a county ought not to bear the whole county expenses, neither ought the whole county to be taxed for the benefit of a single township; and the same principle requires that taxation for a local object, beneficial only to a portion of a town or city, should be upon that part only. General taxation for a mere local purpose is unjust; it burdens those who are not benefited, and benefits those who are exempt from the burden." Leonard, J., in *Lockwood v. St. Louis*, 24 Mo. 20.

<sup>9</sup> "It had its origin and devel-

opment in the principle of local self-government, characteristic of free institutions, founded by the Anglo-Saxon race,—the leaving to each local community the due administration of the affairs in which it had an exceptive, peculiar and local interest, and in the nature of real property, to which it is alone applicable. It is not the creation of a philosophic brain drafting constitutions and forms of government, but the outgrowth of the necessities and varying exigencies of local communities, and hence, like all institutions of similar origin and development, has inconsistencies and incongruities." George, C. J., in *Macon v. Patty*, 57 Miss. 378, 34 Am. Rep. 451.

<sup>10</sup> See, also, cases cited under heading "Local and Special Assessments Defined," note 68 *infra*.



sity; that it cannot continue without means to pay its expenses; that for those means it has the right to compel all citizens and property within its limits to contribute; and that for such contribution it renders no return of special benefit to any property, but only secures to the citizen that general benefit which results from protection to person and property, and the promotion of those various schemes which have for their object the protection of all. . . . On the other hand, special assessments or special taxes, proceed upon the theory that when a local improvement enhances the value of neighboring property, that property should pay for the improvement.”<sup>11</sup>

### — California.

11. “An assessment for a local improvement is a tax, differing from other taxes in that it need not be levied upon the *ad valorem* principle. Although such assessment is not prohibited by that clause of the State Constitution which provides that ‘all property shall be taxed in proportion to its value,’ it is of the very essence of taxation, *in every form*, that it be levied with equality and uniformity; and to this end, that there should be some system of apportionment.”<sup>12</sup>

<sup>11</sup> Illinois C. R. Co. v. Decatur, 147 U. S. 197, 37 L. ed. 134, 13 Sup. Ct. Rep. 293, by Brewer, J. Taxes are collected in a summary manner, without opportunity for hearing. But “summary” does not mean “unjust,” or “arbitrary.” *McMillen v. Anderson*, 95 U. S. 41, 24 L. ed. 336.

<sup>12</sup> *People v. Lynch*, 51 Cal. 20, 21 Am. Rep. 677.

The power of “assessment” cannot be exercised as an independent or principal power like that of “taxation,” but must be used as an incident to the power of organizing municipal corporations.

“It is not a power to tax all the property within the corpora-

tion for general purposes, but the power to tax specific property for a specific purpose. It is not a power to tax property generally, founded upon the benefits supposed to be derived from the organization of a government for the protection of life, liberty and property, but a power to tax specific property founded upon the benefits supposed to be derived by the property itself from the expenditure of the tax in its immediate vicinity.”

*Taylor v. Palmer*, 31 Cal. 240, 254.

An assessment for street work in the city and county of San Francisco, under the consolidation act, is not “taxation” within



“An assessment, as distinguished from a tax, is a special and local charge or imposition upon property in the immediate vicinity of municipal improvements, predicated upon the theory or principle of equivalents or benefits from such improvements, and levied as a charge upon land or property specially benefited thereby.”<sup>13</sup>

— Illinois.

**12.** General taxes are imposed for the support of government and to promote the well being and good order of society, and are, in theory at least, compensated for by the protection afforded by the government to life, liberty and property. It is the burden borne in return for the benefits afforded by civil liberty, and to which all are compelled to contribute upon some recognized basis of equality. Special taxes are not regarded as burdens upon the citizen, but are imposed as an equivalent or compensation for the enhanced value, real or presumptive, of the property, from the public improvement for which they are assessed.<sup>14</sup>

— Mississippi.

**12<sup>a</sup>.** “A local assessment can only be levied on land; it cannot, as a tax can, be made a personal liability of the tax-payer; it is an assessment on the thing supposed to

the meaning of the thirteenth section of Art. XI of the Constitution.

*Chambers v. Satterlee*, 40 Cal. 497.

The fact that a statute designates as a “tax” that which in its elements is an “assessment,” does not make it a “tax.” The question whether it is a “tax” or an “assessment” must be decided by the nature of the imposition.

*People ex rel. Doyle v. Austin*, 47 Cal. 353.

<sup>13</sup> *Holley v. Orange County*, 106 Cal. 426, 39 Pac. 790.

When a city street is opened, and for the payment of land condemned, damages and expenses, bonds are issued, and an annual percentage is levied on the enhanced value of the lots to pay such bonds, with interest, such imposition is an assessment, and not a tax.

*People ex rel. Doyle v. Austin*, 47 Cal. 353.

<sup>14</sup> *Davis v. Litchfield*, 145 Ill. 313, 21 L. R. A. 563, 33 N. E. 888.



be benefited. A tax is levied on the whole state, or a known political subdivision, as a county or town. A local assessment is levied on property situated in a district created for the express purpose of the levy, and possessing no other function, or even existence, than to be the thing on which the levy is made. A tax is a continuing burden, and must be collected at stated short intervals for all time, and without it government cannot exist; a local assessment is exceptional both as to time and locality,—it is brought into being for a particular occasion, and to accomplish a particular purpose, and dies with the passing of the occasion and the accomplishment of the purpose. A tax is levied, collected and administered by a public agency, elected by and responsible to the community upon which it is imposed; a local assessment is made by authority *ab extra*. Yet it is like a tax, in that it must be levied for a public purpose, and must be apportioned by some reasonable rule among those upon whose property it is levied. It is unlike a tax, in that the proceeds of the assessment must be expended in an improvement from which a benefit clearly exceptive and plainly perceived must enure to the property upon which it is imposed, or else the courts will interfere to prevent its enforcement.”<sup>15</sup>

— New York.

13. All taxes are burdens, charges or impositions set on persons or property for public use; but an assessment for a supposed benefit is not a tax.<sup>16</sup>

“Public taxes, rates and assessments are those which are levied and taken out of the property of the person assessed, for some public or general use or purpose, in which he has no direct, immediate and peculiar interest; being exactions from him toward the expense of carrying on the government, either directly and in general, that of the whole commonwealth, or more immediately and particularly, through the intervention of municipal cor-

<sup>15</sup> *Macon v. Patty*, 57 Miss, 378, 34 Am. Rep. 451.

<sup>16</sup> *In re Mayor, etc.*, 11 Johns. 77; *Astor v. New York*, 5 Jones & S. 539.



porations; and that those charges and impositions which are laid directly upon the property in a circumscribed locality, to effect some work of local convenience, which in its results is of peculiar advantage and importance to the property specially assessed for the expense of it, are not public, but are local and private.”<sup>17</sup>

— Ohio.

14. In a general sense, a tax is an assessment, and an assessment is a tax, but there is a plain distinction between them, an assessment indicating those special and local impositions upon property in the immediate vicinity of an improved street, which are necessary to pay for the improvement, and laid with reference to the special benefit which such property derives from the expenditure of the money.<sup>18</sup>

— Pennsylvania.

15. In a general way, a tax is an impost upon the citizen for the support of the government, and municipal assessment is a contribution levied upon the ownership of land to defray the expense of its improvement.<sup>19</sup>

— Washington.

16. “We think the doctrine is well established at this time that the general use of the term ‘taxes’ in the

<sup>17</sup> Buffalo City Cemetery v. Buffalo, 46 N. Y. 506.      respective shares of contribution to any public burden.

<sup>18</sup> Lima v. Cemetery Asso., 420 Ohio St. 128, 51 Am. Rep. 809; Hill v. Higdon, 5 Ohio St. 243, 67 Am. Dec. 289; Raymond v. Cleveland, 42 Ohio St. 522.      Property taken by the right of eminent domain is so much beyond the individual's share of the public burden.

<sup>19</sup> Pettibone v. Smith, 150 Pa. 118, 17 L. R. A. 423, 24 Atl. 693; Olive Cemetery Co. v. Philadelphia, 93 Pa. 129, 39 Am. Rep. 732; Erie v. Church, 105 Pa. 278; McKeesport v. Fidler, 147 Pa. 532, 23 Atl. 840.      Every presumption is to be made in favor of the right of taxation, and if the case be within the principle of taxation, the proportion of contribution and other details are within the discretion of the taxing power.

Taxation exacts money or services from individuals as their      Hammett v. Philadelphia, 65 Pa. 146, 3 Am. Rep. 615.



constitution does not necessarily include what is meant by the term 'assessments,' in connection with street and other local improvements, but applies only to the larger exercise of the sovereign power of the state, either directly or through its inferior instrumentalities of the county, city, town, school district, etc., in raising general revenues for the support and maintenance of government." <sup>20</sup>

— Wisconsin.

17. "The theory of all taxation is, that taxes are imposed as a compensation for something received by the tax-payer. General taxes are paid for the support of government in return for the protection to life, liberty and property which government gives. Assessments of benefits accruing to property by reason of public improvements rest on the same principle. Both forms of taxation are for public purposes, and both are alike burdens upon property. The only substantial distinction between the two forms is, that general taxation is based upon value and subject to the constitutional rule of uniformity, while assessments are not." <sup>21</sup>

"Assessments, as distinguished from other kinds of taxation, are those special and local impositions upon property *in the immediate vicinity* of municipal improvements (such as grading and paving streets, improving harbors or navigable rivers within the limits of the municipality, and the like), which are necessary to pay for the improvement, and are laid with reference to the special benefit which the property is supposed to have derived from the expenditure." <sup>22</sup>

Under the foregoing definition and authority, a tax upon all the lots and land of a city, not including any improvements thereon, for the purpose of aiding a railroad, was held a tax, and not an assessment, and therefore void as in violation of the rule of uniformity required by the constitution of Wisconsin.

<sup>20</sup> Austin v. Seattle, 2 Wash. 667, 27 Pac. 557.

<sup>22</sup> Hale v. Kenosha, 29 Wis. 599.

<sup>21</sup> Dalrymple v. Milwaukee, 53 Wis. 178, 10 N. W. 141.



**Comparative definitions.**

18. One of the foremost of modern economists attempts to define the two systems as follows:<sup>23</sup>

“A special assessment is a compulsory contribution paid once and for all to defray the cost of a specific improvement to property, undertaken in the public interest, and levied by the government in proportion to the special benefits accruing to the property owner.

“A tax is a compulsory contribution from the individual or association to cover the expenses incurred by the government in the common interest, without reference to special benefits conferred.”

**Distinction between special assessment and special taxation.**

19. Under the Illinois Constitution of 1870,<sup>24</sup> the corporate authorities of cities, towns and villages may be vested by the legislature “with power to make local improvements by special assessment or special taxation of contiguous property, or otherwise,” and it is to this limited kind of taxation that this section specially applies.

The principal difference seems to be in the mode of ascertaining the benefits. In the case of special taxation, the imposition of the tax by the corporate authorities is of itself a determination by such authorities that the benefits to the contiguous property would be fully equal to the expense of the improvement; while in the case of special assessment, the property to be benefited must be ascertained by careful investigation, and the burden must be distributed according to the carefully ascertained proportion in which each part thereof will be beneficially affected.<sup>25</sup> Under special taxation, the levy is upon contiguous property only, and the benefit legislatively determined. Under special assessment, all property

<sup>23</sup> Prof. E. R. A. Seligman's Classification of Public Revenues, Quarterly Journal of Economics, April, 1893.

<sup>24</sup> Sec. 9, Art. IX.

<sup>25</sup> *Craw v. Tolono*, 96 Ill. 255, 36 Am. Rep. 143; *White v. People*, 94 Ill. 604; *Enos v. Springfield*, 113 Ill. 65.



benefited by the improvement may be assessed, the district being determined legislatively, but the amount of the tax is determined judicially, and according to the benefits.

It was for a long time held by the Supreme Court of that state that the question of actual benefits by special taxation was a question with which a jury had nothing to do, but this opinion was fortunately rendered innocuous by the statute of 1895, amending Sec. 17, Art. IX, of the cities and villages act, providing that the ordinance shall not be conclusive as to benefits, but the owner, if dissatisfied, may have the question submitted to the court and tried by a jury, as in special assessment proceedings.

For other distinctions, the cases cited in the marginal note may be consulted.<sup>26</sup>

<sup>26</sup> A special assessment differs mainly from special taxation in that the assessment cannot in any case, or under any circumstances, exceed the benefits which the property assessed will derive from the improvement; and the owner has the right, if dissatisfied, to have this question passed upon by a jury, whereas in cases of special taxation the jury have nothing to do with the amount, which is by ordinance assessed upon contiguous property.

*Sterling v. Gault*, 117 Ill. 11, 7 N. E. 471.

An ordinance providing for sewer construction, one-half to be paid by general taxation, and one-half by special taxation of contiguous property in proportion to the benefits accruing to the respective parcels, is a proceeding by special taxation, and not by special assessment.

*Galesburg v. Searles*, 114 Ill. 217, 29 N. E. 686.

Special taxation of contiguous

property for local improvement is a thing, in its object and character, very different from general taxation for the purpose of revenue, and a thing very different from local taxation, by municipal corporations, for revenue to be applied to other corporate purposes. In the case of taxation by a municipal corporation for other corporate purposes, it is a constitutional requirement that such taxes shall be uniform in respect to persons and property within the jurisdiction of the body imposing the same.

*Craw v. Tolono*, 96 Ill. 255, 36 Am. Rep. 143.

Special taxation does not proceed upon the theory that the assessment must not exceed the special benefits received from the improvement. Thus where a part of a lot is taken for an alley and the balance of the lot is damaged by opening the alley, special taxation of the part of



**When the word "tax" includes "special assessments."**

20. As we have already seen, special assessment has been denominated a tax in some instances, but not in others. It is a tax in every instance in the sense that it is an enforced contribution from the property owner for the public benefit, but not in a sense that it is a burden, as he receives an equivalent in the shape of the enhanced value of his property. Under the general term of "revenue," all taxes and assessments are included,<sup>27</sup> and the words "tax" and "assessment" have been held to be synonymous, and entitled to receive the same construction,<sup>28</sup> but it is apparent that this rule of construction is too broad.<sup>29</sup> A special assessment for building a sewer is deemed a tax in Pennsylvania,<sup>30</sup> and in other states it is held to be a tax within the meaning and application of certain statutes. Thus, in Massachusetts, un-

the lot not taken, in proportion to its frontage as it abuts upon the alley offers no just compensation to the owner for his lots.

*Bloomington v. Latham*, 142 Ill. 462, 18 L. R. A. 487, 32 N. E. 506.

The special benefits arising from a local improvement may be assessed upon the property specially benefited, or it may be imposed by special taxation, the two modes differing only in the manner of ascertaining the benefits.

*Lightner v. Peoria*, 150 Ill. 80, 37 N. E. 69.

A tax is levied for a general or public purpose and lessens the value of the property, while a special assessment is levied for a special purpose and is made in the ratio of benefits accruing to the property from the improvement.

*De Clerq v. Barber Asphalt*

*Pav. Co.*, 167 Ill. 215, 47 N. E. 367.

<sup>27</sup> *People ex rel. Johnson v. Springer*, 106 Ill. 542; *Herhold v. Chicago*, 106 Ill. 547; *Webster v. People*, 98 Ill. 343; *Potwin v. Johnson*, 106 Ill. 532.

The word "revenue" has been held to embrace all taxes and assessments.

*People ex rel. Johnson v. Springer*, 106 Ill. 542; *Herhold v. Chicago*, 106 Ill. 547.

Includes special assessments.

*Webster v. People*, 98 Ill. 343; *Potwin v. Johnson*, 106 Ill. 532.

<sup>28</sup> *Baltimore v. Green Mount Cemetery*, 7 Md. 517.

<sup>29</sup> *Weeks v. Milwaukee*, 10 Wis. 242.

<sup>30</sup> *Olive Cemetery Co. v. Philadelphia*, 93 Pa. 129, 39 Am. Rep. 732; *Erie v. Church*, 105 Pa. 278; *McKeesport v. Fidler*, 147 Pa. 532, 23 Atl. 799.



der an agreement to give "a good title" to certain land, "free and clear from all mortgage encumbrances, taxes and mechanic's liens," the word "taxes" in the covenant includes a sewer assessment,<sup>31</sup> and in Illinois it includes a special assessment as employed in a statute authorizing the foreclosure of a lien.<sup>32</sup> In Wisconsin, a special assessment is a tax within the meaning of the laws providing for the sale and conveyance of lands for the non-payment of taxes,<sup>33</sup> and certificates issued upon the sale of lots for the non-payment of such a tax are tax certificates within the meaning of a statute limiting the time for commencement of an action to cancel, or restrain the issuance of tax certificates.<sup>34</sup>

Although possessing many points of similarity, special assessments and taxes are inherently different, and the same rule of construction where the words are used in statutes will not be indiscriminately applied.<sup>35</sup>

#### When the word "tax" does not include "special assessment."

21. As will be demonstrated later, special assessments are laid under the taxing power, but that does not of itself constitute the imposition of a tax, and the weight of authority sustains the general proposition that the use of the word "tax" does not include the former term. The decisions of

<sup>31</sup> Williams v. Monk, 179 Mass. 22, 60 N. E. 394.

<sup>32</sup> Gauen v. Drainage Dist., 131 Ill. 446, 23 N. E. 633.

A covenant in a lease whereby the lessee agrees to pay "all the water tax and one-half of all other taxes" levied on the demised premises during the term, does not cover special assessments levied against the property for local improvements.

De Clerq v. Barber Asphalt Paving Co., 167 Ill. 215, 47 N. E. 367.

The life tenant should pay the annual tax, but the expenses of a special assessment which are permanent in their nature should be borne ratably between the life-tenant and the remainderman.

Huston v. Tribbetts, 171 Ill. 547, 63 Am. St. Rep. 275, 49 N. E. 711.

<sup>33</sup> Yates v. Milwaukee, 92 Wis. 352, 66 N. W. 248.

<sup>34</sup> Dalrymple v. Milwaukee, 53 Wis. 178, 10 N. W. 141.

<sup>35</sup> Chicago v. Colby, 20 Ill. 614.



the courts of several of the states holding such to be the law are as follows:

— **Alabama.**

**22.** Provisions, whether in statutes or in constitutions, relating to general taxation for state, county and municipal purposes, or either, have no application to special assessments laid against abutting property to pay for street improvements, which have benefited and enhanced the value of the property so assessed.<sup>36</sup>

— **Arkansas.**

**23.** A local assessment is not a tax within an exception in a covenant of warranty of the taxes for a certain year,<sup>37</sup> and the term "taxes," as employed in Sec. 9, Art. VI, of the constitution, will not be construed to include local special assessments for a fund raised to be expended for the improvement of the property included in the assessment.<sup>38</sup>

— **California.**

**24.** The words "taxation" and "assessment," in the constitution of the state, do not possess the same significance,<sup>39</sup> and an assessment for a street improvement is not a tax within the meaning of the constitutional provision that taxation shall be in proportion to value.<sup>40</sup> The words "taxation" and "taxed," in Sec. 13, Art. XI, relate to such general taxes upon all property as are levied to defray the ordinary expenses of the state, county, town and municipal governments, and not to assessments levied on the lots front-

<sup>36</sup> Mayor, etc. v. Klein, 89 Ala. 461, 8 L. R. A. 369, 7 So. 386.

Overruling the earlier cases of Mayor, etc. v. Dargan, 45 Ala. 310, and Mayor, etc. v. Royal St. R. Co., 45 Ala. 322.

<sup>37</sup> Sanders v. Brown, 65 Ark. 498, 47 S. W. 461.

<sup>38</sup> McGehee v. Mathis, 21 Ark. 40.

<sup>39</sup> Taylor v. Palmer, 31 Cal. 240.

<sup>40</sup> Chambers v. Satterlee, 40 Cal. 497; Smith v. Farrelly, 52 Cal. 77.



ing on a city street to pay the expense of its improvement.<sup>41</sup> While the term "assessment" is often popularly used as a synonym for taxation, this is not its strict legal significance,<sup>42</sup> nor does the fact that a statute designates as a tax that which in its elements is an assessment, make it a tax. The question whether it is a "tax" or an "assessment" must be decided by the nature of the imposition.<sup>43</sup> Thus, the authority to compel local improvements, at the expense of those immediately benefited, is not taxation, though referable to the taxing power,<sup>44</sup> whereas a tax imposed on *all* the property in a district, to be used in constructing levees to protect such district from overflow, is a tax and not an assessment.<sup>45</sup>

#### — Colorado.

25. The word "tax," as used in the state constitution, refers to the ordinary public taxes, and not to assessments for local improvements in cities and towns.<sup>46</sup>

#### — Connecticut.

26. An assessment for benefits conferred in laying out a highway is, in a general sense, a tax, because it is an exercise of the taxing power; but it is local, special and limited to a class of persons interested in a local improvement who are assumed to receive an equivalent for the amount of the levy

<sup>41</sup> *Emery v. San Francisco Gas Co.*, 28 Cal. 345.

<sup>42</sup> *Holley v. Orange Co.*, 106 Cal. 420, 39 Pac. 790.

<sup>43</sup> *People ex rel. Doyle v. Austin*, 47 Cal. 353.

<sup>44</sup> *Hagar v. Yolo County*, 47 Cal. 222.

<sup>45</sup> *People v. Whyler*, 41 Cal. 351.

An assessment for the improvement of streets is a municipal tax, levied by the corporation upon the property adjacent to the street, to defray the expenses

of the improvement, and no demand can be made a set-off against it unless expressly so authorized by statute.

*Himmelman v. Spanagel*, 39 Cal. 389.

An assessment for street improvement is a tax.

*Whiting v. Quackenbush*, 54 Cal. 306.

<sup>46</sup> *Denver v. Knowles*, 17 Colo. 204, 17 L. R. A. 135, 30 Pac. 1041, overruling *Palmer v. Way*, 6 Colo. 106.



by reason of the benefits resulting from the improvement.<sup>47</sup>

— Georgia.

27. "Taxes and assessments," in the language of an amendment to the charter of Augusta, in 1847, were the general taxes and assessments the city was authorized by law to make, and not special assessments on abutting property.<sup>48</sup>

— Illinois.

28. An assessment for opening a street is not a tax.<sup>49</sup>

— Indiana.

28<sup>a</sup>. A charter provision authorizing a city to sweep the streets, and to pay for the same by assessing the abutting owners, is a local assessment, and not a tax, and does not fall within the constitutional provision requiring an equal and uniform rule of taxation.<sup>50</sup>

— Kansas.

29. The word "assessment," as used in Art. XII, of the constitution, providing for "the organization of cities, towns

<sup>47</sup> Bridgeport v. N. Y. & N. H. R. Co., 36 Conn. 255, 4 Am. Rep. 63.

<sup>48</sup> Augusta v. Murphy, 79 Ga. 101.

<sup>49</sup> "It is the established doctrine of this court that assessments of this character are not taxes. It is not, therefore, embraced in or regulated by the provisions of the Constitution to which reference has been made. The Constitution has provided that private property shall not be appropriated to public use, without just compensation being made to the owner. Under this provision, when it becomes

necessary to appropriate private property to public use, by the opening, widening or extension of a street in a town or city, the owner whose property is thus appropriated must have compensation made to him, by the public at large, by the city, or by the persons deriving a pecuniary benefit from the improvement. That the legislature may require compensation to be made in either of these modes, we conceive there can be no question." Peoria v. Kinder, 26 Ill. 351.

<sup>50</sup> Reinken v. Fuehring, 130 Ind. 382, 15 L. R. A. 624, 30 Am. St. Rep. 247, 30 N. E. 414.



and villages, and their power of taxation, *assessment*, borrowing money," etc., means a charge upon adjacent property for improvements.<sup>51</sup>

— Louisiana.

30. Local assessments on property specially benefited by the work, as an equivalent for the direct benefits conferred, are not considered as taxes within the meaning of the constitutional restrictions on the power of taxation.<sup>52</sup>

— Maryland.

31. The word "tax" means a burden, charge or imposition put on persons or property for public uses; but to pay for opening a street in a ratio to the benefit derived from it, is not a "tax" within the meaning of an exemption providing that certain property shall not "be taxed by any law of the state."<sup>53</sup>

— Missouri.

32. "Taxes are charges or burdens imposed by the legislature for public purposes, or to defray the necessary expenses in administering the government." An assessment is not a tax, because it is not a burden, but an equivalent or compensation for the enhanced value which the property derives from the improvement.<sup>54</sup> And the reference in Sec. 11, Art. X of the constitution to "special taxes" does not embrace special assessments for local improvements, although confessedly based on the taxing power.<sup>55</sup>

<sup>51</sup> Hines v. Leavenworth, 3 Kan. 186.

See, also, Weeks v. Milwaukee, 10 Wis. 242.

<sup>52</sup> Charnock v. Fordoche, etc., Co., 38 La. An. 323.

<sup>53</sup> Mayor, etc., v. Green Mount Cemetery, 7 Md. 517.

<sup>54</sup> Sheehan v. Good Samaritan Hospital, 50 Mo. 155, 11 Am. Rep. 412.

<sup>55</sup> Lamar W. & E. L. Co. v. Lamar, 128 Mo. 188, 32 L. R. A. 157, 26 S. W. 1025, 31 S. W.

756.



— New York.

33. "Our laws have made a plain distinction between taxes, which are burdens or charges imposed upon persons or property to raise money for public purposes, and assessments for city and village improvements, which are not regarded as burdens, but as an equivalent or compensation for the enhanced value which the property of the person assessed has derived from the improvement."<sup>56</sup>

— Oregon. An assessment is in the nature of a tax.<sup>57</sup>

— Pennsylvania.

34. Although laid under the taxing power, special assessments are not taxes strictly speaking.<sup>58</sup>

<sup>56</sup> Bronson, J., in *Sharpe v. Speir*, 4 Hill, 76.

See, also, *Mix v. Ross*, 57 Ill. 121.

<sup>57</sup> *King v. Portland*, 2 Or. 146.

<sup>58</sup> *Northern Liberties v. St. John's Church*, 13 Pa. St. 104; *Pray v. Northern Liberties*, 31 Pa. St. 69.

The question being as to the liability of the lessee of a coal mine to pay for constructing a sewer and paving a street, under the covenants of a lease requiring him to pay all state and local taxes, the court say: "It is constructed entirely for the benefit and advantage of the surface and the surface owner; moreover it is permanent and will continue in use long after the determination of defendant's lease. Why should he pay for it, when in point of fact he has never agreed to such payment? Because it is a tax, says the

lessor, and therefore is included within the burdens which the tenant agreed to pay. But it is not a tax literally, and nothing in the lease defines any expressed intent by either party that it should be paid by the lessee. To this it is replied that this court has said an assessment is a tax, or is to be considered as a tax, in a certain class of cases. But to this it can be well answered that this is not a case belonging to that class, and therefore the contract of the parties must be adjudged by the ordinary rules of interpretation, and, being so adjudged, all the authorities concur, and manifest legal principles require, that it should be declared that the defendant never agreed to pay the assessment in question either expressly or by way of necessary implication."

*Pettibone v. Smith*, 150 Pa. St. 118, 17 L. R. A. 423, 24 Atl. 693.



— Texas.

35. The word "taxes" refers to general taxes, and not to special assessments, either under the constitutional provision, Sec. 50, Art. XVI, or the statute prohibiting a delinquent from setting up the statute of limitations in proceedings to recover "any taxes due the municipality."<sup>59</sup>

**Taxes and assessments defined.**

36. Taxes are the enforced proportional contributions from persons and property, levied by the state by virtue of its sovereignty for the support of government and for all public needs,<sup>60</sup> and the power of taxation is one which the legislature takes, from the law of its creation, to impose taxes for such purposes,<sup>61</sup> the term itself, as used in the constitution, being applied only to the revenues raised and applied for the purpose of defraying the general expenses of government.<sup>62</sup>

The term "assessment," as ordinarily used, is one of very wide scope. It has been called an "adjusting the shares of contribution by several towards a common beneficial object, according to the benefit received,"<sup>63</sup> and has also been construed to mean not merely the act of the assessor, but the completed act of all the agencies employed in determining the amount and value of property available for taxation. As used in the constitution of Wisconsin, Sec. 3, Art. XI, it has reference to the system of special taxation for municipal improvements existing at the adoption of the constitution, and is a clear recognition of the existence of the power to lay a special assessment.<sup>64</sup>

<sup>59</sup> Allen v. Galveston, 51 Tex. 302; Higgins v. Bordages, 88 Tex. 458, 53 Am. St. Rep. 770, 31 S. W. 52, 803; Galveston v. Trust Co., 46 C. C. A. 319, 107 Fed. 325.

<sup>60</sup> Cooley on Taxation (3d Ed.), 1.

<sup>61</sup> Taylor v. Palmer, 31 Cal. 240.

<sup>62</sup> King v. Portland, 2 Or. 146.

<sup>63</sup> Bouvier, Law Dict., Palmer v. Stumph. 29 Ind. 329.

<sup>64</sup> Weeks v. Milwaukee, 10 Wis. 242.



In California <sup>65</sup> the word "assessment" is employed in the constitution to represent those local burdens imposed by municipal corporations upon property bordering upon an improved street, for the purpose of paying the cost of the improvement, and laid with reference to the benefit the property is supposed to receive from the expenditure of the money. Property not benefited by the improvement cannot be subjected to a tax for it.

**37.** Among different more exact definitions of the term "special assessment," or "local assessment," are the following:

"A local assessment is a contribution for the purpose of constructing works of public improvement for the advantage of a particular district, and not to be levied upon taxable property generally, but upon particularized property to be benefited thereby, and with direct reference to such benefit as the property may receive therefrom." <sup>66</sup>

"A special or local assessment is a burden imposed by law upon real property for a public improvement, the extent of the burden being determined by the special benefits which inure to the assessed property by reason of the improvement." <sup>67</sup>

"A special imposition levied in order to defray the expense of a specific improvement, upon those property owners to whom particular advantages accrue, and in the ratio of those advantages." <sup>68</sup>

**38.** "Local assessments are not ordinary taxes levied for the purpose of sustaining the government, but they are charges laid upon individual property because the property on which the burden is imposed receives a special benefit which is different from the general one which the owner enjoys with others as a citizen of the commonwealth." <sup>69</sup>

<sup>65</sup> Taylor v. Palmer, 31. Cal. 240.

<sup>66</sup> Munson v. Commissioners, 43 La. Ann. 15, 8 So. 906.

<sup>67</sup> 25 Am. and Eng. En. Law (2d Ed.), 1168.

<sup>68</sup> Rosewater, Special Assessments, 85.

<sup>69</sup> Elliott, Roads and Streets (2d Ed.), Sec. 543, and cases cited.



"Special assessments are a peculiar species of taxation, standing apart from the general burdens imposed for state and municipal purposes, and governed by principles that do not apply universally. The general levy of taxes is understood to exact contributions in return for the general benefits of government, and it promises nothing to the persons taxed beyond what may be anticipated from an administration of the laws for individual protection and the general public good. Special assessments, on the other hand, are made upon the assumption that a portion of the community is to be specially and peculiarly benefited in the enhancement of the value of property peculiarly situated as regards a contemplated expenditure of public funds; and, in addition to the general levy, they demand that special contributions, in consideration of the special benefit, shall be made by the person receiving it. The justice of demanding the special contribution is supposed to be evident in the fact that the persons who are to make it, while they are made to bear the cost of a public work, are at the same time to suffer no pecuniary loss thereby, their property being increased in value by the expenditure to an amount at least equal to the sum they are required to pay. That is the idea that underlies all these levies." <sup>70</sup>

<sup>70</sup> Cooley, Taxation (3d Ed.), 1153. And see, also, Ill. Cent. R. Co. v. Decatur, 147 U. S. 197, 37 L. ed. 134, 13 Sup. Ct. Rep. 293, 294; Peake v. New Orleans, 139 U. S. 342, 35 L. ed. 131, 11 Sup. Ct. Rep. 541, 544; Daly v. Morgan, 69 Md. 460, 1 L. R. A. 757, 16 Atl. 300; Ittner v. Robinson, 35 Neb. 133, 137, 52 N. W. 846, 847; Pettit v. Duke, 10 Utah, 311, 37 Pac. 568, 569.

**"Local," or "Special Assessments" defined.**

*Connecticut.*

Special assessments in municipalities upon specific property specially benefited by the local public improvement, for the pur-

pose of paying the expense of that improvement, are taxes. Such assessments are enforced proportional contributions of a somewhat special kind, made *in invitum*, by virtue of legislative authority conferred upon the municipality for that purpose, upon such terms and conditions as the legislature within constitutional limits sees fit to impose.

Sargent v. Tuttle, 67 Conn. 162, 32 L. R. A. 822, 34 Atl. 1028, 1029.

*Illinois.*

A special assessment is an assessment to pay for an improvement for public purposes on



# Legal theories of the power of special assessment.

39. The power of special assessment, although one which has been exercised for many generations, has only been a potent factor in local affairs within the last half century.

real property which is by reason of the locality of the improvement specially benefited. *Morgan Park v. Wiswall*, 155 Ill. 262, 40 N. E. 611, 613.

A special assessment for a public improvement under the statutes in Illinois is a species of taxation, and is authorized only as an exercise of the taxing power. A special assessment should not be levied except for the purpose of making a needed public improvement. *Critchfield v. Bermudez Asphalt Paving Co.*, 174 Ill. 466, 42 L. R. A. 347, 51 N. E. 552. "Special Assessment," as used in Act of April 19, 1872, Art. 9, Sec. 9, relating to the incorporation of cities and villages, and limiting the power of corporate authorities to make public improvements by special assessment or special taxation, to contiguous property only, means an assessment on property specially benefited, without regard to whether it is contiguous or not. *Guild v. Chicago*, 82 Ill. 472. A special assessment is a charge on the specific land benefited, and not against the owner. *Hudson v. People*, 188 Ill. 103, 80 Am. St. Rep. 166, 58 N. E. 964, 965. "General taxes" are levied on the ground of general public benefits, while "special assessment" is a peculiar species of taxation to pay for local improvements, which recognizes the general public interest and benefit,

but rests upon the supposition that a portion of the public are specially benefited in the increase of value to their property. *Shurtleff v. Chicago*, 190 Ill. 473, 60 N. E. 870.

*Louisiana.*

Local assessments are a species of taxes on supposed benefits. *Shreveport v. Prescott*, 51 La. Ann. 1895, 46 L. R. A. 193, 26 So. 664, 672.

The essential characteristic of a local assessment is that it is levied on particularized property, and not on property generally. This feature is the corollary of what in theory, if not in actual practice, is the fundamental principle of the law of local assessment—that the tax should be levied on each particular piece of property in proportion to the benefit that is to be derived, not supposedly, but actually, from the expenditure of the avails of the tax. The mere localness of the tax is not necessarily a distinguishing feature, nor is the fact that the tax was imposed only after a consultation of the taxpayers, for local assessments may be, and often they are, levied without consultation with the contributors; hence a bridge tax levied under authority of the Constitution, on all the property generally in a ward, is not a local assessment, even though for the imposition of it a vote of the taxpayers is required. *Griggsry*



Many theories have been offered, from time to time, as to the source of the power, and upon what particular attribute of sovereignty must we look as the one which must father the manifest benefits of the system, as well as to correct its

Const. Co. v. Freeman, 108 La. 435, 58 L. R. A. 349, 32 So. 399, 400. A local assessment is not a tax, but a consideration for the enhancement of the value of the property of the community. It not being a tax *eo nomine*, it is not governed by the provisions of the Constitution on the general subject of taxation. Vicksburg S. & P. R. Co. v. Goodenough, 108 La. 442, 66 L. R. A. 314, 32 So. 404, 410.

#### *Maryland.*

A local assessment is a tax levied occasionally, as may be required, on a limited class of persons interested in local improvements, and who are presumed to be benefited by the improvement over and above the ordinary benefit which the community in general derives from the expenditure of the money. Gould v. Baltimore, 59 Md. 378, 380.

#### *Minnesota.*

The terms "local" and "vicinity," used in connection with assessments for improvements, are not to be taken as indicating any definite limits, but are usually understood to extend to the real property reported by the assessors to be actually benefited to a certain amount. State v. District Court, 33 Minn. 295, 23 N. W. 222, 229.

#### *Nebraska.*

"Special Assessments" are a peculiar species of taxation, standing apart from the general

burdens imposed for state and municipal purposes, and governed by principles that do not apply generally. They are made upon the presumption that a portion of the community is to be specially and peculiarly benefited in the enhancement of the value of the property peculiarly situated as regards a contemplated expenditure of public funds. Ittner v. Robinson, 35 Neb. 133, 137, 52 N. W. 846, 847. (Citing Cooley on Taxation, like text.) See, also, Daly v. Morgan, 69 Md. 460, 1 L. R. A. 757, 16 Atl. 287, 300; Pettit v. Duke, 10 Utah, 311, 37 Pac. 568, 569.

A special assessment is a tax which, owing to the direct benefit to be received by certain property, is specially levied against the property so benefited in accordance with the benefits. Wilson v. Auburn, 27 Neb. 435, 43 N. W. 257, 259. Special assessment is taxation imposed upon property proportionate to the benefit which it has received from such improvement, the expense of which is to be defrayed by the money realized from the special assessment. The principle which underlies and sustains all special assessments is that the value of the property assessed is enhanced to an amount at least equal to the assessment, which principle cannot be departed from without there being a taking of private property for public use



equally manifest abuses. In theory, it is an equivalent, or exchange, by which the money or property of the land owner is taken from him, and turned over for local public use, for some purpose of a public nature which results also in a private and peculiar benefit to the property upon which the

without compensation. *Hanscom v. Omaha*, 11 Neb. 37, 7. N. W. 739, 741. Special assessment differs from general taxation in this: that the imposition can extend only to the extent of special benefits received, while the benefits which the taxpayer receives in return for general taxation are the enforcement of the laws, protection to life and property, and such other benefits as are shared by the public at large. The principle which underlies special assessments is that the value of the property is enhanced to an amount at least equal to the assessment. *Beatrice v. Brethren Church*, 41 Neb. 358, 59 N. W. 932, 934.

The words "special assessment," as used in statutes conferring power on cities to make such assessments, refer to and mean the same as "special taxation," namely, special impositions on property to the extent of benefits received by it for improvements. *Ibid.*

*New Jersey.*

There is a fundamental distinction between the plan of special assessments and taxation. Special assessments, such as those for improving streets, are benefits, not burdens, and are imposed upon property because the equivalent inheres in or upon the property the moment the assessment is made. *Herrman v. Guttenberg*,

62 N. J. L. 605, 43 Atl. 703, 706. *New York.*

Local or private taxes and assessments are those charges and impositions which are laid on property in a circumscribed locality, to effect some work of local convenience, beneficial to the property specially assessed for the expense of it. *Buffalo City Cemetery v. Buffalo*, 46 N. Y. 506, 509.

*North Carolina.*

"Special assessments," as the term is used with reference to municipal corporations, are impositions in the nature of taxes levied by the city for the payment of local improvements, which attach by force of law to the abutting property benefited thereby. *Raleigh v. Peace*, 110 N. C. 32, 17 L. R. A. 330, 14 S. E. 521, 522.

*Oregon.*

"Special assessments," such as those made for street improvements, etc., are founded on the theory that a portion of the community is to be specially benefited in the enhancement of their property by reason of the contemplated expenditure of the public fund, and is therefore, in addition to the general levy, required to make special contributions for the intended purposes. In theory, at least, the property assessed is supposed to be benefited in the amount corresponding to the as-



imposition is laid, and therefore inures to the advantage of its owner. "It is based upon the theory that the owner of the property assessed is to receive a benefit corresponding with the amount assessed, and that this is to be paid to meet the cost and expense of the improvement. It is, therefore, of no consequence what the value of the lots may be, provided the enhanced benefit is equal to the assessment."<sup>71</sup> It is not in the nature of a contract, for the exchange is a forced one, made by governmental authority, not only without the consent of the property owner, but in very many cases against his actual wishes and active opposition. A review of some of the opinions of the courts will aid us in determining the source of this power. One able jurist, in a dissenting opinion,<sup>72</sup> arrived at the conclusion that it was attributable neither to the power of taxation, nor of eminent domain, but that "it is a distinct power vested in the councils by the charter, to enable them to perform their important function of providing suitable streets and highways for the city, to determine what proportion of the cost, if any, shall be paid by the city, and what portion the parties benefited shall pay." Although the theory is very ingenious, it is against almost all the authorities, and overlooks the posts planted in its way by the provisions of our written constitutions.

assessment by its increased value on account of the improvement. *Mercer v. Kelly*, 20 Or. 86, 25 Pac. 73, 77.

*South Dakota.*

"Special assessment" ordinarily means money ordered or levied for some municipal purpose, to which the funds so collected are to be specifically applied in making the local improvements. *Winona & St. P. R. Co. v. Watertown*, 1 S. D. 46, 44 N. W. 1072, 1073.

*Washington.*

"Local assessments" are not ordinary taxes levied for the pur-

poses of sustaining the government, but they are charges on individual property because the property on which the burden is imposed receives a special benefit, which is different from the general one which the owner enjoys, in common with others, as a citizen of the commonwealth. *Seabor v. Whatcom Co., Com'rs*, 13 Wash. 48, 42 Pac. 552, 555. Legal Theories.

<sup>71</sup> *In re Mead*, 74 N. Y. 216.

<sup>72</sup> *Norfolk v. Ellis*, 26 Gratt. 224.



— Under the police power.

40. Owing probably to the fact that the earliest reported cases were those for drains and sewers, the overflow of rivers, and drainage of marshes, and being for sanitary matters directly affecting the public health, the power of special assessment was most naturally attributed to the police power. The elasticity and limit of expansion of this sovereign power are so great that it was most natural the courts should seize the first theory that seemed to fit the nature of the case, and adopt it as the source of power. To this day, sidewalk, sewer and levee assessments are made, and drainage laws passed in many instances, avowedly under this power.<sup>73</sup> In Texas, the power to compel both street and sidewalk improvements has been attributed to the police power,<sup>74</sup> while in Colorado, it is held to be the sole foundation of the authority to levy a special assessment under the constitution of that state although the court authorizes the imposition to be apportioned according to benefits, and rather illogically held an ordinance void as not giving due notice, while distinctly repudiating the power of taxation as the source of authority.<sup>75</sup> In Tennessee, pavements are constructed under this power, the court expressly holding that to require the owners of town lots to construct pavements along their side-

<sup>73</sup> Cooley on Taxation (3d Ed.), p. 1128, *et seq.*

A statute authorizing cities to construct sewers and to lay the necessary pipe for house connections from the sewer to the curb line of each abutting lot, and authorizing the cost thereof to be charged upon the abutting premises, is not unconstitutional, but is an exercise of the police power. *Van Wagoner v. Patterson*, 67 N. J. L. 455, 51 Atl. 922.

<sup>74</sup> *Adams v. Fisher*, 63 Tex. 651.

<sup>75</sup> *Palmer v. Way*, 6 Colo. 106;

*Brown v. Denver*, 7 Colo. 305, 3 Pac. 455.

An assessment authorizing the cost of sewers to be levied on property in a district according to area and not based on value, benefits or improvements, is a valid assessment under the police power. *Keese v. Denver*, 10 Colo. 112, 15 Pac. 825.

But the council may prescribe the rule of apportionment with reference to special benefits. *Pueblo v. Robinson*, 12 Colo. 593, 21 Pac. 899.



walks, is not an exercise of the taxing power, nor is it a taking of private property for public use.<sup>76</sup>

41. All the authorities agree that the constitutional provision against taking private property without compensation is not intended as a limitation on the police power, subject to which all property is held.<sup>77</sup> And Judge Cooley is authority for the principle that the construction of sidewalks and footwalks is more distinctly referable to the police power than to the right of taxation.<sup>78</sup>

<sup>76</sup> Washington v. Mayor, 1 Swan, 177; Mayor v. Maberry, 6 Humph. 368, 44 Am. Dec. 315; Whyte v. Mayor, 2 Swan, 364.

"It is contended that this ordinance is in the nature of a tax levied on the owners of lots, and as such, that it is unconstitutional, because it is unequal. A tax is a sum which is required to be paid by the citizen annually for revenue for public purposes. But this ordinance levies no sum of money to be paid by the citizens. It requires a duty to be performed for the comfort and well being of the citizens of the town. It is in the nature of a nuisance to be removed.

Mayor v. Maberry, 6 Humph. 368, 44 Am. Dec. 315.

<sup>77</sup> "The clause prohibiting the taking of private property without compensation, is not intended as a limitation of the exercise of those police powers which are necessary to the tranquillity of every well-ordered community, nor of that general power over private property which is necessary for the orderly existence of all governments. It has always been held that the legislature may make police regulations, al-

though they may interfere with the full enjoyment of private property, and though no compensation is given." Sedgwick, Stat. & Const. Law, 434.

"Every citizen holds his property subject to the proper exercise of this power, either by the state legislature directly, or by public or municipal corporations to which the legislature may delegate it. . . . It is well settled that laws and regulations of this character, though they may disturb the enjoyment of individual rights, are not unconstitutional, though no provision is made for such disturbances. . . . If he suffers injury, it is either *damnum absque injuria*, or, in the theory of the law, he is compensated for it by sharing in the general benefits which the regulations are intended and calculated to procure." 1 Dillon Mun. Corp. (4th ed.) 212.

<sup>78</sup> "The cases of assessments for the construction of walks by the side of streets in cities and other populous places are more distinctly referable to the power of police. These foot-walks are not only required, as a rule, to be put and kept in proper condition



42. The Supreme Court of Mississippi, in a very able opinion,<sup>79</sup> in discussing this question, says:

“The police power is incapable of exact definition and of a precise limitation. It seems to be a power to which are referred all governmental acts which are incapable of arrangement under any other distinct head, and which are at the same time justifiable, as internal regulations having in view facility of intercourse between citizen and citizen, the preservation of good order, good manners and morals, and the health of the public.”

But while conceding to it all the power prescribed, the court hold in the same case, a local assessment requiring the lot owner to improve the street in front of his property, as unconstitutional, because there is no apportionment of the tax, although the making and repairing of the sidewalk may be imposed under the police power.

43. The drainage laws of most of the states which have enacted such statutes, frequently provide that they are for the benefit of the public health, and avowedly under the police power.<sup>80</sup> The Wisconsin statute for drainage and

for use by the adjacent proprietors, but it is quite customary to confer by the municipal charters full authority upon the municipalities to order the walks of a kind and quality by them prescribed to be constructed by the owners of adjacent lots at their own expense, within a time limited by the order for the purpose, and, in case of their failure so to construct them, to provide that it shall be done by the public authorities, and the cost collected from such owners or made a lien upon their property. When this is the law, the duty must be looked upon as being enjoined as a regulation of police, because of

the peculiar interest such owners have in the walks, and because their situation gives them peculiar fitness and ability for performing with promptness and convenience, the duty of putting them in proper state, and of afterwards keeping them in a condition suitable for use. Upon these grounds the authority to establish such regulations has been supported with little dissent.”

Cooley, *Taxation* (3d Edition), 1128.

<sup>79</sup> *Macon v. Patty*, 57 Miss. 378, 34 Am. Rep. 451.

<sup>80</sup> The legislature has power to authorize the organization of companies for the purpose of



reclamation of lands, and providing for the payment of the expense by a special assessment on the property benefited, has been held to be a valid exercise of this power;<sup>81</sup> and in Minnesota, the drainage of wet lands "to promote the public health and welfare" is a valid exercise of the same power, and under it the expense may be imposed upon the property benefited.<sup>82</sup> And, by analogy, a statute authorizing a city to assess a lot on which a nuisance exists with the entire cost of abating the nuisance by improving the lot, does not violate any constitutional provision, being an exercise of this power.<sup>83</sup> Under the Maryland statute of 1797, giving authority "to tax any particular part of the city, for paving the streets, lanes or alleys therein, or for sinking wells or erecting pumps, which may appear for the benefit of such particular part or district," the preservation of the public health is a benefit within the meaning of the act,<sup>84</sup> and it may be stated as a general proposition that any legislative act for the protection of the public is not invalidated merely because it creates a burden upon, or results in a depreciation of property.<sup>85</sup>

**44.** Other subjects of municipal supervision, desirable for sanitary purposes, or those of safety, such as sprinkling and sweeping streets,<sup>86</sup> and removing snow from sidewalks, are

draining swamp lands, and such authority is derived from the police power.

*O'Reiley v. Kankakee, &c., Draining Co.*, 32 Ind. 169.

Construction of drains is within the police power, and the expense of their construction may be imposed without consideration of benefits conferred.

*Sessions v. Crunkilton*, 20 Ohio St. 349.

<sup>81</sup> *Bryant v. Robbins*, 70 Wis. 258, 35 N. W. 545; *Donnelly v. Decker*, 58 Wis. 461, 46 Am. Rep. 637, 17 N. W. 389.

<sup>82</sup> *McGhee v. Commissioners*, 84 Minn. 472, 88 N. W. 6; *Dowlan v. Sibley Co.*, 36 Minn. 430, 31 N. W. 517; *Lien v. Commissioners*, 80 Minn. 58, 82 N. W. 1094.

<sup>83</sup> *Horbach v. Omaha*, 54 Neb. 83, 74 N. W. 434.

<sup>84</sup> *Mayor, &c. v. Hughe's Admr.*, 1 Gill & J. 480, 19 Am. Dec. 243.

<sup>85</sup> *Given v. State*, 160 Ind. 552, 66 N. E. 750.

<sup>86</sup> As the general public has an interest in keeping the streets clean, a city may, in the exercise of the police power conferred upon it by the state, order them swept;



upon their face referable to this power; and it is somewhat noticeable that as to the former subject, courts are divided as to the power to lay a charge by way of special assessment, as will be seen later; while as to the latter subject, while courts are divided as to the right to enforce an ordinance providing a fine for failure to remove snow from the walk,<sup>87</sup> no case supporting an attempt to levy a special assessment, as such, for such removal, is to be found in the books.

But with the irresistible and marvelous growth of modern cities, the power of police, elastic though it be, could not be stretched to keep pace with the necessities presented, and it was soon definitely settled that it could not embrace the various improvements of acquiring land, opening, grading and paving streets, and other cognate matters.

— Under the power of eminent domain.

45. The process of evolution is perhaps as noticeable in law as in any of the exact sciences. In no particular branch is it more marked than in the law appertaining to local

and as the abutting owner derives a benefit from such sweeping not enjoyed by the general public, he may be assessed to pay the expense; and such assessment does not amount to a taking of private property without compensation and without due process of law. And as such owner is fully compensated for his outlay in the enhanced value of his property, he may also be taxed generally along with the remainder of the public for cleaning other streets in which the public alone have an interest.

*Reinken v. Fuehring*, 130 Ind. 382, 15 L. R. A. 624, 30 Am. St. Rep. 247, 30 N. E. 414.

<sup>87</sup> Petition for *certiorari* to review action of police court in fining petitioner for failure to re-

move snow from the sidewalk as required by ordinance. Refused.

*Shaw, C. J.* "We think it is to be regarded as a police regulation, requiring a duty to be performed, highly salutary and advantageous to the citizens of a populous and closely built city, and which is imposed upon them because they are so situated as that they can most promptly and conveniently perform it, and it is laid, not upon a few, but upon a numerous class, all those who are so situated, and equally upon all who are within the description composing the class."

*Petition of Nathaniel Goddard*, 16 Pick. 504 (1835), 28 Am. Dec. 259.



or special assessments. With the great growth of cities in the past half century, coupled with the demand for improved conditions of living, new and complex legal problems were presented for solution. Extending a street through a city suburb, merely for the accommodation of a rapidly growing population, involving the condemnation of land under the power of eminent domain, naturally turned the eyes of the courts to that sovereign power as the one to invoke as authority for the acts involving a derogation of private right, the police power being manifestly insufficient to cover the case.

46. The sovereign power of taxation was in most of the states coupled with a constitutional provision requiring its exercise to be "equal and uniform," which was a manifest impossibility in many cases of special assessment, even without considering the underlying principle of benefits. And because of this difficulty, many courts, especially in their earlier decisions, were inclined to rest the exercise of all authority for special assessment upon the power of eminent domain, and for a time theory and practice went hand in hand. The extension of city streets resulted almost universally in an increase in the value of adjoining property, and what more conformable to natural equity and justice than that the landholder should compensate by the surrender of his land necessary for the street, for the greatly enhanced value to the remainder. This plan evaded all questions as to equality and uniformity of taxation, and under the Illinois Constitution of 1848, the Supreme Court of that state upheld the authority to levy special assessments under the power of eminent domain, upon the theory that both the exercise of the right of eminent domain and the power of taxation are limited, and the rule was deduced, not from general principles, but from the constitution itself, that there did not exist, either in the legislature or in any of the subdivisions of state sovereignty, any power of apportioning the taxes, whether of a general or of



a local character, except on the principles of equality and uniformity.<sup>88</sup>

47. But the same court held that the doctrine of eminent domain is strictly applicable only to the condemnation of property, and not to the levy of a tax,<sup>89</sup> and that the power of taxation is essential to the exercise of the power of eminent domain.<sup>90</sup> But when it was decided that the

<sup>88</sup> It is apparent to all who read it that our constitution is very stringent in regard to equal taxation whether general or local. Take away the assessment of injuries and benefits, the special assessments become the same in any substance as taxes. This will not be denied. Why then should not the same principles apply? But the constitution while fixing the rule in regard to taxation is silent in regard to special assessments. Why was this since they were well known means at the time of the adoption of the constitution of local improvements? Undoubtedly it seems to us, because its forms regarded them as a proceeding under the right of eminent domain, and the property of the citizen as sufficiently protected under the clause requiring just compensation.

Chicago v. Larned, 34 Ill. 203; Ottawa v. Spencer, 40 Ill. 211; Bedard v. Hall, 44 Ill. 91; Wright v. Chicago, 46 Ill. 44; Adams Co. v. Quincy, 130 Ill. 566, 6 L. R. A. 155, 22 N. E. 624. See also, Griffin v. Dogan, 48 Miss. 11.

If a special assessment is not taxation it must be an exercise of the power of eminent domain, and consequently special assessments which do not provide for compensation in some mode, either by

money or by benefits, will be invalid.

Chicago v. Larned, *supra*.

<sup>89</sup> Hessler v. Drainage Commissioners, 53 Ill. 105; Harward v. St. Clair &c. Drainage Co., 51 Ill. 130.

<sup>90</sup> Where the provision made for the raising of money to pay for land condemned for a public use is the levy of a tax, such tax levy is the mode of obtaining the compensation awarded to the owner. In such case, the power of taxation and the right of eminent domain are made to go hand in hand, and the one aids the other. The constitutional exercise of the right of eminent domain constitutes a resort to the power of taxation. The latter power, when thus invoked as a means of providing compensation for the taking of private property, is necessarily restricted by the constitutional requirement in regard to such taking. The tax power must be so exercised as to give the property owner a just compensation, and hence cannot be exercised arbitrarily.

Bloomington v. Latham, 142 Ill. 462, 18 L. R. A. 487, 32 N. E. 506.

The proceeding by which a city takes private property for public use, under its power of eminent



value of land taken for public use could not be compensated in benefits to the residue of the tract, but must be made in money,<sup>91</sup> it was generally admitted that the right of eminent domain could no longer be successfully appealed to as the authority for special assessments, and the opinion of Judge Ruggles, in *The People v. Mayor, etc. of Brooklyn*, 4 N. Y. 419, was such a masterly one, and so profoundly reasoned, that it gradually percolated through all sister jurisdictions, and placed the authority unmistakably upon the taxing power, where it remains to-day.<sup>92</sup>

domain, is distinct in character from that by which it raises money, under its power of taxation, to make compensation for property so taken. The first cannot be exercised except in obedience to the constitutional mandate that the compensation must be first ascertained by a jury. But the constitution does not require benefits to be so ascertained.

*St. Louis v. Buss*, 159 Mo. 9, 59 S. W. 969. See, also, *Fairchild v. St. Paul*, 46 Minn. 540, 49 N. W. 325; *State v. Rapp*, 39 Minn. 65, 38 N. W. 926; *State v. Oshkosh*, 84 Wis. 548, 54 N. W. 1095; *Tide-Water Co. v. Coster*, 18 N. J. Eq. 518, 90 Am. Dec. 634; *Nichols v. Bridgeport*, 23 Conn. 189, 60 Am. Dec. 636.

<sup>91</sup> *Norfolk v. Chamberlain*, 89 Va. 196, 16 S. E. 730; *McKusick v. Stillwater*, 44 Minn. 372, 46 N. W. 769. *Contra*, *Genet v. Brooklyn*, 99 N. Y. 296, 1 N. E. 777.

<sup>92</sup> The constitutional provisions for trial by jury, and for due process of law, which control in respect to the mode of ascertaining the amount to be paid to one whose property is taken for public use, do not apply to the ques-

tion of the necessity for such taking.

*People v. Smith*, 21 N. Y. 595.

The compensation to which a land-owner, part of whose land is taken for a street improved, is entitled to receive for the part so taken, may be offset, *pro tanto*, by the benefits assessed against the remainder.

*Genet v. Brooklyn*, 99 N. Y. 296, 1 N. E. 777.

When the public good requires, property may be taken by the right of eminent domain; and in such case what one parts with is just so much more than his share of contribution to the public good, and hence for such property he must receive compensation in money or its equivalent.

*People v. Mayor*, 4 N. Y. 419, 55 Am. Dec. 266; *Stuart v. Palmer*, 74 N. Y. 183, 30 Am. Rep. 289.

Under the Const. of Wisconsin, Art. XI., Sec. 2, a municipal corporation may not take private property for public use, against the consent of its owner, without the necessity thereof being first established by the verdict of a jury.



— Under the power of taxation.

48. In the opinion by Judge Ruggles referred to in the last section, he points out some of the distinctions between the powers of taxation and of taking private property for public use, which had been referred to in the same case by the court below as being “by no means easy to trace the dividing between the two kinds of taking private property, and that the two appear in principle to be somewhat blended. Both are exercises of the sovereign power over individual property, and in both cases the individual is presumed to receive, or does in fact receive some equivalent for the contribution.” But the able judge in the Court of Appeals found no difficulty in distinguishing them. He says, “Taxation exacts money, or services, from individuals, as and for their respective shares of contribution to any public burthen. Private property taken for public use by right of eminent domain, is taken not as the owner’s share of contribution to a public burthen, but as so much beyond his share. Special compensation is therefore to be made in the latter case, because the government is a debtor for the property so taken; but not in the former, because the payment of taxes is a duty and creates no obligation to repay, otherwise than in the proper application of the tax. Taxation operates upon a community or upon a class of persons in a community and by some rule of apportionment. The exercise of the right of eminent domain operates upon an individual, and without reference to the amount, or value exacted from any other individual, or class of individuals.”

49. When one considers that a trained judicial mind, like that of the judge who delivered the opinion in the same case in the court below,<sup>93</sup> confuses the many striking points of difference in the two powers, so completely classified by the distinction pointed out in the upper court, and knowing that the two operations of condemning private property for public use, and of levying a special assess-

<sup>93</sup> *People v. Mayor, &c.*, 6 Barb. (N. Y.) 209.



ment to pay for it, are frequently, or even usually, performed by the same board or officers, and combined in the same proceeding, it is not strange that judicial opinions should have been so diverse.

It is axiomatic that private property may be taken for public use under the right of taxation, the power of police, or that of eminent domain. In the latter case, compensation must be made to the owner, while under the police power it is principally a matter of legislative discretion. Under the power of taxation for general governmental purposes, private property may in effect be confiscated,<sup>94</sup> but under the power of special assessment, the limitation is the extent of the benefit conferred, as we shall see later. However, it is now settled in the Federal Courts, and in the Courts of last resort of practically every state of the Union which recognizes the power of special assessment, except Colorado, that all such assessments are laid under the taxing power.<sup>95</sup>

<sup>94</sup> Private property may be constitutionally taken for public use by the right of taxation or the right of eminent domain.

*People v. Mayor, &c., of Brooklyn*, 4 N. Y. 419, 55 Am. Dec. 266.

The constitutional restriction as to the taking of private property for public use does not apply to the power of taxation.

*State v. Newark*, 35 N. J. L. 168.

<sup>95</sup> The authority to levy an assessment is usually referable to and an exercise of the taxing power. *Holley v. Orange Co.*, 106 Cal. 420, 39 Pac. 790.

Special assessment is an exercise of the power of taxation vested in the state government, and is not in conflict with any provision of the constitution.

*Nichols v. Bridgeport*, 23 Conn. 189, 60 Am. Dec. 636.

The authority to make special assessments is found in the taxing power of the legislature.

*New London v. Miller*, 60 Conn. 112, 22 Atl. 499.

An assessment in proportion to benefits is a legitimate exercise of the taxing power under Const. of 1802, and does not violate contract rights.

*Scovill v. Cleveland*, 1 Ohio St. 126; *Hill v. Higdon*, 5 Ohio St. 243, 67 Am. Dec. 289; *Marion v. Epler*, 5 Ohio St. 250.

Assessments for street grading, upon lots fronting on the street, are an exercise of the taxing power of the government, and not the right of eminent domain.

*McComb v. Bell*, 2 Minn. 295, Gil. 256.

Under the constitution of 1870, the levying of special assessments is regarded as a species of taxa-



**Of the power to levy special assessments — Constitutional authorization unnecessary.**

50. Although, as we have just seen, by the almost unanimous consensus of judicial opinion, the power to authorize the laying of special assessments is attributable to the sov-  
 tion, and they may not be levied under the power of eminent domain, for the reason that property taken for public use cannot be compensated for in benefits. Benefits are only allowed as a set-off to damages to property not taken.

Adams Co. v. Quincy, 130 Ill. 566, 6 L. R. A. 155, 22 N. E. 624.

Under Section 9, Article 9, of the present Illinois constitution, municipalities may be vested with power to levy and collect taxes, both general and special. The former must be uniform in respect to persons and property, while taxation of contiguous property for local public improvements has no limitation as to uniformity and equality. Under the power conferred by this clause, the legislature may authorize local improvements to be made by special assessments to the extent the property assessed will be benefited, or by special taxation of contiguous property according to its frontage upon the proposed improvement, or according to its value, or by general taxation, or partly by general, partly by special taxation and partly by special assessment. Either mode involves taxation, and both special assessments and special taxation are treated by the constitution as a species of taxation.

Adams Co. v. Quincy, 130 Ill. 566, 6 L. R. A. 155, 22 N. E. 624.

Special assessments are a species of taxation, peculiar in their nature, and subject to special rules, but the power to levy them is referable to the taxing power.

Wabash E. R. Co. v. Commissioners, 134 Ill. 384, 10 L. R. A. 285, 25 N. E. 781.

The power to make special assessments is referable to and included in the taxing power, and the purpose of such taxation must be a public one. Even the owner of land benefited cannot be taxed to improve it, unless public considerations are involved.

Elmore v. Drainage Comr's, 135 Ill. 269, 25 Am. St. Rep. 363, 25 N. E. 1010.

An objection that a special taxation ordinance deprives the party taxed of his property without compensation, in violation of the constitution, cannot be sustained, as the power to specially tax contiguous property is a branch of the taxing power, and is not an exercise of eminent domain.

C. & N. W. R. Co. v. Elmhurst, 165 Ill. 148, 46 N. E. 437.

Special tax assessments are sustainable under the taxing power.

Garrett v. St. Louis, 25 Mo. 505, 69 Am. Dec. 475; Keith v. Bingham, 100 Mo. 300, 13 S. W. 683; St. Joseph v. Farrell, 106 Mo. 437, 17 S. W. 497.

Although local assessments are referable to the taxing power, they are not, strictly speaking, taxes.



ereign power of taxation, yet the courts of last resort exhibit a wide difference of opinion as to the necessity of express constitutional authority for the exercise of that power. The attempts to attribute the legislative right to enact measures

*Independence v. Gates*, 110 Mo. 374, 19 S. W. 728.

The right of providing that benefits or advantages shall be considered in determining the just compensation required by the constitution, is based on the taxing power.

*Newby v. Platte Co.*, 25 Mo. 253.

An ordinance passed in compliance with a petition signed by the requisite number of property holders, which provides for so grading a street that it will conform to a grade previously established by the city, is not an ordinance passed in the exercise of eminent domain, but one enacted under the taxing powers of the city.

*Saxton Nat. Bank v. Bennett*, 138 Mo. 494, 40 S. W. 97.

The provision of the Missouri Constitution declaring that private property cannot be taken for ditches and drains, or other sanitary purposes, and that whether the contemplated use be really public shall be a judicial question, is intended to regulate the right of eminent domain, and has no application to a special taxbill to pay for the construction of a sewer. That is referable to the taxing power.

*Heman v. Schulte*, 166 Mo. 409, 66 S. W. 163.

The imposition of taxes is an exercise of the sovereign power, which, under our system, may be exercised by the legislature with-

out limitation, except as restricted by State or Federal constitutions. That this power may be delegated to the municipalities of the state, as instrumentalities of government, for the purpose of carrying on municipal affairs, is everywhere conceded.

*Davis v. Litchfield*, 145 Ill. 313, 21 L. R. A. 563, 33 N. E. 888.

Special taxation of contiguous property and special assessments for local improvements are branches of the taxing power, and not an exercise of the power of eminent domain.

*C. & A. R. Co. v. Joliet*, 153 Ill. 649, 39 N. E. 1077.

An assessment upon city lots fronting a street, for the purpose of raising money to grade the street, is an exercise of the sovereign right of taxation, and not of the power to appropriate private property to public use under the right of eminent domain.

*Emery v. San Francisco Gas Co.*, 28 Cal. 345.

A charter provision making abutting property owners liable to persons other than the city for injury to travellers by defective walks, is void as not being within the taxing power.

*Noonan v. Stillwater*, 33 Minn. 198, 53 Am. Rep. 23, 22 N. W. 444.

The power to assess for local improvements is a part of the great legislative prerogative of taxation.



for the delegation and control of this power to various, and somewhat vague and cloudy expressions in the constitutions of the various states, and to refinements on the meaning of the word "assessment" where it appears in those instru-

State v. Fuller, 34 N. J. L. 227.

Assessments for local improvements are clearly an exercise of the taxing power.

State v. Newark, 35 N. J. L. 168.

A special assessment is distinguishable from our general idea of a tax, but owes its origin to the same source of power, and this power to tax should exist in the discretion of the legislature, without the interference of the courts, unless some radical principle is violated, or the guarantee of the constitution disturbed under color of its exercise.

State v. Fuller, 34 N. J. L. 227.

The legislation complained of here "(grading and paving a street)" is of the character of much that has prevailed in Pennsylvania without complaint; which has been often sanctioned by judicial tribunals; and which is made indispensable by the growth and prosperity of towns and cities. It is a fair and legitimate mode of taxation, because it imposes the burthens exactly where the benefits are conferred, and its constitutionality is unquestionable.

Schenley v. Allegheny, 25 Pa. St. 128; Gault's Appeal, 33 Pa. St. 94.

The levy of special assessments on property benefited by a levee, is an exercise of the taxing power, and cannot be justified as an exercise of the police power.

Reelfoot, &c., District v. Dawson, 97 Tenn. 151, 34 L. R. A. 725, 36 S. W. 1041.

Local assessments for street improvements are an exercise of the taxing power.

Violett v. Alexandria, 92 Va. 561, 31 L. R. A. 382, 53 Am. St. Rep. 825, 23 S. E. 909; Norfolk v. Young, 97 Va. 728, 47 L. R. A. 574, 34 S. E. 886.

Levying a local assessment is not a taking of private property "for public use" under the power of eminent domain, but is the exercise of the right of taxation inherent in every sovereign state.

Allen v. Drew, 44 Vt. 174.

The foundation of the power to levy special assessments is the right of taxation, rather than the police power or the right of eminent domain.

Hackworth v. Ottumwa, 114 Iowa, 467, 87 N. W. 424; Allen v. Davenport, 65 C. C. A. 641, 132 Fed. 209.

Levying a special assessment upon lots for building streets and sidewalks in front of them, or for building piers or breakwaters, is not a taking, in the constitutional sense, but an exercise of the taxing power for the public benefit. Weeks v. Milwaukee, 10 Wis. 242; Soens v. Racine, 10 Wis. 271. They are an exercise of the taxing power. Charnock v. Fardoche, &c., Co., 38 La. An. 323; Garrett v. St. Louis, 25 Mo. 505, 69 Am. Dec. 475; Springer v. Wal-



ments, are numerous, and not only difficult of exact analysis, but impossible of reconciliation.

A careful consideration of the term "sovereign power of taxation" would seem to furnish the key with which the problem may be solved. If it be, indeed, a sovereign power, then it can be exercised only by the sovereign, or as delegated by the sovereign.

It is admitted that the government of the United States is one of enumerated powers, and to the Federal Constitution must we turn for the authority to exercise any of the powers which the national government assumes to possess.<sup>96</sup> The Tenth Amendment to the Constitution of the United States provides that the "powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, and to the people." At the declaration of independence, the prerogatives of the sovereign which were held by him in trust for his subjects, were immediately assumed and held by the people.<sup>97</sup> And the people of the several states, both under the organic law

ters, 139 Ill. 419, 28 N. E. 761; Roundtree v. Galveston, 42 Tex. 612; Alexander v. Mayor, &c., 5 Gill, 383, 46 Am. Dec. 630; Gould v. Mayor, &c., 59 Md. 378; State v. St. Louis, 62 Mo. 244; McGuire v. Brockman, 58 Mo. App. 307; McComb v. Bell, 2 Minn. 295, Gil. 256; Stinson v. Smith, 8 Minn. 366, Gil. 326.

The laws requiring levees to be made on lands adjoining the Mississippi River are not laws imposing a tax within the meaning of Sec. 3, Act of Congress Feb. 20, 1811, exempting lands sold by Congress from any tax imposed by the authority of the state government for five years from the date of sale.

Crowley v. Copley, 2 La. An. 329.

#### **Note.**

Although the Supreme Court of the United States have said that there is no limitation whatever upon the legislative power of the states, as to the amount or objects of taxation, it is manifest that this statement is too broad. In the first place, it must be qualified to the extent that it is limited by the state constitutions, and outside of those limitations, by the further one, that it can be unlimited only as to general taxes for general purposes. For local taxes for local improvements, the philosophical and just limitation is that of the benefit received.

<sup>96</sup> Cooley, Const. Lim. 11.

<sup>97</sup> O'Connor v. Pittsburgh, 18 Pa. St. 187.



and the common law, retained all the powers not expressly granted to the National Government, or prohibited to the states, and the power of taxation by local assessment falls in neither category. It is a settled rule of construction that the limitations imposed by the Federal Constitution are restraints upon the power of Congress, and not restraints upon the power of the States, except where the latter are specially mentioned.<sup>98</sup>

51. The Constitutions of the various States are not grants of power, but apportion and restrict the powers inherently possessed by the States. The law-making power of the legislature is supreme within its proper sphere, and it may establish whatever is suitable for government to do, qualified only by the limitations and prohibitions of the Constitution.<sup>99</sup> Taxation, being an inherent sovereign power, may be directed and controlled by the Legislatures of the several sovereign States, subject only to the restrictions mentioned, and it is unnecessary for a Constitution to confer upon the Legislature in express terms a power which is inherent in that body; and it necessarily follows that the power to levy special assessments for local public improvements, which are levied under the taxing power, needs no express authorization of constitutional creation. In the absence of any constitutional provision upon the subject, the power of taxation by special assessment exists, in the legislature, as an inherent municipal power.<sup>1</sup>

52. This view receives confirmation from a consideration of the old Articles of Confederation, where the question of construction was presented in much broader shape. Article II provided that "Each State retains its sovereignty,

<sup>98</sup> Cooley, Const. Lim. 29. This statement has been criticized as being too narrow, and as eliminating the theory of restraint by necessary implication. See McCulloch v. Maryland, 4 Wheat. 316, 4 L. ed. 579; Gibbons v. Ogden, 9 Wheat. 1, 6 L. ed. 23.

<sup>99</sup> Philadelphia v. Field, 58 Pa. St. 320; State v. W. U. Tel. Co., 73 Me. 518.

<sup>1</sup> Donnelly v. Decker, 58 Wis. 465, 46 Am. Rep. 637, 17 N. W. 389.



freedom and independence, and every power, jurisdiction and right which is not, by this confederation, expressly delegated to the United States in Congress assembled." The Constitution, as originally adopted, contained no equivalent for this canon of construction. The Tenth Amendment was intended to serve as a compromise between the two extreme views, and it will be observed that the controlling word "especially," found in the Articles of Confederation is omitted in the Tenth Amendment.<sup>2</sup>

**53.** It is believed that this view of the rationale of the principle of special assessment rests upon a foundation which is broad enough to sustain the great structure which has so largely been built up during the last generation, and which has assumed such enormous importance in the fiscal management of municipalities. And it is somewhat significant that some of the courts that were at first most reluctant to acknowledge the existence of the power, in the absence of express constitutional provision therefor, have since gone to the extremest limit in sustaining the omnipotence of the Legislature in the application and control of such power.

#### **Restraints upon power to levy special assessments.**

**54.** That the power, therefore, to levy these impositions, is inherent in the Legislature of each of the several States, unless restrained in the State Constitution, is manifest, if the foregoing reasoning be correct.<sup>3</sup> But, as will be attempted to be demonstrated in the next chapter, the Legislature is not omnipotent in either exercising or delegating this power, but is restrained by three primary principles of law. It must be for a public purpose, as taxation can be exercised for none other; the property upon which the charge is laid

<sup>2</sup> Miller on Const. U. S. 650.

<sup>3</sup> The author is not unmindful of the opinion in *Hurford v. Omaha*, 4 Neb. 336, holding that authority to levy and collect these

assessments, is an express constitutional power, resting alone upon constitutional authority; but believes it contrary to the current of authority and better reason.



must be peculiarly and specially benefited by the work; and the charge must be apportioned according to the benefits by some reasonable rule, and must not exceed such benefits.<sup>4</sup>

**What is meant by "taxation by special assessment."**

55. It appearing from the practically unanimous opinions of courts and text-writers that the right to lay special assessments is derived from the taxing power, and having examined both the analogies and distinctions between a "tax" and an "assessment," and assuming for the present that benefit resulting to the property assessed is the only legal and logical excuse for the system, as will be shown hereafter, we are in possession of the material to formulate a definition of the term "Taxation by Special Assessment," which will eliminate some of the features in the definitions heretofore quoted which seem to be contrary to the weight of authority, and perhaps more completely include the different factors which make up the sum total.

It appears to be a universal rule that this peculiar imposition is levied upon real estate, unless we except the charge laid in Louisiana for the maintenance of the levee system upon the produce of both land and sea protected thereby, and which is more in the nature of a special tax. It involves the idea of permanence in the improvements, notwithstanding such temporary and evanescent subjects as street sprinkling and sweeping have by a few courts been adjudged proper subjects of the power. The word "special" would seem to exclude such objects, and to indicate that the power is not exercised at regular intervals, but only as occasion arises. It is not a burden upon the land, because the latter suffers no diminution in value thereby, and it is immaterial whether the land upon which it is laid belongs to a citizen or an alien, for the land alone is liable for the charge. Like all impositions in the nature of a tax, it must be laid upon property within a clearly defined district,

<sup>4</sup> State v. Reis, 38 Minn. 371, 38 N. W. 97.



and by some reasonable rule of uniformity within such district. Within these principles, the author submits the following as a definition of the subject of this work:

**Definition.**

56. Taxation by Special Assessment is a compulsory charge upon real estate within a pre-determined district, made under express legislative authority, for defraying in whole or in part the expense of a permanent public improvement therein, enhancing the present value of such real estate, and laid by some reasonable rule of uniformity based upon, in the ratio of, and limited by, such enhanced value.

**Objections to the system.**

57. Not only property owners, but judges of the courts of last resort, have expressed in forcible terms their opinion of the many acts of iniquity and injustice perpetrated under this system. "Among the manifold evils complained of in municipal administration, there is no one, in my judgment, calling more loudly for reform than this arbitrary system of local assessments." So said a distinguished Chief Judge of one of our greatest courts,<sup>5</sup> and it has been echoed at many a hearing before other courts.

In those states whose courts practically admit the omnipotence of the Legislature, not only in fixing the taxing district, but in apportioning the tax on any arbitrary theory of cost or frontage, the opportunity afforded the ministerial department of the public service to do acts of injustice and oppression, are very great. The officers and boards vested with the power, being officers or employees of the municipality, fail to appreciate the fact that the law imposes upon them duties which are judicial in their nature, and that they should be as strenuous in protecting the property of an individual from undue imposition, on the one hand, as they are in preventing him from escaping the payment of a

<sup>5</sup> Church, C. J., in *Guest v. Brooklyn*, 69 N. Y. 516.



just tax, on the other. But as a rule, the estimate of benefits is stretched so as to cover the entire expense of the improvement, and the unfortunate and dissatisfied property owner is relegated to the narrow remedy usually given by statute; and, if the amount be comparatively small, it is less expensive for him to submit to the injustice than to assert his right. In the great majority of instances, the rankest injustice is thus permitted, which would be even greater if the following expression from the Supreme Court of Pennsylvania were to become acknowledged law in all jurisdictions:

“It would be intolerable if in every instance of special taxation the question of benefits could be thrown into the jury-box. It would introduce into municipal government a novel and dangerous feature. It would substitute for the responsibility of councils, limited though it be, the wholly irresponsible and uncertain action of jurors. It is better ‘to endure the ills we have, than to fly to those we know not of.’ ”<sup>6</sup>

It may be that the maxim “*de minimis non curat lex*” is especially applicable in special assessment cases, but to hold to the extent indicated in the opinion would permit cases of grand larceny to be punished, but to allow petit larceny to flourish unchecked.

### **Assessment of cost of work.**

**58.** In some jurisdictions, few in number, and growing fewer, the cost of the improvement, irrespective of benefits or apportionment, is assessed against abutting property, and has been upheld as within the power of the Legislature by both Courts and text-writers. This method of using the power of special assessment is illogical, dangerous and unjust, and, as stated by a distinguished writer, “It is an

<sup>6</sup> *Michener v. Philadelphia*, 118 Pa. St. 535, 12 Atl. 174, holding that a plea that a sewer is neither a private benefit nor a public necessity cannot be permitted.



archaic practice, suitable to archaic conditions.”<sup>7</sup> And in the same article this author says even of the principle of taxing according to benefit, that “the total appropriation of new values is as much confiscation as the appropriation of former values would have been. Injustice is not consciously intended only because a logical fallacy is not perceived. None the less the injustice would be violent in principle, and most oppressive in effect, just as the intellectual confusion is very deeply seated, and reaches very far.”<sup>8</sup>

### Further objections.

59. Another objection, and a very pertinent one, is that improvements of streets are ordered far ahead of actual needs, oftentimes in the interests of speculators, and against the objections of the property owners, thus fostering extravagance and corruption, to the very verge of audacity. By collusion of officials and contractors, exorbitant prices are paid, and in the days of the Tweed *régime*, not infrequently the expense of laying out and improving an avenue was greater than the total value of abutting property, which was thus confiscated.<sup>9</sup> These practices well deserve the scathing words applied to them by Judge Church, that “to force an expensive improvement upon a few property owners, against their consent, and compel them to pay the entire expense,

<sup>7</sup> Duke of Argyll, *The Betterment Tax*, Contemporary Review, June, 1890.

<sup>8</sup> The Duke opposes the principle of appropriating the “unearned increment.” He argues that if the rates were formerly £30 on a rental value of £100, and by the improvement the rental value was doubled, that then the rate payer would contribute £60 annually, or in proportion to the increased rate, although £2000 of somebody’s money has been expended in the improvement. To one

brought up in the school of the necessity of special assessment, the view thus expressed is extremely narrow.

<sup>9</sup> Lots valued at \$200, \$400 and \$500 were subjected to a special assessment aggregating \$884.08, \$1,072.88 and \$3,871.25 respectively, and these examples occurred under a law prohibiting the levy of a special assessment exceeding one-half the value of the property benefited. Special Report of Comptroller, Brooklyn, 1880.



under the delusive pretense of a corresponding specific benefit conferred upon their property, is a species of despotism that ought not to be perpetuated under a government which claims to protect property equally with life and liberty.<sup>10</sup>

60. If these words are appropriate when the basis of assessment is, theoretically, the actual benefit conferred, they are infinitely more applicable to cases where this principle is either ignored, or used merely as a legal fiction. Where the distinction between general taxation and special assessment is lost sight of, courts go to greater extremes in asserting the legislative prerogative than we believe to be warranted. This matter will be more thoroughly discussed later, but for the sake of making clear the principles which the author believes to be the corner stone of the whole theory of general taxation and of special assessment, the following brief statement is submitted. General taxation, except as limited by organic law, is limited only by the ability of the person taxed,<sup>11</sup> and may result in confiscation; special assessment is limited to the actual enhanced value of the real estate affected, the ability of the owner being outside the question, and can never result in confiscation. The tax is a burden, and to that extent reduces the value of the land. An assessment is not a burden, but an equivalent for a benefit, and does not reduce the value of the land.<sup>12</sup> An early case held, in effect, that the power of special assessment, being attributable to the power of taxation, naturally involved the right to apportion the tax, and except in cases where the proceeding was only colorable, and was really an exercise of the right of eminent domain, the discretion of the legislature was beyond judicial control, regardless of how onerous the burden imposed might be.<sup>13</sup> But the world is built on

<sup>10</sup> *Guest v. Brooklyn*, 69 N. Y. 516.

<sup>11</sup> *Commissioners, &c., v. Harrell*, 147 Ind. 500, 46 N. E. 124.

<sup>12</sup> *Angell & Durfee*, Law of

Highways, 153; *Canal Trustees v. Chicago*, 12 Ill. 403.

<sup>13</sup> *Scovill v. Cleveland*, 1 Ohio St. 126.



moral foundations, and in the long run justice and equity are bound to prevail against injustice and wrong-doing, and courts will so construe the law as to attain this desirable end.

61. In two cases of comparatively recent date, the Supreme Court of the United States has largely eliminated the force of the objection to the system that we are now considering, and laid down two principles which are undeniably correct, and entitled to be carved in golden letters upon the monument of modern jurisprudence. In the first case,<sup>14</sup> the court say, "The exaction from the owner of private property of the cost of a public improvement in substantial excess of the benefits accruing to him is, to the extent of such excess, a taking under the guise of taxation, of private property for public use without compensation." And in a somewhat later case,<sup>15</sup> the court used the following language: "It may be conceded that courts of equity are always open to afford a remedy where there is an attempt, under the guise of legal proceedings, to deprive a person of his life, liberty, or property without due process of law. And such, in the opinion of a majority of the judges of this court was the nature and effect of the proceedings in the case of *Norwood v. Baker*." These decisions, carried to their legitimate results, should insure to every property holder in the land, an assurance that the wrong and oppression frequently perpetrated under the guise of special assessment proceedings may be righted in the courts of the country.

62. In one of the most celebrated of our early cases,<sup>16</sup> remarkable as involving an important principle, and decided upon principles of pure reasoning, and without citing a

<sup>14</sup> *Norwood v. Baker*, 172 U. S. 269, 43 L. ed. 443, 19 Sup. Ct. Rep. 187; *Iowa Paving & Tile Co. v. Callanan*, 125 Iowa, 358, 67 L. R. A. 408, 106 Am. St. Rep. 311, 101 N. W. Rep. 141.      <sup>15</sup> *French v. Barber Asphalt Paving Co.*, 181 U. S. 324, 45 L. ed. 879, 21 Sup. Ct. Rep. 625.      <sup>16</sup> *McCulloch v. Maryland*, 4 Wheat. 316, 428, 4 L. ed. 579, 607.



single authority to sustain the result, Chief Justice Marshall said:

“It is admitted that the power of taxing the people and their property is essential to the very existence of government, and may be legitimately exercised on the objects to which it is applicable, to the utmost extent to which the government may choose to carry it. The only security against the abuse of this power is found in the structure of the government itself. In imposing a tax, the legislature acts upon its constituents. This is in general a sufficient security against erroneous and oppressive legislation.”

This is quoted by Church, C. J., in *Guest v. Brooklyn*, 69 N. Y. 516, and he comments thereon as follows:

“This is true to a degree, as it respects general taxation, when all are equally affected, but it has no beneficial application in preventing local taxation for public improvements. The majority of the constituents would generally approve, certainly not dissent from taxing the small minority.”

“The few are powerless against the legislative encroachments of the many. The ‘constituents,’ under this system, are attacked in detail, a few only selected at a time, and they have no power to enforce accountability, or to punish for a violation of duty on the part of the representative. The majority are never backward in consenting to, and even demanding, improvements which they may enjoy without expense to themselves. The inevitable consequence is, to induce improvements in advance of public necessity, to cause extravagant expenditures, fraudulent practices and ruinous taxation. The system operates unequally and unjustly, and leads to oppression and confiscation. It is difficult to discover in it a single redeeming feature which ought to commend it to public favor.”

**63.** To which may be added the fact that the officials who have charge of the assessment, no matter how arbitrarily, illegally and viciously they may have acted, usually have it



within their power to secure legislative relief for their acts, in the shape of curative and reassessment statutes. So far as these acts, not infrequently obtained in a furtive manner, are used to prevent a property owner from escaping the payment of a just tax, they work justice, and are commendable. But when used in a way which results in a depreciation to the property of the citizen, without affording him adequate relief for his loss, they are to be strongly condemned.

64. Additional objections very often strongly urged against the system are that the property of the taxpayer is often taken for a public use without adequate compensation, and that it is taken without due process of law. These objections will be considered in the next chapter.

#### **Merits of the system.**

65. On the other hand, in a comparatively early case, an able jurist upholds the system of special assessment, as being more just and equitable, and less liable to result in extravagance than the method of paying for local improvements from the general fund. He says,

“I must repeat my conviction that the system of paying for local improvements wholly out of the general treasury is inequitable, and will result in great extravagance, abuse and injustice. I think the system of making particular localities, which are specially benefited, bear a special portion of the burden is safer, and more just to the citizens at large, by whose united contributions the city treasury is supplied.”<sup>17</sup>

<sup>17</sup> “For nearly thirty years this equitable contribution by front proprietors, who derive a special benefit from the improvement, has been enforced. Experience and the general acquiescence for so long a time may be considered as demonstrating the reasonableness of the apportionment; and it would be a manifest injustice to

the vast number of proprietors who have paid one-third of the costs of paving streets used by all the citizens, if others of their fellow citizens, who have enjoyed a public benefit at the partial expense of front proprietors, should afterwards be permitted, when paving is done in front of their property, to escape a similar con-



66. When we reflect that under the method of general taxation, the property of the rich is taxed to pay for support of the poor, that of the childless to maintain the common school system, and that of the blind to pay for public lighting, the system of special assessments for benefits seems a radical departure. But numerous as are the objections to this system, by reason not only of its inherent qualities, but of the peculiar and intricate manner in which necessity seems to compel its active and practical operation, it is founded upon a principle that is so unquestionably just that its place in American municipal finance is firmly fixed, and its place in American jurisprudence growing more important. In the endeavor to make taxation as nearly equal as possible, it is only right that he who receives, through an increase in the value of his property by reason of a local public improvement, a direct benefit beyond that received by the public at large, should pay an amount greater than those who are only incidentally benefited, and proportioned in some manner or in some ratio to such enhancement. And if more judicial care and responsibility, and less ministerial haste, carelessness and arbitrary methods, were employed in planning improvements, and making an honest and legal assessment of benefits and damages, most of the objections now so strenuously invoked against the system would vanish like mist before the morning sun.

tribution. It is just that the burden should fall on all who stand in the same situation."

Slidell, C. J., in *New Orleans v. Dunn*, 10 La. Ann. 57.



## CHAPTER II.

### OF CONSTITUTIONAL AND STATUTORY POWERS AND RESTRICTIONS.

#### Constitutional authority — Equality and uniformity, 67.

Alabama, 68.  
Arkansas, 69-70.  
California, 71-73.  
Colorado, 74-75.  
Connecticut, 76.  
Delaware, 77.  
Florida, 78.  
Georgia, 79.  
Idaho, 80.  
Illinois, 81-84.  
Indiana, 85.  
Kansas, 86.  
Kentucky, 87.  
Louisiana, 88.  
Maine, 89.  
Maryland, 90.  
Massachusetts, 90a.  
Michigan, 91.  
Minnesota, 92-93.  
Mississippi, 94.  
Missouri, 95.  
Nebraska, 96.  
Nevada, 97.  
New Hampshire, 98.  
New Jersey, 99.  
New York, 100.  
North Carolina, 101.  
North Dakota, 102.  
Ohio, 103.  
Oregon, 104.  
Pennsylvania, 105-106.  
Rhode Island, 107.  
South Carolina, 108-109.  
South Dakota, 110-111.  
Tennessee, 112.

Texas, 113.

Vermont, 114.

Virginia, 115.

Washington, 116.

West Virginia, 117.

Wisconsin, 118-120.

Constitutional restrictions — State constitutions not a grant of power, 121.

Limitation on taxing power, 122.

Who may levy a tax, 123.

Effect of constitutional limitation on indebtedness, 124.

The fourteenth amendment — Importance of, 125.

Assessment of cost of work against abutting property, 126-129.

The front foot rule, 130-131.

Priority of lien, 132.

Equal protection of the laws, 133.

Due process of law, 134-136.

Definition of, 137.

Arbitrary legislation, 138.

Interest on deferred payments, 139.

"Due process" not necessarily judicial process, 140.

Requisites of due process — Notice, 141-144.

Opportunity for hearing, 145-147.

What notice sufficient, 148-149.

What is not sufficient notice, 150.

What constitutes a taking, 151-159.

What is not a taking, 160-164.



Of property damaged for public use, 165-166.	A continuing power, 185.
Of the constitutionality of statutes, 167-169.	Express statutory authority necessary, 186.
Legislative omnipotence, 170-182.	Power of special assessment strictly construed, 187-189.
Of the delegation of power, 183-184.	Statutory powers, 190-194.
	Statutory construction, 195-201.

### Constitutional authority — Equality and uniformity.

67. If the views expressed in the previous chapter be correct, then there need be no express constitutional authority for the exercise of the power of special assessment, it being a branch of the taxing power which is inherent in the legislative branch of the Federal and State governments.<sup>1</sup> But many of the states have constitutional provisions more or less directly bearing upon this subject, which provisions have been construed by the various courts of last resort in those states, and it will be instructive to examine the questions involved with some care. Especially has the requirement that taxes shall be equal and uniform, which is found in a majority of the state constitutions, been subject to rigid scrutiny, and with varying and contradictory results.

#### — Alabama.

68. In 1871, upon bills of equity to enjoin the municipal authorities from collecting special assessments against real estate, to defray the expense of street paving, it was held that a special tax upon the abutting property for the purpose named, construed two provisions of the Constitution of Alabama of 1868, the first one of which provides that

“All taxes levied on property in this state, shall be assessed in exact proportion to the value of such property; *Provided, however,* that the general assembly may levy a poll tax, not to exceed one dollar and fifty cents

<sup>1</sup> It is a principle of constitutional law that the power to levy taxes is an incident to sovereignty, without which no government could exercise the powers expressly delegated to it. Yunker v. Nichols, 1 Colo. 551, 567.



on each poll, which shall be applied exclusively in aid of the school fund."

The court say, taxes are thus divided into two classes, one on property and one on persons, and a tax on property according to its front on a street so improved violates the rule laid down. The court further say, that as a tax is an orderly rate levied on the property of the citizen according to its value, or a fixed sum levied on his person for the public use, it ought, in strict justice, to be levied on the property of all, it being for the use of all. In the case in question, it is levied on a few for the use of all, for the improvement of a public street, and to that extent is a seizure of private property for public use, without the owner's consent, and without just compensation.<sup>2</sup>

But in 1889, the same court, construing the provisions of Sec. 1, Art. XI, of the Constitution of 1875, which is substantially the same as the provision already quoted, expressly overruled these two cases, and held the sounder view to be that provisions, either of constitutions or statutes, relating to general taxation for either state or municipal purposes have no application to special assessments upon abutting property to pay for street improvements, which have benefited and enhanced the value of the property so assessed.<sup>3</sup> This same constitutional provision was further held to have no application to local assessments for street paving, and similar improvements, such power being referable to the general inherent power of taxation, not here limited or restrained,<sup>4</sup> although as a general proposition, the right to tax is a limitation, and not a grant of power.<sup>5</sup>

<sup>2</sup> Mayor, etc., v. Dargan, 45 Ala. 310; Mayor, etc., v. Royal, etc., Co., 45 Ala. 322.

<sup>3</sup> Mayor, etc., v. Klein, 89 Ala. 461, 8 L. R. A. 369, 7 So. 386. The present constitution was adopted in 1901.

<sup>4</sup> Irwin v. Mobile, 57 Ala. 6.

<sup>5</sup> Dorman v. State, 34 Ala. 216; Irwin v. Mobile, *supra*; Shultes v. Eberly, 82 Ala. 242, 2 So. 345; Hare v. Kermerly, 83 Ala. 608, 3 So. 683; Mayor v. Klein, 89 Ala. 461, 8 L. R. A. 369, 7 So. 386; Elyton Land Co. v. Mayor, 89 Ala. 477, 7 So. 901.



## — Arkansas.

69. As early as 1853 the Supreme Court of the State held that the term "taxes," as employed in the earlier constitution, which provides that

"All property subject to taxation shall be taxed according to its value — that value to be ascertained in such manner as the General Assembly shall direct; making the same equal and uniform throughout the state," applied to taxation for state purposes alone;<sup>6</sup> and in 1860, it held that an act authorizing a special levee tax to be levied in one certain county, and requiring the lands to be assessed at not less than ten dollars an acre, was not in contravention of such provision, the term "taxes" in Sec. 9, Art. 6, of the constitution being construed to have reference to taxation for general county purposes, and not to special assessments for local improvements.<sup>7</sup>

Under the further constitutional requirement that Laws shall be passed taxing by a uniform rule . . . all real and personal property according to its true value in money, the application to local assessments was upheld, and an assessment according to frontage declared invalid.<sup>8</sup> But a law which levies a tax for a local benefit upon part of the lands to be benefited, to the exclusion of others of the same class, was held void,<sup>9</sup> while under the constitutional authority to the legislature to provide for special assessments, such permission is not controlled by another fixing the power of general taxation.

70. Under the constitution of 1874, the rule for taxation is fixed as follows:

"All property subject to taxation shall be taxed according to its value, that value to be ascertained in such

<sup>6</sup> Washington v. State, 13 Ark. 752. point involving the obligations of a contract.

<sup>7</sup> McGehee v. Mathis, 21 Ark. 40. Although this case was reversed in the federal supreme court (4 Wall. 143), it was on a <sup>8</sup> Peay v. Little Rock, 32 Ark. 31.

<sup>9</sup> Carson v. St. Francis Levee Dist., 59 Ark. 513.



manner as the general assembly shall direct, making the same equal and uniform throughout the state. No one species of property from which a tax may be collected shall be taxed higher than another species of property of equal value." Art. XVI, Sec. 5.

The words "*ad valorem* and uniform" seem to state the idea intended in contradictory terms. When a case involving the section quoted came before the court in 1877, it declared an assessment for paving according to frontage unconstitutional as being in conflict with such section, thereby declaring in effect the tax might be laid in specially named districts, but within the limits of each must be equal and uniform according to the value of each estate. So that the term employed in the constitution is really a misnomer, except in those rare cases where the value of the property affords a just measure for the benefit.<sup>10</sup>

#### — California.

71. Article XIII, Sec. 1, of the Constitution of 1879, says; "All property in the state, not exempt under the laws of the United States, shall be taxed in proportion to its value, to be ascertained as provided by law," and the previous constitution also provided that "taxation shall be equal and uniform throughout the state," and also conferred upon municipal corporations the power of assessment and taxation.

The power of special assessment for local improvements is expressly recognized, and Art. XI, Sec. 19, goes so far as to place certain restrictions upon the procedure to be adopted in carrying out the work and making and collecting the assessment.

<sup>10</sup> Peay v. Little Rock, *supra*.

<sup>11</sup> "No public work or improvement of any description whatsoever shall be done or made in any city, in, upon, or about the streets thereof, or otherwise, the cost and expense of which is made chargeable or may be assessed upon pri-

vate property by special assessment, unless an estimate of such cost and expense shall be made, and an assessment in proportion to benefits on the property to be affected or benefited shall be levied and collected and paid into the city treasury before such work or im-



**72.** It was held as early as 1859, that the constitutional provision as to equality and uniformity of taxation upon property refers only to that charge upon property requisite to levy in order to provide funds to defray the expenses of the government of the state, county or town. It has no reference to special assessments for local improvements by which individual parties are chiefly benefited in the increased value of their property,<sup>12</sup> although it has since been held that the legislature is without power to levy within an incorporated city an assessment for street improvement purposes which is not uniform and equal.<sup>13</sup> It makes no difference that a special assessment be called a tax in the statute authorizing it, for it will be enforced as an assessment if it be such in fact.<sup>14</sup>

**73.** The frontage rule was first adapted as the basis of levying the assessment,<sup>15</sup> and afterwards it was based upon valuation, but after two years of experiment, the frontage rule was again reverted to, and the legislative authority to that effect has been steadily upheld,<sup>16</sup> although the question

provement shall be commenced, or any contract for letting or doing the same, authorized or performed." But this clause was repealed in 1884, as it too greatly retarded improvements, and with little corresponding benefits to taxpayers.

An assessment levied by a municipal government upon lots adjacent to a street to pay for improvements made on the street, if held to be a tax, cannot be maintained because it lacks the constitutional requirement of equality and uniformity.

*Creighton v. Manson*, 27 Cal. 613.

<sup>12</sup> *Burnett v. Sacramento*, 12 Cal. 76, 73 Am. Dec. 518; *Hagar v. Supervisors*, 47 Cal. 222; *Chambers v. Satterlee*, 40 Cal. 497.

And the constitutionality of the system was expressly upheld in *Chapman v. Ames*, 135 Cal. 246, 67 Pac. 1125.

<sup>13</sup> *Brady v. King*, 53 Cal. 44.

<sup>14</sup> *People v. Austin*, 47 Cal. 353. And see, *Re Market Street*, 49 Cal. 546.

<sup>15</sup> *Burnett v. Sacramento*, 12 Cal. 76, 73 Am. Dec. 518; *Blanding v. Burr*, 13 Cal. 343.

<sup>16</sup> *Emery v. San Francisco Gas Co.*, 28 Cal. 345; *Emery v. Bradford*, 29 Cal. 75; *Walsh v. Matthews*, 29 Cal. 123; *Taylor v. Palmer*, 31 Cal. 240; *Crosby v. Lyon*, 37 Cal. 242; *Chambers v. Satterlee*, 40 Cal. 497; *Reclamation Dist. No. 108 v. Hagar*, 6 Sawy. 569, 4 Fed. 366.



of benefits as the proper basis has been theoretically approved.

— Colorado.

74. "All taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws which shall prescribe such regulations as shall secure a just valuation for taxation of all property, real and personal." Art. X, Sec. 3.

75. Under the foregoing provision, it was expressly held that *assessments* upon property, except in the sense of taxation for general revenue purposes, are entirely unauthorized.<sup>17</sup> The system of taxation by special assessments for local improvements is thus judicially repudiated, while assessments for sidewalk and sewer purposes have been sustained as an exercise of the police power.<sup>18</sup> These positions were supported by the court with a tenacity worthy of a better cause, and it certainly takes courage to maintain the opposite of a doctrine upheld by all the supreme judicial courts of the general and state governments wherever it has been discussed, with three exceptions, and whose origin is almost "lost in the resistless wake of judicial authority." But after a repeated consideration of the question, aided by changes in the personnel of the court, the Supreme Court of Colorado swung into line, expressly overruled the case of *Palmer v. Way*, and held that the word "tax" referred to ordinary public taxes, and not to special assessments, and that the power to make the latter does not infringe upon the rule of uniformity.<sup>19</sup> And later an assessment for a sewer by area was upheld.<sup>20</sup>

<sup>17</sup> *Palmer v. Way*, 6 Colo. 106, 116.

Denver, 10 Colo. 112; *Brown v. Denver*, 7 Colo. 308, 3 Pac. 455.

<sup>18</sup> Palmer v. Way, *supra*; Pueblo v. Robinson, 12 Colo. 596, 21 Pac. 899; Wilson v. Chilcott, 12 Colo. 600, 21 Pac. 901; Keese v.

<sup>19</sup> *Denver v. Knowles*, 17 Colo. 204, 17 L. R. A. 135, 30 Pac. 1041.

<sup>20</sup> *Gillette v. Denver*, 21 Fed. 822.



— Connecticut.

76. The constitution of this state makes no requirements of equality and uniformity, and none seem to be implied.

— Delaware.

77. All taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax. Art. VIII, Sec. 1. But this does not prohibit the expense of local improvements in a town or city being met, in whole or in part, by local assessments.<sup>21</sup>

— Florida.

78. The Constitution provides for a "just valuation of all property," "uniform and equal rate of taxation," and that for municipal purposes, "property shall be taxed upon the principle established for state taxation." Art. IX, Sec. 1.

In 1877, the legislature conferred upon any city or town council the power to make certain street improvements and "to charge upon those benefited such reasonable assessments as may be agreed upon," or in case of disagreement, the amount is to be fixed and ascertained by five discreet freeholders. This enactment was sustained by the court as being competent for the legislature to pass, and the court well say, "A more just or fairer course could not have been adopted; and it would be strange indeed if the power were not in the legislature to prescribe it."<sup>22</sup>

— Georgia.

79. The only constitutional provision as to special assessments, discussed by the Georgia Supreme Court, is the one requiring taxation to be *ad valorem* and uniform. An act of the legislature was passed in 1881 conferring on a municipal corporation the power to grade, pave and improve its

<sup>21</sup> Murphy v. Wilmington, 6      <sup>22</sup> Edgerton v. Mayor, etc., 19  
Houst. (Del.) 108, 22 Am. St. Rep. Fla. 140.  
345.



streets and sidewalks, and to assess the real estate abutting on each side of the street improved, in proportion to its frontage, for the payment of one-third of the cost of such improvements, and was held not in violation of the constitutional requirements that taxes shall be *ad valorem* and uniform. Such assessments are not taxes within the meaning of the Constitution.<sup>23</sup>

— Idaho.

80. "All taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws, which shall prescribe such regulations as shall secure a just valuation for taxation of all property, real and personal." Art. VII, Sec. 5.

— Illinois.

81. The constitution of 1818 was silent upon the subject of assessment for local improvements, but Art. IX, Sec. 5, of the constitution of 1848, provides that

"The corporate authorities of counties, townships, school districts, cities, towns and villages may be vested with power to assess and collect taxes for corporate purposes; such taxes to be uniform in respect to persons and property within the jurisdiction of the body imposing the same."

This clause has been construed as imposing a limitation on the power of the legislature to grant the right of corporate taxation to any other than the local corporate authorities, and consequently could not be granted to private persons or corporations even for draining purposes.<sup>24</sup>

<sup>23</sup> *Hayden v. Atlanta*, 70 Ga. 817; *First M. E. Church v. Atlanta*, 76 Ga. 181; *Speer v. Athens*, 85 Ga. 49, 6 L. R. A. 402, 11 S. E. 802.

<sup>24</sup> *Harward v. St. Clair Drain Co.*, 51 Ill. 130. The court say,

"It is evident that this clause was not inserted in the present constitution (1848) as a necessary grant of power, or to remove a doubt as to its existence. . . . If the clause in question was not designed as a limitation of power,



82. Notwithstanding the silence of the constitution on the subject, the city of Chicago has possessed the power of local assessment from its first incorporation in 1837, under which charter, as well as that of 1851, the assessments went upon the ground of benefits, and this ground was incidentally ratified by the courts.<sup>25</sup> The charter revision of 1863 changed the rule to that of frontage, but this change was vigorously assailed in the courts as unconstitutional, and it was so declared in Larned's case, and with a broad intimation that the only legal foundation for laying these assessments was for benefits to the property assessed.<sup>26</sup> To meet the decision of the court, the charter was amended in 1865, and the change met with judicial approval.<sup>27</sup> And in order to settle the question beyond all possible dispute, the Constitution of 1870, Art. XI, Sec. 9, recited that

“The general assembly may vest the corporate government of cities, towns and villages, with power to make local improvements by special assessment or by special taxation of contiguous property or otherwise.”

After the adoption of this clause, the Supreme Court of the State held that it had the effect of removing any constitutional restrictions which previously existed, and to permit legislative authorization of the frontage rule, in its discretion.<sup>28</sup>

no reason can be given why it was inserted in the constitution at all.”

*Ibid.*

<sup>25</sup> Canal Trustees v. Chicago, 12 Ill. 403; Chicago v. Baer, 41 Ill. 306.

<sup>26</sup> Chicago v. Larned, 34 Ill. 203; Ottawa v. Spencer, 40 Ill. 211; Bedard v. Hall, 44 Ill. 91.

<sup>27</sup> Wright v. Chicago, 46 Ill. 44.

<sup>28</sup> White v. People ex rel. Bloomington, 94 Ill. 604; Felch v. People, 99 Ill. 137.

#### *Discretion of legislature.*

Under the Illinois constitutional provision giving the assembly general power to make local improvements by special assessment, or special taxation, or both, the legislature is not restricted to any one of the modes provided in that section, and an ordinance providing for either mode, if it conflicts with neither constitution nor statute, is lawful.

Felch v. People, 99 Ill. 137;  
People v. Shuman, 83 Ill. 165.



**83.** Under the last constitutional provision, it has been decided that the difference between special assessments and special taxation lies mainly in the manner of determining benefits. In the former case the benefits are assessed by commissioners, whose findings are reviewable by a jury, but in the latter case the council which enacts the ordinance determines the benefits to be equal to the cost, and in the case of sidewalks the cost may be imposed upon the contiguous property without a consideration of special benefits.<sup>29</sup> And this remained the law until amended in 1895.<sup>30</sup>

**84.** The effect of the various changes in the constitution has given to the opinions of the State Supreme Court an appearance of indecision or hesitation, which is dissipated upon a close investigation of the cases, and the various constitutional provisions under consideration.<sup>31</sup>

*Limitation on legislative power.*

A constitutional provision that the corporate authorities of cities may be vested with power to assess and collect taxes for corporate purposes, such taxes to be uniform in respect to persons and property, is a limitation on the power of the legislature to confer such power upon any other than the corporate authorities of the district to be taxed.

*Cornell v. People*, 107 Ill. 372.

*Issuing park bonds.*

An act to enable the corporate authorities of two or more towns to issue bonds for park purposes, and provide for special assessments to pay them, is in conformity with sec. 9, art. 9, const. of Ill.

*People v. Brilin*, 80 Ill. 423; *Dunham v. People*, 96 Ill. 331.

*Payments made as ordinance directs.*

Under both the constitution and general law payments for local im-

provements may be made wholly or in part by special assessments, as the corporate authorities may by ordinance direct.

*People v. Sherman*, 83 Ill. 165.

<sup>29</sup> *Chicago Park Com'rs v. Farber*, 171 Ill. 146, 49 N. E. 427; *Craw v. Tolono*, 96 Ill. 255, 36 Am. Rep. 143; *Davis v. Litchfield*, 145 Ill. 313, 21 L. R. A. 563, 33 N. E. 888.

<sup>30</sup> *Laws of 1895*, p. 100.

<sup>31</sup> The principles of equality and uniformity are indispensable to all legal taxation, whether general or local.

*Chicago v. Larned*, 34 Ill. 203; *Ottawa v. Spencer*, 40 Ill. 211; *Bedard v. Hall*, 44 Ill. 91; *Wright v. Chicago*, 46 Ill. 44; *Lee v. Rugles*, 62 Ill. 427.

But does not apply to special assessments.

*Hundley v. Commissioners*, 67 Ill. 559.

Equality and uniformity of benefits and burdens in special assess-



## — Indiana.

85. "The general assembly shall provide by law for a uniform and equal rate of assessment and taxation, and shall prescribe such rules and regulations as shall secure a just valuation for taxation of all property, both real and personal, excepting only for municipal, educational, literary, scientific, religious, or charitable purposes as may be specially exempted by law." Art. X, Sec. 1.

Local and special laws may not be passed "for the assessment and collection of taxes for state, county, township or road purposes." Art. IV, Sec. 22.

These provisions are held, in various cases in which one or both of them were questioned, not to inhibit the levy of special assessments upon property benefited by street improvements, and special provisions for street improvements are discernible in several of the earlier charters, notably those of Lawrenceburg and Vevay in 1846, and of Peru in 1848,<sup>32</sup> while the act of 1857 expressly authorized the imposition by the city of Indianapolis of similar charges upon abutting property;<sup>33</sup> and five years earlier the same

ments for public local improvements of streets by cities and villages, are not essential under the present Illinois constitution and legislation on that subject.

Murphy v. People, 120 Ill. 234, 11 N. E. 202.

An ordinance requiring the cost of improving a street or sidewalk to be levied by special taxation upon real estate abutting thereon, in proportion to the frontage of the several lots, is valid.

Springfield v. Green, 120 Ill. 269, 11 N. E. 261.

An ordinance for a street improvement by special taxation of the lots fronting thereon in proportion to the number of feet frontage, is not in contravention

of the constitution as violating the principle of uniformity and equality required in taxation.

Wilbur v. Springfield, 123 Ill. 395, 14 N. E. 871.

A special tax in proportion to frontage for a street improvement must charge each piece of land in the proportion its front bears to that of all the land abutting on the line of improvement, for its share of the entire cost of the improvement.

Ware v. Jerseyville, 158 Ill. 234, 41 N. E. 736.

<sup>32</sup> Palmer v. Stumph, 29 Ind. 329.

<sup>33</sup> Indianapolis v. Mansur, 15 Ind. 112.



system was authorized to be used to defray the expenses of constructing levees and drains, upon the principle of benefits.<sup>34</sup>

— Kansas.

86. "The legislature shall provide for a uniform and equal rate of assessment and taxation." Art. XI, Sec. 1.

"Provision shall be made by general laws for the organization of cities, towns and villages, and their power of taxation and assessment, etc., shall be so restricted as to prevent the abuse of such power."

These provisions have been held not to preclude the legislature of the power to lay special assessments on abutting property to pay for street improvements. Indeed, this state was among the earliest of the western commonwealths to exercise this legislative power, and in 1864 the charter of the city of Leavenworth clothed the local authorities with the requisite permission, and it was expressly held that the "equal and uniform clause" means that if the state levies

<sup>34</sup> *Anderson v. Kerns Drain. Co.*, 14 Ind. 199, 77 Am. Dec. 63, and generally, as to the constitutional provisions cited, see, in addition to last three cases, *Goodrich v. Turnpike Co.*, 26 Ind. 119; *Bright v. McCullough*, 27 Ind. 223; *Turpin v. Eagle Creek, etc., Co.*, 48 Ind. 45; *Reinken v. Fuehring*, 130 Ind. 382, 15 L. R. A. 624, 30 Am. St. Rep. 247, 30 N. E. 414; *La-fayette v. Jenners*, 10 Ind. 70; *Bank v. New Albany*, 11 Ind. 139.

*Uniformity and equality.*

If a tax law provides that the rate of assessment and taxation shall be uniform and equal throughout the locality in which the tax is to be levied, it does not violate the constitutional requirement that a tax law shall provide

for a uniform and equal rate of assessment and taxation.

*Gilson v. Commissioners*, 128 Ind. 65, 11 L. R. A. 835, 27 N. E. 235.

*Tax to pay tuition in public schools.*

In 1857, the Indiana Supreme Court held that an act authorizing a municipality to levy a tax to pay for tuition in the public schools was in conflict with the constitution of the state, but spoke approvingly to the point that municipal corporations might be authorized to raise money by taxation to build school houses, but that the assessment should perhaps be for that specific purpose.

*La Fayette v. Jenners*, 10 Ind. 70.



the tax, the rate must be equal and uniform throughout the state, and if the county, they must be equal and uniform throughout the county, and so of the township, city or village.<sup>35</sup> And when questioned in the light of the restrictions upon the unlimited power of taxation, the legality of the act in question was quickly sustained, the learned chief justice who wrote the opinion arguing that under the general grant of power the legislature may authorize charges upon adjacent property for improvements of streets and alleys, and is not bound by the first section of the eleventh article of the constitution to require that such charges shall be equal and uniform throughout the whole city.<sup>36</sup>

— Kentucky.

87. Sec. 171. "Taxes shall be levied and collected for public purposes only. They shall be uniform upon all property subject to taxation within the territorial limits of the authority levying the same; all taxes shall be levied and collected by general laws.

Sec. 172. All property . . . shall be assessed for taxation at its fair cash value.

Sec. 181. The general assembly shall not impose taxes for the purposes of any county, city, town or other municipal corporation, but may, by general laws, confer on the proper authorities thereof, respectively, the power to assess and collect such taxes."

Judge Cooley says,<sup>37</sup> "The provisions of the constitution requiring uniformity of taxation, and taxation according to value, are merely declaratory of what always was the law of taxation within the state, and do not render invalid the assessment on abutting property of a part of the cost of a street improvement."<sup>38</sup> But the judicial and legislative depart-

<sup>35</sup> Hines v. Leavenworth, 3 Kan. 186.

<sup>36</sup> *Ibid.*

<sup>37</sup> Cooley, Taxation (3d Ed.) 1189.

<sup>38</sup> Maddux v. Newport, 12 Ky. L. Rep. 657, 14 S. W. 957.

Sections 171 and 174 of the present constitution of Kentucky, which require uniformity of taxation according to value, announce nothing new, but are merely declaratory of what was always the law of taxation in this state, and,



ments of this commonwealth have not agreed to any very commendable degree. A statute of 1831 amendatory of the Louisville charter, and authorizing special assessments, was declared in 1837 to be unconstitutional and void, the argument being that the charges imposed, not being general and according to a fixed valuation, were not taxes, and that because they were not taxes, it was an attempt to take property without due compensation.<sup>39</sup> Similar legislative authority was some three years later upheld, but only "by hypothetical construction of a quasi-municipal corporation out of each separate square in the city," a judicial erection which their brother architects in other states have wisely refused to copy.<sup>40</sup> But the trend of judicial decision has gradually been towards sustaining the system of local assessment, and is now firmly intrenched in the jurisprudence of the state.<sup>41</sup>

— Louisiana.

88. "Taxation shall be equal and uniform throughout the state."

By a long course of decisions, running through three-fourths of a century, special assessments have been declared not to be precluded by the above constitutional provision, and that the clause applies only to state taxation, and not to municipal taxes.<sup>42</sup>

therefore, do not forbid local assessments to pay for improvements of streets or the construction of sewers.

*Holzhauser v. Newport*, 94 Ky. 396, 22 S. W. 752.

<sup>39</sup> *Sutton's Heirs v. Louisville*, 5 Dana, 28; approved in the later case of *Rice v. Danville & D. L. & N. Turnpike Co.*, 7 Dana, 81.

<sup>40</sup> *Lexington v. McQuillan's Heirs*, 9 Dana, 513, 35 Am. Dec. 159.

<sup>41</sup> *Gosnell v. Louisville*, 104 Ky. 201, 46 S. W. 722; *Wolfe v. Mc-*

*Hargue*, 88 Ky. 251, 10 S. W. 809; and see *Covington v. Boyle*, 6 Bush. 204; *Bradley v. McAtee*, 7 Bush. 667, 3 Am. Rep. 309; *Broadway, etc., Church v. McAtee*, 8 Bush. 508, 8 Am. Rep. 480; *Caldwell v. Rupert*, 10 Bush. 179.

<sup>42</sup> *Munic. No. 2 v. Duncan*, 2 La. Ann. 182; *Lafayette v. Cummins*, 3 La. Ann. 673; *Yeatman v. Crandall*, 11 La. Ann. 220; *Wallace v. Shelton*, 14 La. Ann. 498; *Richardson v. Morgan*, 16 La. Ann. 429; *Petition of New Orleans*, 20 La. Ann. 497; *Barber Asphalt Pav-*



The first specific act authorizing special assessments was in 1832, when it was provided that the expenses of opening new streets in New Orleans should be paid by assessments for benefits on property adjacent, instead of being defrayed by the public treasury, as theretofore.<sup>43</sup>

89. "All taxes upon real and personal estate, assessed by authority of this state, shall be apportioned and assessed equally, according to the just value thereof." Art. IX, Sec. 8.

The act of 118, authorizing and directing the municipal authorities to assess a tax "upon the lots and parcels of land" benefited by the construction of a sewer to the extent of one half its cost, and establishing a lien upon such real estate for the collection thereof, is not in contravention of the constitutional provision.<sup>44</sup> And as early as 1872, a statute authorized an assessment upon the lots adjacent "in proportion as such lots are benefited or made more valuable by such laying out, widening, alteration or discontinuance," for laying out, widening or altering any new street.<sup>45</sup>

ing Co. v. Gogreve, 41 La. Ann. 251, 5 So. 848; M. K. & T. Trust Co. v. Smart, 51 La. Ann. 416, 25 So. 443; Shreveport v. Prescott, 51 La. Ann. 1895, 46 L. R. A. 193, 26 So. 664.

<sup>43</sup> Municipality No. 2 v. White, 9 La. Ann. 446.

*Special tax to build embankments.*

A special tax on a parish, passed under an express statute, to defray the expense of certain embankments to protect the parish from overflow, was held unconstitutional, as being a tax for a public purpose, and as such violating the constitutional requirements as to equality and uniformity.

Cumming v. Police Jury, 9 La. Ann. 503.

This rule was formally re-

nounced by one of the justices who concurred in the opinion, in Yeatman v. Crandall, 11 La. Ann. 220. *Ordinance taxing abutter one third cost.*

An ordinance imposing on the abutting proprietor one-third of the expense of paving the street is constitutional, and not obnoxious to the constitutional requirements of equality and uniformity.

New Orleans v. Elliott, 10 La. Ann. 59.

The court claim to follow the Benton Street Case, 9 La. Ann. 446, but the reasoning is somewhat narrow and strained.

<sup>44</sup> Auburn v. Paul, 84 Me. 212, 24 Atl. 817.

<sup>45</sup> Maine Rev. Stats. 1884, ch. 18, sec. 31.



— Maryland.

90. This state copies its legislation largely from New York, and its supreme court hold that the principle of equality in taxation is fully met by making local taxation equal and uniform as to all property within the limits of the taxing district, and that as between different taxing districts, whether the district be an entire city, or only part thereof, uniformity is not required in local taxation.<sup>46</sup> As early as 1847 the system of local assessment was judicially sustained; <sup>47</sup> both as an exercise of the taxing power, as well as under the right of eminent domain, and the constitutionality of the principle is no longer open to doubt.<sup>48</sup> Art. 15 of the Declaration of Rights, is the section pertaining to taxation, and is as follows:

“ The levying of taxes by the poll is grievous and oppressive, and ought to be prohibited; paupers ought not to be assessed for the support of the government; but every person in the state, or person holding property therein, ought to contribute his proportion of public taxes for the support of the government, according to his actual worth in real or personal property; yet fines, duties or taxes may properly and justly be imposed or laid, with a political view for the good government and benefit of the community.”

— Massachusetts.

90a. The general court has full power “to impose and levy proportional and reasonable assessments, rates and taxes upon all the inhabitants of, and persons resident and estates lying within, the said commonwealth.” Part II, Chap. 1, Art. IV.

In an early case,<sup>49</sup> it was held that in requiring that taxes should be proportional and reasonable, the framers of the

<sup>46</sup> *Daly v. Morgan*, 69 Md. 460, Md. 451; *Steuart v. Mayor, etc.*, 1 L. R. A. 757, 16 Atl. 287. 7 Md. 500; *Henderson v. Mayor,*

<sup>47</sup> *Alexander v. Mayor, etc.*, 5 etc., 8 Md. 352.

Gill, 383, 46 Am. Dec. 630.

<sup>49</sup> *Oliver v. Washington Mills,*

<sup>48</sup> *Howard v. Ind. Church*, 18 11 Allen, 268.



constitution intended to erect a barrier against an arbitrary, unjust, unequal, or oppressive exercise of the power, and such requirement does not prevent a town from raising a tax to pay part of the expense of locating the state agricultural college therein,<sup>50</sup> nor from laying local assessments according to benefits, for local improvements.<sup>51</sup> The latter decision definitely affirmed the constitutionality of the act of 1865 providing for a system of special assessments, although as early as 1781 there was upon the statute book an act providing for a similar method of taxation to help pay the cost of widening and improving streets which had been laid waste by fire.<sup>52</sup>

— Michigan.

91. "The legislature shall provide an uniform rule of taxation, except on property paying specific taxes, and taxes shall be levied on such property as is prescribed by law." "All assessments hereafter authorized shall be on property at its cash value." Art. XIV, Secs. 11 and 12.

Several decisions of the supreme court of the state have construed these provisions as applying only to general taxation, and not to special assessments.<sup>53</sup> This system was authorized in the city charter of Detroit in 1827, and its constitutionality affirmed in 1853,<sup>54</sup> although in a later decision the method authorized, which required each lot-owner to pay the cost incurred along his lot line, was repudiated as not providing an apportionment.<sup>55</sup>

<sup>50</sup> *Merrick v. Amherst*, 12 Allen, 500.

<sup>51</sup> *Dorgan v. Boston*, 12 Allen, 223.

<sup>52</sup> *Special Laws*, Mass., p. 21.

<sup>53</sup> *Motz v. Detroit*, 18 Mich. 495;  
*Hoyt v. East Saginaw*, 19 Mich. 39, 2 Am. Rep. 76.

<sup>54</sup> *Williams v. Mayor, etc.*, 2 Mich. 560.

<sup>55</sup> Sec. 11, Art. XIV., Const. of

Michigan, requiring the legislature to provide a uniform system of taxation, is not self executing, nor did it become operative until some rule complying with its terms was formulated by the legislature.

*Williams v. Detroit*, 2 Mich. 560.  
*Taxation not equivalent to assessment.*

The provisions of the Michigan Constitution with respect to taxa-



— Minnesota.

92. "All taxes to be raised in this state shall be as nearly equal as may be, and all property on which taxes are to be levied shall have a cash valuation, and be equalized and uniform throughout the state." This was amended afterwards by adding "Provided that the legislature may, by general law or special act, authorize municipal corporations to levy assessments for local improvements upon the property fronting upon such improvements, or upon the property to be benefited by such improvements, without regard to cash valuation, and in such manner as the legislature may prescribe, *and provided further*, that for the purpose of defraying the expenses of laying water-pipes and supplying any city or municipality with water, the legislature may, by general or special law, authorize any such city or municipality, having a population of five thousand or more, to levy an annual tax or assessment upon the lineal foot of all lands fronting on any water-main or water-pipes laid by such city or municipality within corporate limits of said city, for supplying water to the citizens thereof, without regard to the cash value of such property, and to empower such city to collect any such tax assessments, or fines or penalties for failure to pay the same, or any fine or penalty for any violation of the rules of such city or municipality in regard to the use of water, etc." Art. IX, Sec. 3.

93. Before the amendment of 1869, it was held that this section was applicable to city assessments for grading streets, and that such assessment must be apportioned according to

tion do not apply to assessments for local improvements; and valuation of the property taxed for such improvements is not a necessary element in the apportionment of the taxes.

Woodbridge v. Detroit, 8 Mich. 274.

"Uniformity and equality" do not apply to "assessments."

The provisions of the Michigan

constitution requiring a uniform rule of taxation, and cash valuation, in the assessment of property (Const. Art. 14, secs. 11, 12) have no application to local assessments for local improvements, such as grading and paving a street, but relate only to the valuation of property and its taxation for general purposes.

Motz v. Detroit, 18 Mich. 495.



the cash valuation of the land.<sup>56</sup> But this basis of assessment was so manifestly unjust, as to cause the amendment of the constitution as it now exists. It has been expressly held to authorize the legislature to confer the power upon counties.<sup>57</sup>

— Mississippi.

94. "Taxation shall be equal and uniform throughout the state. Property shall be taxed in proportion to its value." Sec. 112.

As early as 1853, the courts upheld the Aberdeen charter of 1846 authorizing assessments for street improvements,<sup>58</sup> and the power has been repeatedly upheld since. As the supreme court of that state say, in one of the strongest and best reasoned cases in the books: "We believe the power exists: it has been recognized as an existing power in the state by the public, the legislature, and by at least three decisions of this court."<sup>59</sup>

<sup>56</sup> *Stinson v. Smith*, 8 Minn. 366, Gil. 326; *Bidwell v. Coleman*, 11 Minn. 78, Gil. 45.

The constitutional rule requiring uniformity of taxation is not violated by a law authorizing and requiring a partial assessment based on the estimated cost.

*State v. District Court*, 61 Minn. 542, 64 N. W. 190; *State v. Norton*, 63 Minn. 497, 65 N. W. 935.

<sup>57</sup> *Dowlan v. Sibley Co.*, 36 Minn. 430, 31 N. W. 517.

The constitutional requirement of equality in taxation applies to assessments for local improvements, but an act is not void because inequality *may* result, but only where it *must* result.

*State v. District Court*, 33 Minn. 235, 22 N. W. 625, 632.

<sup>58</sup> *Smith v. Aberdeen*, 25 Miss. 458.

<sup>59</sup> *Vasser v. George*, 47 Miss. 713; *Chrisman v. Brookhaven*, 70 Miss. 477, 12 So. 458.

In point of principle and constitutional power, there is no difference between taxes imposed for a general purpose, and those imposed for a local purpose.

*Williams v. Cammack*, 27 Miss. 209, 61 Am. Dec. 508.

The legislature has power to impose a tax on a local district for the construction of local public improvements, and such acts are not in conflict with constitutional restrictions.

*Williams v. Cammack*, 27 Miss. 209, 61 Am. Dec. 508; *Alcorn v. Hamer*, 38 Miss. 652.

The "equal and uniform" taxation clause in constitution does not include local assessments.

*Daily v. Swope*, 47 Miss. 367.



— Missouri.

95. In 1853, the principle of special assessment was authorized, and has received the consistent support of the courts.<sup>60</sup> It has been applied to assessments for the purpose of constructing levees,<sup>61</sup> and the principle of equality and uniformity in taxation is held to be inapplicable to this mode of taxation.<sup>62</sup>

— Nebraska.

96. There is a provision in the constitution very similar to that in the constitution of Wisconsin, requiring the legislature to provide for the organization of municipal corporations, and to restrict their power of assessment and taxation, and it has been held sufficient to authorize the legislature to permit local assessment upon abutting property for street improvements,<sup>63</sup> while the provisions of Art. IX, Sec. 1, of the constitution, requiring uniform taxation, are construed to relate to the revenue required for the general purposes of state and municipal government, and have no application to taxes or assessments levied for local purposes.<sup>64</sup>

— Nevada.

97. "The legislature shall provide by law for a uniform and equal rate of assessment and taxation, and

The power to make local assessments is distinct from the right of eminent domain, and, though a taxing power, it is special and peculiar, and is not regulated by the constitutional provisions as to equality and uniformity on an *ad valorem* basis.

Macon v. Patty, 57 Miss. 378, 34 Am. Rep. 451.

<sup>60</sup> Garrett v. St. Louis, 25 Mo. 505, 69 Am. Dec. 475.

<sup>61</sup> Egyptian Levee Co. v. Hardin, 27 Mo. 495, 72 Am. Rep. 276.

<sup>62</sup> Adams v. Lindell, 72 Mo. 198;

St. Joseph v. Owen, 110 Mo. 445, 19 S. W. 713.

The constitutional provision for taxation according to value applies to taxation for general state, county, city and town purposes, and not to local assessments where the money raised is expended on the property taxed.

Egyptian Levee Co. v. Hardin, 27 Mo. 495, 72 Am. Rep. 276.

<sup>63</sup> Hurford v. Omaha, 4 Neb. 336.

<sup>64</sup> Irrigation District v. Collins, 46 Neb. 411, 64 N. W. 1086.



shall prescribe such regulations as shall secure a just valuation for taxation of all property." Art. X, Sec. 1.

This requirement has not been construed with reference to special assessments.

#### — New Hampshire.

98. Authority is given to the general court "to impose and levy proportional and reasonable assessments, rates and taxes upon all the inhabitants of, and residents within and upon all the estates within the state." Part II, Art. 5.

Although legislation, authorizing the imposition of charges for sewer construction was had in 1870,<sup>65</sup> and five years later for miscellaneous street improvements, the constitutionality of the legislation does not appear to have been challenged in the courts. The uniformity required is that the tax should be uniform throughout the taxing district.<sup>65a</sup>

#### — New Jersey.

99. At an early date, the constitutionality of the system was affirmed in New Jersey, and is no longer questioned in that state, where it has witnessed a great development.<sup>66</sup> The constitution requires property to be assessed by general rules, according to value, and under general laws. Art. IV, Sec. VII, Sub. 12.

#### — New York.

100. The constitution of this state contains no limitation upon the power of the legislature on the subject of taxation, except that each law imposing a tax shall state the purpose to which it shall be applied.

<sup>65</sup> General Laws, N. H., 1878, ch. 78, sec. 7. etc., *R. R. Co. v. State*, 60 N. H. 87.

<sup>65a</sup> *State v. U. S. & Can. Ex. Co.*, 60 N. H. 219, 243; *Boston*, <sup>66</sup> *State v. Dean*, 23 N. J. L. 335; *State v. Newark*, 27 N. J. L. 185.



— North Carolina.

101. The requirements are that taxes be imposed by a uniform rule upon moneys, credits, and investments, and upon real and personal property according to its true value, and that such taxes as are levied by any county, city, town or township shall also be uniform and *ad valorem* upon all property therein. Although the earlier decisions construing these provisions arose under the act of 1881 providing for fencing in townships at the cost of the owners benefited, the reasoning applies well to cases of special assessment, and the court decided these constitutional inhibitions "are not within the restraints put upon general taxation,"<sup>67</sup> while in a later case the imposition of a tax according to benefit to pay for a local improvement was expressly upheld.<sup>68</sup>

— North Dakota.

102. "The legislative assembly shall provide by general law for the organization of municipal corporations, restricting their powers as to levying taxes and assessments, . . . and money raised by taxation, loan or assessment shall not be diverted to any other purpose except by authority of law." Sec. 130.

"Laws shall be passed taxing by uniform rule all property according to its true value in money." Sec. 176.

<sup>67</sup> Special assessments, although taxes in a general sense, in that the authority to levy them must be derived from the legislature, are nevertheless not considered as taxes falling within the restraints of the constitution as to being equal and uniform, although the principles of uniformity govern both.

Shuford v. Commissioners, 86 N. C. 552; Cain v. Commissioners, 86 N. C. 8; Busbee v. Commissioners, 93 N. C. 143; Raleigh v.

Peace, 110 N. C. 32, 17 L. R. A. 330, 14 S. E. 521.

The principle of equality and uniformity does not apply to local assessments imposed upon owners of property who, in respect of such ownership, are to derive a special benefit in the local improvements for which the tax is expended.

Cain v. Commissioners, *supra*.

<sup>68</sup> Commissioners v. Commissioners, 92 N. C. 180; Hilliard v. Asheville, 118 N. C. 845, 24 S. E. 738.



The latter section has been construed to relate to general taxation, and not to special assessment, and the front-foot rule to be proper.<sup>69</sup>

— Ohio.

**103.** "The general assembly shall provide for the organization of cities, and incorporated villages, by general laws, and restrict their power of taxation, assessment, &c." Art. XIII, Sec. 6, Constitution of 1851.

Under this section, legislation authorizing cities and villages to levy special assessments for the purpose of improving streets, upon property specially benefited, is not repugnant to its terms, and it may be laid according to the number of feet abutting thereon.<sup>70</sup>

— Oregon.

**104.** The legislative assembly shall provide by law for uniform and equal rate of taxation." Art. IX, Sec. 1.

Under this section, a special assessment upon lots abutting a street for the improvement thereof, is not obnoxious as not being equal and uniform assessment and taxation.<sup>71</sup>

— Pennsylvania.

**105.** "All taxes shall be uniform upon the same class of subjects within the territorial limits of the authority

<sup>69</sup> *Rolph v. Fargo*, 7 N. Dak. 640, 42 L. R. A. 646, 76 N. W. 242.

<sup>70</sup> *Bonsall v. Lebanon*, 19 O. 418; *Scovill v. Cleveland*, 1 O. St. 126; *Hill v. Higdon*, 5 O. St. 243, 67 Am. Dec. 289; *Marion v. Eppler*, 5 O. St. 250; *Ernst v. Kunkle*, 5 O. St. 520; *Reeves v. Wood Co.*, 8 O. St. 333; *Foster v. Wood Co.*, 9 O. St. 540; *N. I. R. R. Co. v. Connelly*, 10 O. St. 159; *Maloy v. Marietta*, 11 O. St. 636; *Creighton v. Scott*, 14 O. St. 438; *State v. Warren Co.*, 17 O. St. 558.

<sup>71</sup> *King v. Portland*, 2 Or. 146; *Cook v. Port of Portland*, 20 Or. 580, 13 L. R. A. 533, 27 Pac. 263; *Masters v. Portland*, 24 Or. 161, 33 Pac. 540.

An assessment limited to the benefits actually received is not in conflict with the constitutional requirement that "all taxation shall be equal and uniform."

*King v. Portland*, 38 Or. 402, 55 L. R. A. 812, 63 Pac. 2; *Kaderley v. Portland*, 44 Or. 118, 74 Pac. 710, 75 Pac. 222.



levying the tax, and shall be levied and collected under general laws." Art. IX, Sec. 1. But this section has no application to assessments for street improvements.<sup>72</sup>

**106.** In the year 1700, in old provincial days, commissioners were authorized to be appointed by the governor in council for regulating and repairing streets, docks and drains, to be paid for in proportion to the number of feet of each owner in proportion to the whole.<sup>73</sup> The system was recognized by appropriate legislation at intervals, and some of the earlier charters bear witness to the fact, but in 1832 Pittsburgh was authorized to apportion the cost of street opening proceedings according to benefits, and the act declared constitutional, the court stating that this principle was a new feature introduced from the laws of New York into those of the commonwealth.<sup>74</sup> The constitutionality of proceedings by special assessment has been affirmed by numerous decisions of the courts of Pennsylvania, and is no longer questioned in that state, and is recognized as a branch of the taxing power.<sup>75</sup>

#### — Rhode Island.

**107.** "The burdens of the state ought to be fairly distributed among its citizens" is the equitable duty enjoined by the constitution, and does not render invalid special assessments authorized under the act of 1854, levying one-half the cost of the street improvement upon the estates adjudged to be benefited.<sup>76</sup>

<sup>72</sup> Beaumont v. Wilkesbarre, 142 Pa. St. 198, 21 Atl. 888; Chester v. Black, 132 Pa. St. 568, 6 L. R. A. 802, 19 Atl. 276.

<sup>73</sup> Dissenting op. of Read, J., in Hammett v. Philadelphia, 65 Pa. St. 146, 3 Am. Rep. 615.

<sup>74</sup> McMasters v. Commonwealth, 3 Watts, 292.

<sup>75</sup> Fenelon's Petition, 7 Pa. St. 173; Hancock St. Extension, 18 Pa. St. 26; Schenley v. Allegheny,

25 Pa. St. 128; Philadelphia v. Tryon, 35 Pa. St. 401; Schenley v. Allegheny, 36 Pa. St. 29, 78 Am. Dec. 359.

Taxation is an attribute of sovereignty to be exercised by the legislature in accordance with the constitution, but *equality* of taxation is not enjoined by the bill of rights.

Kirby v. Shaw, 19 Pa. St. 258.

<sup>76</sup> Matter of Dorrance Street, 4



— South Carolina.

**108.** Art. I, Sec. 6. "All property subject to taxation shall be taxed in proportion to its value."

Art X, Sec. 1. "The general assembly shall provide by law for a uniform and equal rate of assessment and taxation and shall prescribe such regulations as shall secure a just valuation for taxation of all property, real, personal and possessory, except mines and mining claims, the proceeds of which alone shall be taxed, and also exempting such property as may be exempted by law for municipal, educational, scientific, religious or charitable purposes."

Under the earlier cases, it was held that the council was legally possessed of the power to assess abutting proprietors with the expense of a pavement,<sup>77</sup> but that doctrine was later squarely denied, the court holding that "the right to tax property abutting upon a public street to pay the cost of improvements upon the same, according to the supposed benefit to such property by such improvement is distinctly repudiated."<sup>78</sup>

**109.** The court, in another portion of the opinion, evidently feels the singularity of its position in being the only court of last resort to deny the right of the legislature to authorize special assessments for local improvements, and almost plaintively asks: "Granted, as it may be, that eminent text-writers and the judicial tribunals of many states of this Union adopt a different view of the matter, why may not the people of this commonwealth adopt a domestic policy at variance with the views of others?"<sup>79</sup> The court has

R. I. 230; *Cleveland v. Tripp*, 13 R. I. 50; *Bishop v. Tripp*, 15 R. I. 466, 8 Atl. 692.

<sup>77</sup> *City Council v. Pinckney*, 3 Brev. 217; *Cruikshanks v. City Council*, 1 McCord, L. 360.

<sup>78</sup> *Mauldin v. Greenville*, 42 S. C. 293, 27 L. R. A. 284, 46 Am. St. Rep. 723, 20 S. E. 842.

<sup>79</sup> A city council may, under

legislative sanction, levy a tax to pay for improvements in its streets, but it may not assess the cost, or any part thereof, of such improvements exclusively upon abutting real property, to the extent of the supposed benefits accruing from such improvements, there being no express authority to be found therefor in the consti-



recently, relying upon the provisions of the new constitution, reversed its former decision allowing special assessments for sidewalks and sewers, and unqualifiedly rejects the whole system as contrary to its constitution.<sup>79a</sup>

— South Dakota.

*Constitution of 1890.*

**110.** "The legislature may vest the corporate authority of cities, towns and villages with power to make local improvements by special taxation of contiguous property or otherwise. For all corporate purposes, all municipal corporations may be vested with authority to assess and collect taxes; but such tax shall be uniform in respect to persons and property within the jurisdiction of the body levying the same." Art. IX, Sec. 10.

**111.** The provision of the organic law of the Territory of Dakota that

"All property subject to taxation shall be taxed in proportion to its value," relates only to general, county and municipal taxes, levied to defray the ordinary expenses of the government, and not to assessments for local municipal improvements.<sup>80</sup>

The new constitutional provision nearly resembles that of Illinois, and would probably receive similar construction.

— Tennessee.

**112.** Under the constitutional provision that "all property shall be taxed according to value," the system of taxa-

tion, or in "the law of the land"—that is to say, the common law and statute law existing at the adoption of the constitution. But by force of decisions rendered prior to the present constitution, and, therefore, the "law of the land" within the meaning of the constitution, the cost of improvements to sidewalks and of

drains and sewers may be assessed upon the abutting land.

Mauldin v. Greenville, 42 S. C. 293, 27 L. R. A. 284, 46 Am. St. Rep. 723, 20 S. E. 842.

<sup>79a</sup> Mauldin v. Greenville, 53 S. C. 285, 43 L. R. A. 201, 69 Am. St. Rep. 855, 31 S. E. 252.

<sup>80</sup> W. & St. P. R. Co. v. Watertown, 1 S. Dak. 46, 44 N. W. 1072.



tion by assessment, according to benefits, is prohibited. The distinction between assessments and taxation is recognized, but is deemed inapplicable under the constitutional provision restricting municipal taxation to a rule of uniformity according to value.<sup>81</sup> The early cases were authority to the contrary, but may now be relegated to the list of overruled cases.<sup>82</sup>

### — Texas.

**113.** The constitutional requirement that "taxation shall be equal and uniform throughout the state," is not applicable to taxation by special assessment.<sup>83</sup>

### — Vermont.

**114.** It was decided by the highest court of this state in 1872 that the legislature might confer upon municipalities power to levy assessments to pay for sidewalks, aque-

<sup>81</sup> *McBean v. Chandler*, 9 Heisk. 349, 124 Am. Rep. 308; *State v. Butler*, 11 Lea, 418.

A special assessment on lands in a levee district to erect a levee for the special protection and benefit of the lands situated therein, is such a tax as falls within the constitutional requirement that taxes shall be levied upon all property according to value.

*Reelfoot, etc., District v. Dawson*, 97 Tenn. 151, 34 L. R. A. 725, 36 S. W. 1041.

The levy of a tax on property, *in specie*, or by the acre, regardless of its value, violates the constitutional requirement that all property (including personal) shall be taxed according to value, and is void.

*Reelfoot, etc., Dist. v. Dawson*, 97 Tenn. 151, 34 L. R. A. 725, 36 S. W. 1041.

<sup>82</sup> *Mayor v. Maberry*, 6 Humph. 368, 44 Am. Dec. 315; *Washington v. Mayor*, 1 Swan, 177; *Whyte v. Mayor*, 2 Swan. 364.

*Note.*

Since the text was written, the case of *Arnold v. Knoxville*, 90 S. W. 469, has been decided, completely overruling the earlier cases of *Taylor v. Chandler*, 9 Heisk. 352, 24 Am. Rep. 308, and *Reelfoot Lake Dist. v. Dawson*, 97 Tenn. 151, 36 S. W. 1041, 34 L. R. A. 725, which held special assessments to be unconstitutional. The opinion is quite exhaustive, and has the effect of leaving to South Carolina the unenviable distinction of being the only state that denies the power to levy special assessments for benefits.

<sup>83</sup> *Roundtree v. Galveston*, 42 Tex. 612; *Taylor v. Boyd*, 63 Tex. 533.



ducts, sewers and streets. The constitution contains no "uniformity or equality" provision, and is silent as to special assessments.<sup>84</sup>

— Virginia.

**115.** "Taxation, whether imposed by the state, county, or corporate bodies, shall be equal and uniform." . . . "All property, both real and personal, shall be taxed in proportion to its value, to be ascertained as prescribed by law," . . . "no one species of property shall be taxed higher than any other species of property of equal value;" these are the constitutional requirements inquired into by the courts as to authorizing local assessment.

A generation ago, the highest court of the state sustained a paving assessment levied on the foot-front plan.<sup>85</sup> The question as to constitutionality thus raised was sustained in a later decision, the court saying, "It is sufficient to say that the right to make such assessments, unless prohibited by some constitutional provision, is almost universally conceded."<sup>86</sup> But again, the court appears a little later to doubt the authority of the legislature to authorize local assessments for public improvements, but has not changed the rule.<sup>87</sup>

— Washington.

**116.** "Taxes shall be equal and uniform, and according to value" . . . and "for all corporate purposes, all municipal corporations may be vested with authority to assess and collect taxes, and such taxes

<sup>84</sup> "General taxation implies a distribution of the burden upon some general rule of *equality*. So a local assessment, or tax for a local benefit, should be distributed among and imposed upon all *equality*, standing in like relation. But *equality* can never be but an *approximation*."

Redfield, J., in *Allen v. Drew*, 44 Vt. 174.

<sup>85</sup> *Norfolk v. Ellis*, 26 Gratt. 224.

<sup>86</sup> *Sands v. Richmond*, 31 Gratt. 571, 31 Am. Rep. 742; *R. & A. R. R. Co. v. Lynchburg*, 81 Va. 473; *Davis v. Lynchburg*, 84 Va. 861, 6 S. E. 230.

<sup>87</sup> *Norfolk v. Virginia*, 89 Va. 196, 16 S. E. 730.



shall be uniform in respect to persons and property within the jurisdiction of the body levying the same."

Accordingly, it has been held that a charter provision that the cost of street improvements shall be assessed upon the lands benefited thereby in proportion to their frontage upon the improvement, is not in violation of the constitutional provision that taxes shall be according to value, and shall be equal and uniform.<sup>88</sup>

Under the territorial organic act (U. S. Rev. St. Sec. 1924) declaring that "all taxes shall be equal and uniform, and no distinction shall be made in the assessment between different kinds of property," a section of a city charter providing that "real estate only shall be assessed" for local improvements, is not unconstitutional, as the first provision refers to general taxation only,"<sup>89</sup> while the constitutional requirement as to equality and uniformity in taxation applies only to the mode and rate of assessment, and is not a restriction upon the legislative power to direct the purposes for which tax collections may be expended. And a law providing that the county treasurer shall collect special assessments levied in cities within its limits is not a violation of the rule.<sup>90</sup>

#### — West Virginia.

117. The constitutional provision that taxes shall be "equal and uniform" does not apply to counties, cities, towns and villages,<sup>91</sup> nor to special assessments,<sup>91a</sup> and laws for special assessments are deemed strictly constitutional enactments.<sup>92</sup>

<sup>88</sup> *Austin v. Seattle*, 2 Wash. 667, 27 Pac. 557.

<sup>89</sup> *Spokane Falls v. Brown*, 3 Wash. 84, 27 Pac. 1077.

<sup>90</sup> *State v. Mudgett*, 21 Wash. 99, 57 Pac. 351.

<sup>91</sup> *Douglass v. Harrisville*, 9 W. Va. 162, 27 Am. Rep. 548.

<sup>91a</sup> *Wilson v. Philippi*, 39 W. Va. 75, 19 S. E. 553.

<sup>92</sup> *Parkersburg v. Tavenner*, 42 W. Va. 486, 26 S. E. 179.



— Wisconsin.

118. "The rule of taxation shall be uniform, and taxes shall be levied upon such property as the legislature shall prescribe." Art. VIII, Sec. 1.

"It shall be the duty of the legislature, and they are hereby empowered, to provide for the organization of cities and incorporated villages, and to restrict their power of taxation, *assessment*, borrowing money, contracting debts and loaning their credit, so as to prevent abuses in assessments and taxation, and in contracting debts by such municipal corporations."

119. By several decisions of the Supreme Court of the state, it has been held that assessments of special taxes for constructing streets and sidewalks cannot be sustained under the rule of uniformity of taxation alone, but can be under the latter provision requiring the legislature to restrict the power of municipal corporations in making assessments. The latter word has reference to the system of special taxation for municipal improvements, in existence at the time of the adoption of the constitution, and is a recognition of the existence of the power to levy such taxes, and to that extent modifies the rule of uniformity required in Art. VIII.<sup>93</sup> And they may be authorized upon adjoining property for the improvement of highways by water as well as upon land.<sup>94</sup> Assessments are special taxes, and it is within the legislative power to exempt therefrom particular classes of property.<sup>95</sup> The only substantial distinction between ordinary taxes and special assessments for benefits is that the former are based on value and subject to the constitutional rule of uniformity, while the latter are not.<sup>96</sup> All taxes levied for the purposes

<sup>93</sup> Weeks v. Milwaukee, 10 Wis. 242; Lumsden v. Cross, 10 Wis. 282; Bond v. Kenosha, 17 Wis. 284; Hale v. Kenosha, 29 Wis. 599. And see, also, Mitchell v. Milwaukee, 18 Wis. 93; May v. Holdridge, 23 Wis. 93; Blount v. Janesville, 31 Wis. 648.

<sup>94</sup> Johnson v. Milwaukee, 40 Wis. 315.

<sup>95</sup> Milwaukee, etc., Co. v. Milwaukee, 95 Wis. 42, 69 N. W. 796.

<sup>96</sup> Dalrymple v. Milwaukee, 53 Wis. 178, 10 N. W. 141; Yates v. Milwaukee, 92 Wis. 352, 66 N. W. 248.



of revenue and for the support of the government and municipal corporations must be levied by the rule of uniformity prescribed in Art. VIII. But special taxes for street and other local improvements are not subject to such rule, and are levied upon specific property and not on the public at large.<sup>97</sup>

**120.** The first charter of the city of Milwaukee, in 1846, conferred upon the local authorities the power to impose a special charge on lots to pay for grading and improving streets, and laying sidewalks in front of the same, and was extended to include the benefits resulting from building piers into Lake Michigan.<sup>98</sup>

**Constitutional restrictions — State constitutions not a grant of power.**

**121.** The constitution of a state is not a grant of power, but a restriction on the power of the legislature. The provision that the "legislature may vest the corporate authorities of cities, towns and villages with power to make local improvements by special assessments, or by taxation of property benefited," merely prescribes the rule of apportionment, and does not prohibit the legislature from conferring the power to make local improvements by special assessment upon other municipal corporations than those designated.<sup>99</sup>

**Limitation on taxing power.**

**122.** The taxing power of the legislature for public purposes is unlimited, except as specifically restrained by the Constitution. An assessment for a municipal improvement is a species of tax, and the imposition thereof is within the taxing power of the legislature. While the constitution authorizes cities to make local improvements by special taxa-

<sup>97</sup> *Lumsden v. Cross*, 10 Wis. 242; *Soens v. Racine*, 10 Wis. 271; 282.      *Bond v. Kenosha*, 17 Wis. 284.

<sup>98</sup> *Lumsden v. Cross*, 10 Wis. 282; *Weeks v. Milwaukee*, 10 Wis. 124, 30 Am. Rep. 819.      <sup>99</sup> *State v. Dodge Co.*, 8 Neb.



## §§ 123, 124 THE LAW OF SPECIAL ASSESSMENTS.

tion, it at the same time forbids the taking of private property for public use with just compensation. These two provisions must be construed together, so that neither shall nullify the other.<sup>1</sup>

### Who may levy a tax.

**123.** Under the Illinois Constitution of 1848, the legislature had no power to confer upon private persons or corporations the authority to levy and collect taxes or special assessments. A tax must be levied for a public purpose, and be exercised only by public corporations or public officials.<sup>2</sup> And the legislature cannot by special act deprive the common council of all discretion as to a local improvement, where the city charter leaves to the judgment and discretion of the council the matter of such improvements, nor can the legislature within the limits of a city directly exercise the power of special assessment, but it may authorize the municipal authorities to do so.<sup>3</sup>

### Effect of constitutional limitation on indebtedness.

**124.** The constitutional provision requiring the legislature to restrict cities in their power of taxation and assessment, does not apply to special improvements for paving streets, and if it did, the act of the legislature authorizing an assessment is not void because it does not prescribe all of the particulars relating to such assessment,<sup>4</sup> and the limitation to four per cent of the value of taxable property within a municipality, is a limitation on the municipal authorities, but does not limit the power of the legislature to provide by

<sup>1</sup> In re Van Antwerp, 56 N. Y. 261; Bloomington v. Latham, 142 Ill. 462, 18 L. R. A. 487, 32 N. E. 506.

<sup>2</sup> Board of Directors v. Houston, 71 Ill. 318; Harward v. St. Clair, etc., Drainage Co., 51 Ill. 130; Hessler v. Drainage Commission-

ers, 53 Ill. 105; Gage v. Graham, 57 Ill. 144.

<sup>3</sup> People v. Lynch, 51 Cal. 15, 21 Am. Rep. 677; Tusting v. Asbury Park (N. J. L.), 62 Atl. 183. But see Cheney v. Beverly, 188 Mass. 81, 74 N. E. 306.

<sup>4</sup> Raleigh v. Peace, 110 N. C.



appropriate legislation for the levy of special assessments.<sup>5</sup>

Courts will not impute to the legislature the intention of nullifying the judgments and decrees of courts of general jurisdiction in advance, when it would be beyond the constitutional power of that body to do so after they were made; and especially in relation to statutory proceedings to divest the citizen of his property without his consent by confining the citizen to a particular mode of seeking his remedy.<sup>6</sup>

### **The fourteenth amendment — Importance of.**

**125.** The second sentence of the first section of the Fourteenth Amendment to the Federal Constitution, and which has been aptly described as rising to the dignity of a new Magna Charta, reads as follows: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

The provision of the Fifth Amendment that no person shall be deprived of life, liberty, or property without due process of law, is a restraint upon the power of Congress, while the Fourteenth Amendment is a direct restraint upon the power of the States, and the language subject to different construction. "While the language of these amendments is the same, yet as they were engrafted upon the Constitution at different times and in widely different circumstances of our national life, it may be that questions may arise in which different constructions and applications of their provisions may be proper. . . . Certainly it cannot be supposed that, by the Fourteenth Amendment, it was intended to impose on the States, when exercising their powers of taxation, any more rigid or stricter curb than that imposed on the Federal government in a similar exercise of power by the

<sup>5</sup> Guthrie v. Territory, 1 Okla. 188, 21 L. R. A. 841, 31 Pac. 190.      <sup>6</sup> Union, etc., Ass'n v. Chicago, 61 Ill. 439.



Fifth Amendment.”<sup>7</sup> And the Supreme Court has as yet made no distinction between the two amendments as to what is “due process of law” in special assessment proceedings. Not only the Federal courts, but those of the States, have construed the language of these amendments, although it is a matter of sincere regret that greater harmony among the decisions, and greater unanimity in the courts pronouncing them, do not prevail.

**Assessment of cost of work against abutting property.**

**126.** The Iowa statute requiring the council to ascertain the entire cost of the improvement, the portion assessable on adjacent property, and to assess such portion on such property as provided by law and ordinance, is not violative of the 14th amendment, especially in view of Ch. 29, acts of 28th General Assembly providing that all special assessments shall be levied according to benefits conferred.<sup>8</sup>

**127.** The Kentucky statute providing that street improvements shall “be made at the exclusive cost of the owners of lots in each fourth of a square, to be equally apportioned” according to the number of square feet in such area belonging to the various owners, does not provide for any inquiry as to benefits, and contravenes the provisions of the 14th amendment.<sup>9</sup>

<sup>7</sup> French v. Barber Asphalt Paving Co., 181 U. S. 324, 45 L. ed. 879, 21 Sup. Ct. Rep. 625.

<sup>8</sup> Burlington Sav. Bk. v. Clinton, 106 Fed. 269.

<sup>9</sup> Zehnder v. Barber Asphalt Paving Co., 106 Fed. 103; L. & N. R. Co. v. Barber Asphalt Pav. Co., 197 U. S. 430, 49 L. ed. 819, 25 Sup. Ct. Rep. 466; Walston v. Nevin, 128 U. S. 578, 32 L. ed. 544, 9 Sup. Ct. Rep. 192; French v. Barber Asphalt Pav. Co., 181 U. S. 324, 45 L. ed. 879, 21 Sup. Ct. Rep. 625; Cass Farm Co. v.

Detroit, 181 U. S. 396, 45 L. ed. 914, 21 Sup. Ct. Rep. 644; Webster v. Fargo, 181 U. S. 394, 45 L. ed. 912, 21 Sup. Ct. Rep. 623; Detroit v. Parker, 181 U. S. 399, 45 L. ed. 917, 21 Sup. Ct. Rep. 624; Chadwick v. Kelley, 187 U. S. 540, 543, 544, 47 L. ed. 293-295, 23 Sup. Ct. Rep. 175; Schaefer v. Werling, 188 U. S. 516, 47 L. ed. 570, 23 Sup. Ct. Rep. 449; Seattle v. Kelleher, 195 U. S. 351, 358, 49 L. ed. 232, 235, 25 Sup. Ct. Rep. 44.



**128.** Neither the machinery provided for doing the work, the excessive price allowed for the same, the comparative value of the land to the relative importance of the work, that the assessment is made before the work is done, *that assessments exceed the benefits conferred, nor that personal judgments may be entered against the owner for the amount assessed*, are matters in which the Federal constitution controls the state authorities.<sup>10</sup>

**129.** An objection that lots which should have been included in a special assessment district were not so included, thus creating unjust and excessive burdens, and violating the principle of equality of taxation, will not be heard after the expiration of the statutory time for presenting such objections, nor in a case where the record fails to show specifically that certain lots should have been included.<sup>11</sup>

### **The front foot rule.**

**130.** This question is treated more fully in the following chapter, but it may be sufficient to state here that the numerical authority is to the effect that the assessment of the cost of a local improvement upon the property within the taxing district, in proportion to the number of feet of frontage of such property, is not repugnant to the Fourteenth Amendment. It has been expressly so held of the California street assessment law,<sup>12</sup> while in Indiana, and in a very strong opinion, the court found that the imposition of such assessments by the front foot, irrespective of accruing

<sup>10</sup> Davidson v. New Orleans, 96 U. S. 97, 24 L. ed. 616.

An ordinance, passed under authority of statute, authorizing the appropriation of land for the purpose of a public street, and assessing the cost of the same on the foot front rule, together with the expenses incidental thereto, upon the remainder of the land, is in

violation of the fourteenth amendment, as depriving a person of property without due process of law.

Scott v. Toledo, 36 Fed. 385.

<sup>11</sup> O'Dea v. Mitchell, 144 Cal. 374, 77 Pac. 1020.

<sup>12</sup> San Francisco Paving Co. v. Bates, 134 Cal. 39, 66 Pac. 2.



benefits, was in direct violation of the Fourteenth Amendment,<sup>13</sup> although in a very late case,<sup>14</sup> in referring to the decision, the same court say: "What was said in *Adams v. Shelbyville*, concerning a law which makes no provision for a hearing on the question of special benefits, and that such a law would be in violation of the Fourteenth Amendment to the Constitution of the United States, under the case of *Norwood v. Baker*, 172 U. S. 269, was clearly *obiter dicta*, for the reason that no such question was before the court for decision."

**131.** The Supreme Court of the United States, the ultimate authority on questions arising out of the construction and application of the amendment, holds that assessing three-fourths of the cost of a street paving upon abutting property in proportion to frontage, and making such assessment a lien thereon, is not obnoxious to the Fourteenth Amendment,<sup>15</sup> and in a very recent case affirms an assessment made under the Kentucky statute providing for assessment according to area, although the property was used only for a railroad right of way, and its value was not enhanced by the improvement of the street.<sup>16</sup>

<sup>13</sup> *Adams v. Shelbyville*, 154 Ind. 467, 49 L. R. A. 797, 77 Am. St. Rep. 484, 57 N. E. 114.

<sup>14</sup> *Voris v. Pittsburg, etc.*, Glass Co., 163 Ind. 599, 70 N. E. 249.

<sup>15</sup> *Chadwick v. Kelley*, 187 U. S. 540, 47 L. ed. 293, 23 Sup. Ct. Rep. 175, affirming same case in 104 La. 719, 29 So. 295.

<sup>16</sup> The court say: "The whole cost of the improvement is distributed in proportion to area, and a particular area might receive no benefits at all, at least if its present and probable use be taken into account. If that possibility does not invalidate the act, it would be surprising if the corresponding

fact should invalidate an assessment. Upholding the act as embodying a principle generally fair and doing as nearly equal justice as can be expected seems to import that if a particular case of hardship arises under it in its natural and ordinary application, that hardship must be borne as one of the imperfections of human things. And this has been the implication of the cases." And this by the same court that decided *Norwood v. Baker*, and declared in ringing language that the exaction from a property owner under the guise of a special assessment of anything in substantial excess



**Priority of lien.**

**132.** An act authorizing the issue of street improvement bonds, and making the bonds prior to all other liens, is not unconstitutional as impairing the obligation of a prior mortgage, nor is it in violation of the Fourteenth Amendment,<sup>17</sup> nor does the fact that the Illinois sidewalk act of 1875 does not limit the amount of the special tax to special benefits received by the property render the act obnoxious to the Fourteenth Amendment to the Federal Constitution, as such amendment was construed in *Norwood v. Baker*.<sup>18</sup>

**Equal protection of the laws.**

**133.** A city charter provided that where any street has been graded to the established grade, the owner of any lot injured by a subsequent alteration of such grade shall be entitled to compensation therefor. In 1891, the legislature passed an act authorizing the city to change the established grades within a certain limited district (embracing forty-nine blocks), without any compensation being made for ensuing injuries, but the act was held unconstitutional as denying to lot owners in the specified district "the equal protection of the laws."<sup>19</sup>

**Due process of law.**

**134.** The phrase "due process of law" antedates the establishment of our institutions, and is endeared to our race

of the benefits received is, to the extent of such excess, a taking of private property for public use without due process of law.

*L. & N. R. Co. v. Barber Asphalt Paving Co.*, 197 U. S. 430, 49 L. ed. 819, 25 Sup. Ct. Rep. 466.

<sup>17</sup> *German Savings, etc., Society v. Ramish*, 138 Cal. 120, 69 Pac. 89.

<sup>18</sup> This decision went upon the ground that the property owner was protected from arbitrary ex-

actions in such case by the rule that an ordinance to be valid must be reasonable; and also because, under the statute, the property owner may have the questions decided whether the tax is in substantial excess of the special benefits received.

*Job v. Alton*, 189 Ill. 256, 82 Am. St. Rep. 448, 59 N. E. 622.

<sup>19</sup> *Anderton v. Milwaukee*, 82 Wis. 279, 15 L. R. A. 830, 52 N. W. 95.



by antiquity and the noblest historical associations. No words in our language signify more in respect of the rights and privileges of the individual than this phrase, and it embodies one of the broadest and most far-reaching guaranties of personal and property rights. At first, the words undoubtedly related to the procedure for the protection of such rights; but by the time of the Revolution of 1776, it was regarded as synonymous with the famous phrase, "the law of the land," although "due process of law" is more comprehensive.<sup>20</sup>

**135.** The phrase has always been one requiring construction, and, as the Supreme Court of United States has said, has never been defined, and probably never can be defined, so as to draw a clear and distinct line, applicable to all cases, between proceedings which are by due process of law and those which are not.<sup>21</sup> The general meaning of the two phrases "due process of law" and "the law of the land," as given in the Dartmouth College case,<sup>22</sup> is more often quoted than any other, and defines the term in relation to procedure as well as to substantive rights. "By the law of the land is most clearly intended the general law; a law which hears before it condemns; which proceeds upon enquiry, and renders judgment only after trial. The meaning is, that every citizen shall hold his life, liberty, property, and immunities under protection of the general rules which govern society. Everything which may pass under the form of an enactment is not, therefore, to be considered the law of the land."<sup>23</sup> It is not confined to judicial proceedings

<sup>20</sup> Guthrie, Fourteenth Amendment, pp. 66-68.

<sup>21</sup> Miller, J., in *Freeland v. Williams*, 131 U. S. 405, 418, 33 L. ed. 193, 198, 9 Sup. Ct. Rep. 763. See, also, *Holden v. Hardy*, 169 U. S. 366, 389, 42 L. ed. 780, 790, 18 Sup. Ct. Rep. 383.

<sup>22</sup> *Dartmouth College v. Wood-*

*ward*, 4 Wheat. 518, 581, 4 L. ed. 629, 645.

<sup>23</sup> "Due process of law in each particular case means such an exertion of the powers of government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as



alone, but extends to all proceedings which may affect the citizen in his rights of liberty or property. "It is manifest that it was not left to the legislative power to enact any process which might be devised. The article is a restraint on the legislative, as well as on the executive and judicial powers of the government, and cannot be so construed as to leave the Legislature free to make any process "due process of law" by its mere will. It means "such an exertion of the powers of government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one being dealt with belongs."<sup>24</sup>

those maxims prescribe for the class of cases to which the one being dealt with belongs." Story on Const., 5th ed., sec. 1945.

<sup>24</sup> Murray v. Hoboken L. & I. Co., 18 How. 272, 15 L. ed. 372; Stuart v. Palmer, 74 N. Y. 183; Weimer v. Bruneberg, 30 Mich. 201; McMillen v. Anderson, 95 U. S. 37, 24 L. ed. 335; Story on Const., 5th ed., sec. 1945; Davidson v. New Orleans, 96 U. S. 101, 24 L. ed. 618; Ex parte Wall, 107 U. S. 288, 27 L. ed. 562, 2 Sup. Ct. Rep. 569; Hagar v. Rec. Dist., 111 U. S. 708, 28 L. ed. 572, 4 Sup. Ct. Rep. 663; Mo. Pac. R. Co. v. Humes, 115 U. S. 519, 29 L. ed. 465, 6 Sup. Ct. Rep. 110; Freeland v. Williams, 131 U. S. 418, 33 L. ed. 198, 9 Sup. Ct. Rep. 763; Hallinger v. Davis, 146 U. S. 317, 36 L. ed. 989, 13 Sup. Ct. Rep. 105; Holden v. Hardy, 169 U. S. 384, 389, 42 L. ed. 788, 790, 18 Sup. Ct. Rep. 383.

"Due process of law is process according to the system of law obtaining in each state, and not according to any general law of the United States."

Walker v. Sauvinet, 92 U. S. 90, 23 L. ed. 678; Missouri v. Lewis, 101 U. S. 22, 25 L. ed. 989; Hurtado v. California, 110 U. S. 516, 28 L. ed. 232, 4 Sup. Ct. Rep. 111, 292.

"What would be a fair and just provision in one state might be oppressive and grossly arbitrary elsewhere. Each state has its peculiar interests and traditions that may call for distinct legislative policies. . . . In each case, the primary inquiry must be as to what is the system of law of the particular state, and whether, according to that law, as adjudged by its courts, the procedure in question is "due process"; and the secondary inquiry must be whether in that process of law, if followed, there is any violation of the fundamental rights secured by the Federal Constitution."

Guthrie on the Fourteenth Amendment, citing Kennard v. Louisiana, 92 U. S. 480, 23 L. ed. 478; Caldwell v. Texas, 137 U. S. 692, 34 L. ed. 816, 11 Sup. Ct. Rep. 224; Leeper v. Texas, 139



**136.** The one essential to due process of law, in the exercise of the power of taxation, is that at some stage of the proceedings the parties concerned shall have notice and an opportunity to interpose any defense they may have as to either the validity or amount of the tax.<sup>25</sup> If the legislature provides for notice to and hearing of each proprietor, at some stage of the proceeding, upon the question what proportion of the tax shall be assessed on his land, there is no taking of his land without due process of law.<sup>26</sup>

— Definition of.

**137.** It may be defined as "law in its course of administration through courts of justice," but in its broad sense signifies such an exercise of the powers of government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs;<sup>27</sup> while as embodied in Sec. 3, Art. 1, of the Constitution of Nebraska, it relates primarily to the remedy for wrongs to person and property, rather than to matters of substantive law.<sup>28</sup> Where ample provision is

U. S. 462, 35 L. ed. 225, 11 Sup. Ct. Rep. 579; *McNulty v. California*, 149 U. S. 645, 37 L. ed. 882, 13 Sup. Ct. Rep. 959.

<sup>25</sup> *Duluth v. Dibble*, 62 Minn. 18, 63 N. W. 1117; *Higman v. Sioux City (Iowa)*, 105 N. W. 524; *Owens v. Marion*, 127 Iowa, 469, 103 N. W. 381; *Roberts v. Evanston*, 218 Ill. 296, 75 N. E. 923; *Citizens Sav. Bk. & Tr. Co. v. Chicago*, 215 Ill. 174, 74 N. E. 115. But not notice of each step. *Ross v. Wright Co. Supervisors (Iowa)*, 104 N. W. 506.

<sup>26</sup> *Ulman v. Mayor, etc.*, 72 Md. 593, 11 L. R. A. 224, 20 Atl. 141, 21 Atl. 709; *Spencer v. Merchant*, 125 U. S. 345, 31 L. ed. 763, 8 Sup. Ct. Rep. 921; *Paulsen v. City*

of Portland, 149 U. S. 41, 37 L. ed. 641, 13 Sup. Ct. Rep. 754.

<sup>27</sup> *Wulzen v. Supervisors*, 101 Cal. 15, 40 Am. St. Rep. 17, 35 Pac. 353.

<sup>28</sup> *Irrigation District v. Collins*, 46 Neb. 411, 64 N. W. 1086; *Pearson v. Yewdall*, 95 U. S. 294, 24 L. ed. 436.

"It is sufficient to observe here, that by 'due process' is meant one which, following the forms of law, is appropriate to the case, and just to the parties to be affected. It must be pursued in the ordinary mode prescribed by the law; it must be adapted to the end to be attained; and wherever it is necessary for the protection of the parties, it must give them an oppor-



made for an inquiry as to damages before a competent court and for a review of the proceedings of the court of original jurisdiction, upon appeal to the highest court of the state, this complies with the meaning of the term as used in the Federal Constitution.<sup>29</sup> It is a rule founded on the first principles of natural justice older than written constitutions, that a citizen shall not be deprived of his life, liberty or property without an opportunity to be heard in defense of his rights, and the constitutional provision that no person shall be deprived of these "without due process of law" has its foundation in this rule. This provision is the most important guaranty of personal rights to be found in the Federal or State Constitution. It is a limitation upon arbitrary power, and is a guaranty against oppression and confiscation.

### Arbitrary legislation.

**138.** The legislature of a state, unless hampered by some constitutional provision, may create a tribunal in a city or town, such as the council, to make an assessment, and such

tunity to be heard respecting the justice of the judgment sought. The clause in question means, therefore, that there can be no proceeding against life, liberty or property, which may result in deprivation of either, without the observance of those general rules established in our system of jurisprudence for the security of private rights." Field, J., in *Hagar v. Reclamation District*, 111 U. S. 701, 28 L. ed. 569, 4 Sup. Ct. Rep. 663. Followed and approved in *Turpin v. Lemon*, 187 U. S. 51, 47 L. ed. 70, 23 Sup. Ct. Rep. 20. *Due process.*

A statute that no street improvement shall be made where a majority of the resident property owners liable to assessment file a protest against the same, is not

objectionable as denying due process of law or the equal protection of the laws, because nonresident owners are not afforded such privilege, there being no discrimination in the amount of the tax among the property owners.

*Field v. Barber Asphalt Paving Co.*, 194 U. S. 618, 48 L. ed. 1142, 24 Sup. Ct. Rep. 784.

<sup>29</sup> "No case it is believed can be found in which it was decided that this constitutional guaranty did not extend to cases of assessments, and yet we may infer from certain dicta of judges that their attention was not called to it, or that they lost sight of it in the cases which they were considering. It has sometimes been intimated that a citizen is not deprived of his property within the meaning of



assessment will not be void even if every member of the board were a taxpayer in the district, nor is due process of law denied a property owner because two members of such board are abutting owners.<sup>30</sup> It requires compensation to be made or secured to the owner when private property is taken by a state, or under its authority, for public use,<sup>31</sup> for the arbitrary appropriation of private property without notice, and without an opportunity for a hearing, cannot be defended upon any principle of natural justice, and ought not to be tolerated and upheld by the courts.<sup>32</sup> It is provided for by an act creating a levee district, requiring the assessors to meet at a date fixed and make their assessment, and at another time and place to again meet and equalize their assessment, and providing for the collection of unpaid assessments by foreclosure proceedings;<sup>33</sup> and it is within the power of the legislature to create special taxing districts, and to charge the cost of a local improvement in whole or in part, upon the property in said district, either according to valuation, frontage or area. Due process of law is ob-

this constitutional provision by the imposition of an assessment. It might as well be said that he is not deprived of his property by a judgment entered against him."

Earl, J., in *Stuart v. Palmer*, 74 N. Y. 183, 30 Am. Rep. 289.

<sup>30</sup> *Hibben v. Smith*, 191 U. S. 310, 48 L. ed. 195, 24 Sup. Ct. Rep. 88.

<sup>31</sup> *Norwood v. Baker*, 172 U. S. 269, 278, 43 L. ed. 443, 447, 19 Sup. Ct. Rep. 187; *C. B. & Q. R. R. Co. v. Chicago*, 166 U. S. 226, 241, 41 L. ed. 979, 986, 17 Sup. Ct. Rep. 581; *Long Island W. S. Co. v. Brooklyn*, 166 U. S. 685, 695, 41 L. ed. 1165, 1168, 17 Sup. Ct. Rep. 718.

<sup>32</sup> *Gatch v. Des Moines*, 63 Iowa, 724, 18 N. W. 310.

<sup>33</sup> *Carson v. St. Francis Levee*

*Dist.*, 59 Ark. 513, 27 S. W. 590. And see, generally, for a list of authorities defining the subject, *Stuart v. Palmer*, 74 N. Y. 183, 30 Am. Rep. 289; and for cases as to what is, *Meggett v. Eau Claire*, 81 Wis. 326, 51 N. W. 566; *State v. Oshkosh*, 84 Wis. 548, 54 N. W. 1095; *Reclamation Dist. v. Hagar*, 6 Sawy. 567, 4 Fed. 366; *Fallbrook Ir. Dist. v. Bradley*, 164 U. S. 112, 41 L. ed. 369, 17 Sup. Ct. Rep. 56; *Brown v. Denver*, 7 Colo. 305, 3 Pac. 455; *King v. Portland*, 184 U. S. 61, 46 L. ed. 431, 22 Sup. Ct. Rep. 290; *S. F. & W. R. Co. v. Savannah*, 96 Ga. 680, 23 S. E. 847; *Indianapolis v. Holt*, 155 Ind. 222, 57 N. E. 966, 988, 1100; *Leeds v. Defrees*, 157 Ind. 392, 61 N. E. 930.



served by a statute requiring notice to be given to owners of land to be *taken* for a street improvement, which provides for no notice to land owners whose property is liable to be assessed, their interest being too remote.<sup>34a</sup> It is afforded to the taxpayer in the apportionment of special assessments, if he be afforded an opportunity to be heard before the body making the assessment; and the state legislature may provide that such hearing shall be final, so far as the Federal Constitution is concerned.<sup>34b</sup>

### Interest on deferred payments.

**139.** Under a statute authorizing the issue of bonds for paying deferred installments of special assessment payments, the fixing of interest thereon at five per cent is not depriving the owner of his property without due process of law.<sup>34c</sup>

### Due process not necessarily judicial process.

**140.** But due process of law is not necessarily judicial process, nor is the right of appeal essential thereto. There is no provision of the Federal Constitution forbidding the state from granting to a tribunal, whether called a court or board of registration, the final determination of a legal question.<sup>34d</sup>

<sup>34a</sup> *Goodrich v. Detroit*, 184 U. S. 432, 46 L. ed. 627, 22 Sup. Ct. Rep. 397.

<sup>34b</sup> *Hibben v. Smith*, 191 U. S. 310, 48 L. ed. 195, 24 Sup. Ct. Rep. 88.

<sup>34c</sup> *Hulbert v. People*, 213 Ill. 452, 72 N. E. 1097.

<sup>34d</sup> *Murray's Lessee v. Hoboken Co.*, 18 How. 272, 15 L. ed. 372; *Bushnell v. Leland*, 164 U. S. 684, 41 L. ed. 598, 17 Sup. Ct. Rep. 209; *Public Clearing House v. Coyne*, 194 U. S. 497, 48 L. ed. 1092, 24 Sup. Ct. Rep. 789.

"There is nothing in these words ('due process of law'), however, that necessarily implies

that due process of law must be judicial process. Much of the process by means of which the government is carried on and the order of society maintained is purely executive or administrative. Temporary deprivations of liberty or property must often take place through the action of ministerial or executive officers or functionaries, or even of private parties, where it has never been supposed that the common law would afford redress." *Cooley, J., in Weimer v. Bunbury*, 30 Mich. 201.

The only reservation is that the person injured may apply to the courts for redress in case the ex-



And a system of delusive exactness should not be extracted from the very general language of the Fourteenth Amendment in order to destroy methods of taxation that were well known before its adoption, and which no one then supposed would be disturbed.<sup>34e</sup>

### Requisites of due process — Notice.

**141.** The authorities are practically unanimous in the adoption of the general principle that notice to the property owner, and an opportunity to be heard at some stage of the proceedings are necessary steps in a proceeding which seeks to charge property with a special assessment.<sup>34f</sup> But in determining what notice is sufficient, the courts are in apparently hopeless conflict.<sup>34g</sup> It may be enunciated as a general principle, accepted by all courts, that private property may not be taken for public use without notice, but that the legislature may prescribe the mode of giving notice, and such requirements, when complied with, are sufficient.<sup>35</sup>

**142.** The enforcement of a tax levy is a mode of depriving the citizen of his property; and where the assessment is not specific, such as a poll tax, and imposed upon all alike,

executive or ministerial officers have exceeded their authority, or their action is palpably wrong.

*School of Magnetic Healing v. McAnnulty*, 187 U. S. 94, 47 L. ed. 90, 23 Sup. Ct. Rep. 33; *Public Clearing House v. Coyne*, *supra*.

<sup>34e</sup> *L. & N. R. Co. v. Barber Asphalt Paving Co.*, 197 U. S. 430, 49 L. ed. 819, 25 Sup. Ct. Rep. 466; *Spencer v. Merchant*, 125 U. S. 345, 31 L. ed. 763, 8 Sup. Ct. Rep. 921.

<sup>34f</sup> For case holding due process of law complied with, see *Denver v. Kennedy*, 33 Colo. 80, 80 Pac. 122, 467. For mode of procedure held constitutional, as affording

due process of law, see *Chase v. Trout*, 146 Cal. 350, 80 Pac. 81.

<sup>34g</sup> *Webster v. Fargo*, 181 U. S. 394, 45 L. ed. 912, 21 Sup. Ct. Rep. 623; *Tonawanda v. Lyon*, 181 U. S. 389, 45 L. ed. 908, 21 Sup. Ct. Rep. 609; *Cass Farm Co. v. Detroit*, 181 U. S. 396, 45 L. ed. 914, 21 Sup. Ct. Rep. 644; *Detroit v. Parker*, 181 U. S. 399, 45 L. ed. 917, 21 Sup. Ct. Rep. 624; *Farrell v. Park Comr's*, 181 U. S. 404, 45 L. ed. 924, 21 Sup. Ct. Rep. 609; *Shumate v. Heman*, 181 U. S. 402, 45 L. ed. 922, 21 Sup. Ct. Rep. 645.

<sup>35</sup> *Owners of Ground v. Mayor*, 15 Wend. 374; *Stuart v. Palmer*, 74 N. Y. 183, 30 Am. Rep. 289.



it is necessary for its validity that the tax-payer have due notice of the assessment, and an opportunity to be heard in opposition thereto, to the end that he may not, in violation of constitutional guarantees, be deprived of his property without due process of law.<sup>36</sup> But where the amount can be ascertained by a mere mathematical calculation, and no judgment or discretion are required, such notice is unnecessary.<sup>37</sup> It is not enough that the owner may, by chance, have notice, or that he may, as a matter of favor, have a hearing, the law must require notice and give a right to a hearing.<sup>38</sup>

**143.** The notice and hearing required by the constitution need only be such as are adapted to the nature of the assessment proposed, and such as afford the property owner an opportunity to show that, according to the method prescribed for making the assessment, the amount charged against him is not correct.<sup>39</sup> And a city charter which does not provide for proper notice is to that extent unconstitutional, although purporting to give the right of appeal to the courts, in a vague and indefinite manner. All proceedings under such a charter are necessarily void.<sup>40</sup>

**144.** Where an appeal to the courts from the decision of drainage commissioners is given, it cannot be said that property rights will be affected without due process of law,<sup>41</sup> and where an assessment can only be enforced by action to which the land-owner must be a party, it is immaterial if he had notice before the assessment, if in the subsequent action he have his day in court with full opportunity to contest the charge before it is declared a lien upon his land.<sup>42</sup> It has

<sup>36</sup> *Gatch v. Des Moines*, 63 Iowa, 718, 18 N. W. 310.

<sup>37</sup> *Ford v. North Des Moines*, 80 Iowa, 626, 45 N. W. 1031.

<sup>38</sup> *Stuart v. Palmer*, 74 N. Y. 183, 30 Am. Rep. 289.

<sup>39</sup> *Garvin v. Daussman*, 114 Ind. 429, 5 Am. St. Rep. 637, 16 N. E. 826; *Wulzen v. Supervisors*, 101

Cal. 15, 40 Am. St. Rep. 17, 35 Pac. 353.

<sup>40</sup> *S. F. & W. R. Co. v. Savannah*, 96 Ga. 680, 23 S. E. 847.

<sup>41</sup> *State v. Stewart*, 74 Wis. 620, 6 L. R. A. 394, 43 N. W. 947.

<sup>42</sup> *Reclamation District v. Evans*, 61 Cal. 104.



been held that a statutory requirement that notice be given of a proposition to fix or change roads or streets is merely directory,<sup>43</sup> but the proceedings to improve the streets, although somewhat summary in character, are among those which require proper notice and an opportunity for a hearing.<sup>44</sup>

### — Opportunity for hearing.

**145.** Not only notice to the property owner, but an opportunity to be heard before some tribunal empowered by the legislature to determine the matters before it, is deemed by most courts to be an absolute essential to due process of law, although some courts differentiate to such an extent as to almost eliminate the requirement. One court has held that the hearing to which a property owner is entitled when there is a lien upon his property for the cost of a street improvement, and it is sought to be enforced, is the only notice which is necessary,<sup>45</sup> and the court of appeals of New York is of the opinion that a provision in a city charter fixing the amount of sewerage assessments upon abutting property at a definite sum per front foot, is not unconstitutional and void as involving a taking of property without due process of law because it fails to provide for a hearing as to benefits or the justice and equity of the principle upon which the burden is to be imposed, and is a valid exercise of legislative power.<sup>46</sup> The consensus of opinion is that it is necessary to the validity of a special assessment that somewhere along the line of the proceedings, notice be given to the owner and an opportunity afforded him to be heard in opposition or defense,<sup>47</sup> and that

<sup>43</sup> *White v. McKeesport*, 101 Pa. St. 394.

<sup>44</sup> *Garvin v. Daussman*, 114 Ind. 429, 5 Am. St. Rep. 637, 16 N. E. 826; *McLaughlin v. Miller*, 124 N. Y. 510, 26 N. E. 1104. As to requisites of notice, see *Lent v. Tillson*, 72 Cal. 404, 14 Pac. 71.

<sup>45</sup> *Nevin v. Roach*, 86 Ky. 492, 5 S. W. 546.

<sup>46</sup> *People v. Pitt*, 169 N. Y. 521, 58 L. R. A. 372, 62 N. E. 662.

<sup>47</sup> *C. & E. R. Co. v. Keith*, 67 Ohio St. 279, *Thomas v. Gain*, 35 Mich. 155, 24 Am. Rep. 535; *Hilliard v. Asheville*, 118 N. C. 845, 24 S. E. 738; *Adams v. Shelbyville*, 154 Ind. 467, 49 L. R. A. 797, 77 Am. St. Rep. 484, 57 N. E. 114.



statutes which make no provision for notice and a hearing are unconstitutional.<sup>48</sup>

**146.** An assessment against plaintiff's lands for draining them, being resisted in the state courts, was finally brought to the supreme court of the United States by writ of error upon the claim that plaintiff was deprived of his property without due process of law. That court held that when the fixing of a tax or assessment is, by the statute of the state imposing it, required to be submitted to a court of justice before it becomes effectual, with notice to the owners and a right on their part to appear and contest the assessment, that it is due process of law within the meaning of the constitution.<sup>49</sup> The tendency of the court seems to be toward the recognition of the power of the legislature as to fixing notice, hearing, or giving or prohibiting appeal, as almost unlimited. Thus, in quite recent cases, it holds that due process of law is afforded where there is opportunity to be heard before the body which is to make the assessment, and the legislature of a state may provide that such hearing shall be conclusive so far as the Federal Constitution is concerned. And whether a review is or is not given as to the question of benefits and damages, is a mere question of legislative discretion.<sup>50</sup> The decisions of that court are binding upon all, but even their decisions are subject to criticism, and nowhere is it more vigorously displayed than in some of the numerous dissenting opinions, and with apparently more of sound reason.

<sup>48</sup> *Stuart v. Palmer*, 74 N. Y. 183, 30 Am. Rep. 289; *Garvin v. Daussman*, 114 Ind. 429, 5 Am. St. Rep. 637, 16 N. E. 826.

<sup>49</sup> *Davidson v. New Orleans*, 96 U. S. 97, 24 L. ed. 616.

Where land is to be taken for the purposes of a public street, it is a requirement of "due process of law" that notice and an opportunity to be heard be given to those whose land is to be taken or is affected by the improvement; and all the greater need of such

notice under a statute requiring the special assessments to be made so far as practicable according to the benefits to the property assessed, and when such assessments may be collected by distress without notice. *Scott v. Toledo*, 36 Fed. 385, 1 L. R. A. 688.

<sup>50</sup> *Hibben v. Smith*, 191 U. S. 310, 48 L. ed. 195, 24 Sup. Ct. Rep. 88; *Fallbrook Ir. Dist. v. Bradley*, 164 U. S. 112, 41 L. ed. 369, 17 Sup. Ct. Rep. 56.



Even upon the front foot rule, which subject seems to be finally settled so far as the Federal courts are concerned, it seems to be, and as abstract principle, unquestionably is unjust that two adjoining owners, one of whom is injured by the improvement and the other benefited thereby, by reason of the physical conditions, should be assessed alike; and yet the courts of the government and many of the states hold that a statute requiring the cost of paving streets to be assessed against abutting property according to the frontage does not violate the fourteenth amendment, as to taking property without due process of law,<sup>51</sup> and in a late case the cost of maintaining a sewer is held to be a proper subject of assessment.<sup>52</sup>

**147.** As we have seen, the courts differ materially in their construction of what is necessary to constitute due process of law in a special assessment proceeding; but a careful examination of the authorities, and a consideration and analysis of the circumstances of each case, lead irresistibly to the conclusion that notice and opportunity for hearing are not alone sufficient to comply with the constitutional requirements, but that it is even more important that the hearing should be before a tribunal clothed with power by methods and rules prescribed by law to hear and determine the matters at issue.<sup>53</sup>

— What notice sufficient.

**148.** The variance between the opinions of the various courts of last resort as to what constitutes sufficient notice is

<sup>51</sup> *French v. Barber Asphalt Paving Co.*, 181 U. S. 324, 45 L. ed. 879, 21 Sup. Ct. Rep. 625; *Cass Farm Co. v. Detroit*, 181 U. S. 396, 45 L. ed. 914, 21 Sup. Ct. Rep. 644. Affirming same case, 124 Mich. 433, 83 N. W. 108.

<sup>52</sup> A taxpayer, who has been assessed for cost of constructing sewers, is not deprived of his property without due process of law by the levying of a special assessment for the cost of main-

taining the same, in case of use thereof, it being a matter of public policy for the legislature, and the property having been originally benefited by the construction of the sewer in the privilege of discharging their private sewers into it, even if not entitled to the free use thereof. *Carson v. Sewer Comr's*, 182 U. S. 398, 45 L. ed. 1151, 21 Sup. Ct. Rep. 860.

<sup>53</sup> *Charles v. Marion*, 98 Fed. 166.



as pronounced as that involved in any of the questions involved in the discussion of the general subject. Thus the notice of hearing given in the following instances has been held sufficient: When the provisions of a city charter that the cost of a street improvement may be assessed upon abutting property to the amount of half the full cost of the work in front thereof, and a due proportion of the cost of the street intersections where such cost is proportioned according to the benefits, which are equal to such cost, and a hearing is given to the property owner upon the question of such benefits before the district is created, and an opportunity to contest such assessment.<sup>54</sup> When the ordinary course in similar proceedings for the assessment and collection of taxes that has been customarily followed in the state, and where the property owner who may subsequently be charged in his property has had a hearing or an opportunity for one is provided by the statute:<sup>55</sup> Where an assessment can only be enforced by proceedings in court, after notice to the property owner;<sup>56</sup> when a city charter provided that the audit of the cost of street improvement bills should be final and conclusive, giving it power to sue for such bills, and that the audit should be "presumptive evidence" when duly certified, such provisions are not objectionable as not giving a hearing, as they clearly imply a trial;<sup>57</sup> where an act requires notice to be given of every material step by publishing or posting, and an opportunity for hearing, and the fact that no personal notice is required is immaterial.<sup>58</sup> The Indiana statute of

<sup>54</sup> King v. Portland, 184 U. S. 61, 46 L. ed. 431, 22 Sup. Ct. Rep. 290. Affirming same case, 38 Or. 402, 55 L. R. A. 812, 63 Pac. 2. And see, Paulson v. Portland, 16 Or. 450, 1 L. R. A. 673, 19 Pac. 450, holding notice unnecessary, under the principle of *stare decisis*, the court deeming itself bound by Strowbridge's case, 8 Or. 67, decided nine years before.

<sup>55</sup> Kelly v. Pittsburg, 104 U. S.

78, 26 L. ed. 658; Fallbrook Ir. Dist. v. Bradley, 164 U. S. 112, 41 L. ed. 369, 17 Sup. Ct. Rep. 56.

<sup>56</sup> Law v. Johnston, 118 Ind. 261, 20 N. E. 745; Garvin v. Daussman, 114 Ind. 429, 5 Am. St. Rep. 637, 16 N. E. 826.

<sup>57</sup> Schenectady v. Union College, 66 Hun, 179, 21 N. Y. Supp. 147.

<sup>58</sup> Davies v. Los Angeles, 86 Cal. 37, 24 Pac. 771.



1893 relating to the construction of sewers, the giving of notice of the work to be done and describing in such notice the boundary lines of the district intended to be drained, and to be assessed for the costs of the same, and fixing a date on which remonstrances will be heard, is constitutional, the notice required by the statute being ample to the property holders in the district, and ample opportunity being given them to be heard.<sup>59</sup> A ten day notice has been held sufficient,<sup>60</sup> as well as the fact that the land owner in an irrigation district if he be allowed a hearing before the assessment becomes a lien on his property.<sup>61</sup>

**149.** Under the following circumstances, all notice has been held unnecessary: Where property is assessed for benefits for a street improvement, but none of it is taken;<sup>62</sup> where the amount assessed is arrived at under a rule requiring merely a mathematical computation, although the amount constitutes a fixed charge upon the property,<sup>63</sup> and where an act levies a sewer tax per front foot and per square foot;<sup>64</sup> where the act authorizing the assessment does not give the property owners a right to be heard as to who shall be appointed assessors, or a right to appeal from such an appointment.<sup>65</sup> And there is no reason why different improvements may not legally be noticed in the same document.<sup>66</sup>

— What is not sufficient notice.

**150.** Provisions in a city charter authorizing special assessment for sewers without any notice, either actual or con-

<sup>59</sup> *Swain v. Fulmer*, 135 Ind. 8, 34 N. E. 639.

<sup>60</sup> *New Whatcom v. Bellingham etc. Co.*, 16 Wash. 131, 47 Pac. 236.

<sup>61</sup> *Madera Ir. Dist.*, 92 Cal. 296, 14 L. R. A. 755, 27 Am. St. Rep. 106, 28 Pac. 272, 675.

<sup>62</sup> *Goodrich v. Detroit*, 184 U. S. 432, 46 L. ed. 627, 22 Sup. Ct. Rep. 397; *Voigt v. Detroit*, 184 U. S. 115, 46 L. ed., 459, 22 Sup. Ct. Rep. 337.

<sup>63</sup> *Gillette v. Denver*, 21 Fed. 822.

<sup>64</sup> *Cleveland v. Tripp*, 13 R. I. 50; *English v. Wilmington*, 2 Marv. (Del.) 63, 37 Atl. 158.

<sup>65</sup> *Kelly v. Minneapolis*, 57 Minn. 294, 26 L. R. A. 92, 47 Am. St. Rep. 605, 59 N. W. 304.

<sup>66</sup> *Iowa Pipe & Tile Co. v. Callanan*, 125 Iowa, 358, 67 L. R. A. 408, 106 Am. St. Rep. 311, 101 N. W. 141.



structive, of the proceedings to the owners of the property to be assessed;<sup>67</sup> a charter provision authorizing the common council to summon a jury of six freeholders to determine both the necessity for taking private property for a street, and to fix the compensation therefor, and without notice to the owner, is unjust, inequitable, and contrary to the constitutional requirement that private property shall not be taken for public use against the owner's consent without the necessity therefor being first established by the verdict of a jury;<sup>68</sup> where an act to provide for the protection of lands from overflow makes assessments therefor and charge upon the lands benefited, and for sale of assessed lands to pay such benefit, and no opportunity is given for a hearing of the land-owner in regard to the assessment, but makes the assessment an absolute lien upon the property and provides for a summary sale thereof, without any suit or opportunity of the land owner to defend;<sup>69</sup> an act which undertakes to empower a council to collect "all sums that may be assessed by said council, or its authority, against each and every improved lot lying on any street in the city through which the pipes of the city waterworks pass," where no provision is made for fixing the amount of the assessment, with relation to either cost or benefits;<sup>70</sup> where the statute or ordinance providing the assessment shall be according to benefits, and fails to provide for either notice or hearing,<sup>71</sup> and a charter provision that the expense of opening a street shall be apportioned by the council between the city and the owners of the property benefited, directing that their share be collected as city taxes, with no provision for

<sup>67</sup> Dietz v. Neenah, 91 Wis. 422, 64 N. W. 299.

<sup>68</sup> Hood v. Finch, 8 Wis. 381; Lumsden v. Milwaukee, 8 Wis. 485.

<sup>69</sup> Hutson v. Woodbridge, etc., Dist., 79 Cal. 90, 16 Pac. 549, 21 Pac. 435.

<sup>70</sup> Augusta v. King, 115 Ga. 454, 41 S. E. 661.

<sup>71</sup> Trustees of Griswold College v. Davenport, 65 Iowa, 633, 22 N. W. 904; Auer v. Dubuque, 65 Iowa, 650, 22 N. W. 914.



the parties affected to have a hearing, is not objectionable as depriving the owners of their property without due process of law.<sup>72</sup> But it seems that a statute declaring that the assessment made by the board for sewerage purposes shall be final in all cases, is unconstitutional, as depriving the person interested of the right to be heard. "It is well established that the determination of the amount of taxes for special benefits to real estate by any tribunal to which the legislature delegates the power, is a quasi judicial proceeding which cannot take final effect unless persons to be assessed have an opportunity to be heard."<sup>73</sup> Proceedings for levying sewer assessments in accordance with provisions in a city charter requiring the publication of notices showing a plan of sewerage; the order of the council for the construction of the sewer when the contract therefor has been let; the opportunity given to the lot owner to pay the assessment or have bonds issued; and the placing of the assessment on the tax list, are not, however, subject to objection as being a taking of property without due process of law.<sup>74</sup>

#### What constitutes a taking.

**151.** The exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him is, *to the extent of such excess*, a taking, under the guise of taxation, of private property for public use without just compensation.<sup>75</sup> This epi-

<sup>72</sup> In its opinion, the court makes the remarkable declaration that, "as an original question, it is obvious that all possible notice is given by the progress of the work itself, and under our system of laws every citizen is held charged with notice of the public law." The opinion seems to go upon the theory that he who receives the benefit ought to bear the burden, and that the remedy for an unjust and oppressive result must

be sought at the hands of the legislature, and not from the courts. *Davis v. Lynchburg*, 84 Va. 861, 6 S. E. 230.

<sup>73</sup> *Sears v. Street Com'rs*, 173 Mass. 350, 53 N. E. 876, citing many cases.

<sup>74</sup> *Hennessy v. Douglas Co.*, 99 Wis. 129, 74 N. W. 983.

<sup>75</sup> *Norwood v. Baker*, 172 U. S. 269, 279, 43 L. ed., 443, 447, 19 Sup. Ct. Rep. 187; *Cooley on Taxation*, ch. 20; *In re Canal Street*,



grammatic statement of the law by Justice Harlan is so eminently in accord with natural justice and sound judicial reason, that it is a source of much regret that the principle has been so refined upon and received so much judicial buffeting as to have lost much of its original potency and virility. Much of the difficulty arises from the fact that some courts hold that to be a "taking" only which involves the exercise of the right of eminent domain, and that special assessments for benefits, being laid under the taxing power, do not involve a taking. The strong current of authority is that the imposition of taxes and levies is a "taking" within the meaning of the constitution. And if the law under which an assessment is imposed gives reasonable notice to the persons interested so they can appear and contest the same, it suffices. "Due process of law" requires that a person shall have a reasonable notice and a reasonable opportunity to be heard before a binding decree can be made regarding his life, liberty or property.<sup>76</sup>

**152.** The constitutional prohibition against taking for public use without compensation, restrains not only the right of eminent domain, but all invasions of private property by public authority, including the exaction of money under the guise of taxation, and such right is a high prerogative of sovereignty which no individual or corporation can exercise without an express grant,<sup>77</sup> and in the case of an assessment

11 Wend. 156; McCormack v. Patchin, 53 Mo. 36, 14 Am. Rep. 440; State, Hoboken L. & I. Co. v. Hoboken, 36 N. J. L. 293; State, Agens v. Mayor, etc., 37 N. J. L. 416, 18 Am. Rep. 729; Bogert v. Elizabeth, 27 N. J. Eq. 568; Hammett v. Philadelphia, 65 Pa. 146, 3 Am. Rep. 615; Thomas v. Gain, 35 Mich. 155, 162, 24 Am. Rep. 535; Tide-Water Co. v. Coster, 18 N. J. Eq. 527, 90 Am. Dec. 634.

<sup>76</sup> Heth v. Radford, 96 Va. 272, 31 S. E. 8; Violet v. Alexandria,

92 Va. 561, 31 L. R. A. 382, 53 Am. St. Rep. 825, 23 S. E. 909; Norfolk v. Young, 97 Va. 728, 47 L. R. A. 574, 34 S. E. 886.

<sup>77</sup> Macon v. Patty, 57 Miss. 378, 34 Am. Rep. 451; Sharp v. Speir, 4 Hill, 76; Alexander v. Mayor, etc., 5 Gill, 383, 46 Am. Dec. 630.

While there may be discrimination in the subjects of taxation, there must be uniformity in the tax, and the property of no individual can be subjected to a heavier tax than others are re-



for street improvements the just compensation consists in the benefit that the lot owners receive by reason of such public improvement.<sup>78</sup> Whether the property in a taxing district will be benefited in proportion to the burden is for the legislature, and the formation of such district is not in violation

quired to pay on property of the same description, and no one can be exempt, but in consideration of public services. The imposition of a public burden, in which these principles are departed from, is not properly the levying of a tax, but the taking of private property for public use. *Lexington v. McQuillan's Heirs*, 9 Dana, 513, 35 Am. Dec. 159.

*Impairing use of street.*

The right of the owner of a city lot to the use of the street adjacent thereto is property which cannot be taken from him for public use without compensation; and any act impairing that right is to that extent a damage within the meaning of the constitution of California. *Eachus v. Los Angeles, etc., Co.*, 103 Cal. 614, 42 Am. St. Rep. 149, 37 Pac. 750.

*Easement of access, etc.*

An owner of a lot abutting on a public street, in addition to the ownership of the property itself, enjoys rights appurtenant thereto, such as light, air, egress and ingress, which form a part of the estate, and are deemed as much property as the lot itself. *Gans v. St. L. K. & N. W. R. Co.*, 113 Mo. 308, 18 L. R. A. 339, 35 Am. St. Rep. 706, 20 S. W. 658.

<sup>78</sup> *Charles v. Marion*, 98 Fed. 166.

"It is this supreme and controlling power over the property of individuals, which enables the State

to confer upon her subordinate jurisdictions, both municipal and judicial, the right to take private property for the purpose of opening streets and roads, when in their opinion, it is demanded by the public welfare or convenience; and when property is thus taken, and accompanied by an adequate provision for the indemnification of the injured party, the appropriation is legalized by the fact that it has been taken for a public purpose, under the authority and sanction of the State." *Alexander v. Mayor, etc.*, 5 Gill, 383, 46 Am. Dec. 630.

"When, as in this case, the most probable if not the necessary consequence of the law is to produce the most oppressive inequality, and to compel a small minority of tax payers to provide at their sole expense an improvement of general utility and public interest, the construction of which costs more than double as much as the character of such improvements in general use, and from which, when constructed, the general public derives almost as much advantage as themselves, it assumes the character of an attempted exercise of arbitrary power over the property of this minority; it becomes, in the constitutional sense, a taking and appropriation of their private property to the public use without compensation, and it cannot be



of the constitution, merely because it may result in taking a private property for public use without compensation by a corrupt abuse of power, which is not shown to exist in the particular case.<sup>79</sup> But an ordinance directing that the cost of the land taken or damaged, or both, shall be assessed upon and collected from the lands abutting upon the proposed street or alley in proportion to the frontage thereof, in effect provides for the taking or damaging of the lands without just compensation, and is therefore unreasonable and void,<sup>80</sup> and so with a special assessment upon bounding and abutting property by the front foot for the entire cost and expense of a public improvement, including the land taken, and without taking special benefits into account.<sup>81</sup>

**153.** As the right to property includes the right to use that property for any lawful purpose of profit to the owner, whenever that right is restricted, property is taken within the meaning of the constitution,<sup>82</sup> and any physical injury to private property, by reason of the erection, construction or operation of a public improvement in or along a public street or highway, whereby the appropriate use or enjoyment of the property was materially interrupted, or its value substantially impaired, is likewise a taking.<sup>83</sup> So, too, is the digging a ditch on the land of a private owner for the purpose of draining such land and that of others.<sup>84</sup>

**154.** The provision of the California constitution against taking property for public use without just compensation merely fixes a limit upon the otherwise unrestrained power of

sustained so long as the safeguards placed around the citizen by our fundamental law are respected and upheld." *Howell v. Bristol*, 8 Bush, 493.

<sup>79</sup> *Banaz v. Smith*, 133 Cal. 102, 65 Pac. 309.

<sup>80</sup> *Bloomington v. Latham*, 142 Ill. 462, 18 L. R. A. 487, 32 N. E. 506.

<sup>81</sup> *Norwood v. Baker*, 172 U. S.

269, 43 L. ed. 443, 19 Sup. Ct. Rep. 187.

<sup>82</sup> *Matter of opening Rogers Ave.*, 29 Abb. N. C. 361, 22 N. Y. Supp. 27.

<sup>83</sup> *Rigney v. Chicago*, 102 Ill. 64. And this was the uniform rule in Illinois before the adoption of the Const. of 1870.

<sup>84</sup> *People v. Nearing*, 27 N. Y.

306.



eminent domain inherent in the government of sovereign state, but neither the power itself nor its limitation is involved in street assessment proceedings.<sup>85</sup>

**155.** Either the property must be actually taken, or its use by the owner materially limited, to entitle the owner to have compensation first paid or tendered, and the fact that the surveys have been made and ordinances established is not sufficient. The property must be absolutely applied to the use of the public.<sup>86</sup> And the removal of the lateral support of the soil of the premises bordering on the limits of a highway, in making highway improvements, so that a substantial portion of the adjoining owner's land crumbles away, or subsides and falls so as to injure the premises so affected, is an actual appropriation of the soil to the extent of such injury, and amounts to a taking of it for public purposes.<sup>87</sup>

**156.** As to whether benefits resulting to the property by reason of the improvement can be used to offset *pro tanto* property actually taken for public use, is a question upon which the courts differ, but largely because of the language of the constitutions of the various states. Under the Fourteenth Amendment, there seems no reason why this may not be done. The provisions of the charter of Seattle allowing benefits to be offset against the value of lands taken for municipal purposes, are not repugnant to the constitution of Washington, and such benefits as are special and peculiar to the tract upon which the land appropriated was severed may be deducted,<sup>88</sup> but the rule in Kentucky is directly opposite.<sup>89</sup>

**157.** A law providing for the condemnation of rights of way for the construction of dikes is not unconstitutional as

<sup>85</sup> *Chambers v. Satterlee*, 40 Cal. 497; *Williams v. Detroit*, 2 Mich. 560; *White v. People*, 94 Ill. 604; *Bloomington v. Latham*, 142 Ill. 462, 18 L. R. A. 487, 32 N. E. 506.

<sup>86</sup> *Steuart v. Mayor, etc.*, 7 Md. 500.

<sup>87</sup> *Damkoehler v. Milwaukee*, 124 Wis. 144, 102 N. W. 706.

<sup>88</sup> *Lewis v. Seattle*, 5 Wash. 741, 32 Pac. 794; *Waggenerman v. N. Peoria*, 155 Ill. 545, 40 N. E. 485, distinguishing *Bloomington v. Latham*, 142 Ill. 462, 18 L. R. A. 487, 32 N. E. 506.

<sup>89</sup> *Sutton's Heirs v. Louisville*, 5 Dana, 28.



authorizing a taking of private property without full compensation therefor having been made in money, when provision is made therein for ascertaining the cost and collecting same by assessment or the issuance of bonds, as the presumption would be that compensation would be provided in this manner before actual construction began. And "just compensation" is a judicial act, and an award made by the council, or other than the judicial department, is not judicial action, nor conclusive.<sup>90</sup>

158. The general law of Michigan authorizing municipalities to take private property for public use, which provides that the council may determine that the whole or any part of the compensation awarded by the jury shall be assessed upon the owners of the land benefited, if the council believes the portion of the city near the improvement will be benefited thereby, and that then, by resolution, they fix the district and specify the amount to be assessed therein, is not unconstitutional as taking property without due process of law, because it gives no notice of hearing as to fixing the assessment district, or the total assessment.<sup>91</sup> Nor is such statute invalid because it does not limit the total assessment to the amount of the benefits, or fix any standard for determining the proportion of the award to be assessed in the district, these matters being implied in the provisions that "the amount of the benefit thus ascertained shall be assessed" upon the owners of such taxable real estate "in proportion, as nearly as may be, to the advantage" which the several parcels are deemed to acquire by the improvement.<sup>92</sup> And where a statute directs the expense of a street improvement to be assessed upon the owners of lands benefited thereby, and determines what lands are in fact benefited and the

<sup>90</sup> *Rich v. Chicago*, 59 Ill. 286;  
*People v. Brighton*, 20 Mich. 57;  
*Powers' Appeal*, 29 Mich. 504;  
*Hansen v. Hammer*, 15 Wash. 315,  
 46 Pac. 332.

<sup>91</sup> *Voigt v. Detroit*, 123 Mich.  
 547, 82 N. W. 253.

<sup>92</sup> *Voigt v. Detroit*, 123 Mich.  
 547, 82 N. W. 253; *Goodrich v.*  
*Detroit*, 123 Mich. 559, 82 N. W.  
 255.



amount of the entire tax, with a provision for notice to and a hearing of each owner at some stage of the proceedings upon the question as to the proportion to be assessed to him, there is no taking of his property without due process of law,<sup>93</sup> and a statute allowing ten days for publication of the resolution, and ten days thereafter within which property owners may file their remonstrances, is sufficient.<sup>94</sup>

**159.** A provision that certain officers may make plans for streets in their respective towns, and that if any building be erected on the line of any street as laid out on such plan, after filing a map thereof, no compensation shall be paid for such building on opening the street, deprives the owner of the right to improve his property, and is unconstitutional.<sup>95</sup> But an assessment on abutting lots to reimburse the amount paid to an owner for his other land taken for street use, is not in violation of the provisions of the Ohio Constitution guaranteeing full compensation "without deduction for benefits."<sup>96</sup>

In the absence of a showing that the burdens imposed by a special assessment is altogether out of proportion to the benefit actually accruing to the property, the property owner cannot be heard to assert that his property has been taken from him without due process of law.<sup>97</sup>

#### What is not a taking.

**160.** Under the following laws or states of fact, it has been judicially determined there has not been a "taking" within the constitutional meaning: The making of a public improvement in the vicinity of private property, which is

<sup>93</sup> *Spencer v. Merchant*, 125 U. S. 345, 31 L. ed. 763, 8 Sup. Ct. Rep. 921. Ave., 29 Abb. N. C. 361, 22 N. Y. Supp. 27.

<sup>94</sup> *King v. Portland*, 38 Or. 402, 55 L. R. A. 812, 63 Pac. 2. But <sup>96</sup> *Cleveland v. Wick*, 18 Ohio St. 303.

see *Hayes v. Douglas Co.*, 92 Wis. 429, 31 L. R. A. 213, 53 Am. St. Rep. 926, 65 N. W. 482. <sup>97</sup> *McMillan v. Butte*, 30 Mont. 220, 76 Pac. 203; *Elliott, Roads and Streets*, Secs. 558-559; *Haubner v. Milwaukee*, 124 Wis. 153, 101 N. W. 930, 102 N. W. 578.



incidentally injured thereby, or diminished in volume, but no part of which is taken or used for such improvement;<sup>98</sup> nor is a city liable for consequential injury to abutting lots caused by an authorized change of grade made with due care, unless made so by constitution or statute,<sup>99</sup> and since the city is ultimately liable, and all the taxable property in it may be resorted to for the payment of any sum not realized from the special assessment, the statute providing for such assessment is not repugnant to the constitution.<sup>1</sup> So, too, where gas and water pipes in a street are the property of a private corporation, the service pipes, where laid, to be laid at the cost of the abutting property, under the charter, the levy of a tax on abutting property to pay therefor is valid, the evidence showing such cost is balanced by an equivalent benefit to the abutting property;<sup>2</sup> the levy of a specific amount per acre on lands lying within a certain district fixed by the legislature, for the construction of a levee;<sup>3</sup> the imposition of the whole cost of a local street improvement which is assessed upon lands that by reason of their peculiar location may be regarded as benefited thereby;<sup>4</sup> the levy and collection of assessments for the expense of building a public drain;<sup>5</sup> where property is benefited to an amount equal to the assessment;<sup>6</sup> and a law authorizing the taking of private property for public use is not unconstitutional because it provides no compensation for those whose property has suffered consequential damages, although not actually taken.<sup>8</sup>

<sup>98</sup> *Alexander v. Milwaukee*, 16 Wis. 247; but the authority of this case has been very much weakened by later decisions. *Arimond v. G. B. & M. Canal Co.*, 31 Wis. 316; *Pettigrew v. Evansville*, 25 Wis. 223, 3 Am. Rep. 50; *Damkoehler v. Milwaukee*, 124 Wis. 144, 102 N. W. 706.

<sup>99</sup> *Smith v. Eau Claire*, 78 Wis. 457, 47 N. W. 830.

<sup>1</sup> *State v. Superior*, 81 Wis. 649, 51 N. W. 1014.

<sup>2</sup> *Gleason v. Waukesha Co.*, 103 Wis. 225, 79 N. W. 249.

<sup>3</sup> *Williams v. Cammack*, 27 Miss. 209, 61 Am. Dec. 508.

<sup>4</sup> *State v. Fuller*, 34 N. J. L. 227.

<sup>5</sup> *Roberts v. Smith*, 115 Mich. 5, 72 N. W. 1091.

<sup>6</sup> *Owners of Ground v. Mayor*, 15 Wend. 374.

<sup>8</sup> *Radcliff's Exr's v. Mayor, etc.*, 4 N. Y. 195, 53 Am. Dec. 357. But see, *Damkoehler v. Milwaukee*, 124 Wis. 144, 102 N. W. 706.



**161.** A statute requiring the council to assess against abutting lots the cost of improving the half street immediately in front of such lots, and providing that the cost of improving street intersections shall be assessed five-ninths to the first fifty feet, and the remainder to the next fifty feet, in the abutting quarter blocks does not provide a rule for assessing the cost of such improvement that makes the charge against each lot so evidently in excess of or out of proportion to the benefits received as to be a taking of property for public use without compensation in violation of the federal constitution.<sup>9</sup> Where a municipality proceeds lawfully to change the grade of a street, all the work required being confined within the limits of the street, the fact that access to abutting property has been made difficult, and its use materially impaired, causing irreparable injury, is not a taking of private property for public use, and no damages can be recovered unless the municipality has negligently caused injury.<sup>10</sup>

**162.** Street improvement assessments are not an exercise of the right of eminent domain; and an act of the legislature authorizing them is not in conflict with the constitutional provision that private property shall not be taken or damaged for public use except upon just compensation first made,<sup>11</sup> and a law providing for staying proceedings and ordering a new assessment in any action where the original assessment is declared void, is not a taking of private property for public use without just compensation, nor is it repugnant to the provisions of Art. I, sec. 9, Constitution of Wisconsin, which guarantees a certain remedy in the law for all injuries to person, property or character.<sup>12</sup>

<sup>9</sup> *King v. Portland*, 38 Or. 402, 55 L. R. A. 812, 63 Pac. 2.

*waukee*, 92 Wis. 182, 65 N. W. 1039.

<sup>10</sup> *McCullough v. Campbellsport*, 123 Wis. 334, 101 N. W. 709; *Wallich v. Manitowoc*, 57 Wis. 91, 14 N. W. 812; *Colclough v. Mil-*

<sup>11</sup> *Hayden v. Atlanta*, 70 Ga. 817.

<sup>12</sup> *Haubner v. Milwaukee*, 124 Wis. 153, 101 N. W. 930, 102 N. W. 578.



**163.** The provisions of Art. I, Sec. 6, of the Constitution of New York, against the taking of private property for the public use without just compensation, are not contravened by a statute for widening a street which requires the commissioners therein named, before making the assessment, to fix the district to which the assessment shall be restricted, and that then the whole expense, including the damage to land owners, shall be assessed upon the lands in such district, making the assessment relatively equal as between the different parcels, but not limiting the assessment to the actual benefit for each parcel, and authorizing an assessment to be applied in satisfaction of an award for a portion of the land taken for the improvement. The court held that the assessment authorized is an exercise of the legislative right of taxation, all the incidents of which are within legislative control, and in respect to which its determination is final, and the application of the sum assessed in satisfaction of an award for land taken is just compensation within the meaning of the constitution.<sup>13</sup>

**164.** Where land is appropriated for a street improvement, an assessment by the front foot of the property bounding and abutting upon the improvement, to pay the cost thereof, without the passage, notice, and publication of the preliminary notice declaring the necessity for the improvement, will not be a taking of property without due process of law in violation of the 14th amendment.<sup>13a</sup>

#### **Of property damaged for public use.**

**165.** The losses sustained by individual owners under the rule that there must be an actual taking of their property for use in public improvements, before they were entitled to compensation, worked such great injustice as to cause the adoption in many states of a constitutional inhibition against "damaging" private property, as well as against a "taking,"

<sup>13</sup> Genet v. Brooklyn, 99 N. Y. 296, 1 N. E. 777.

<sup>13a</sup> Caldwell v. Carthage, 49 Ohio St. 334, 31 N. E. 602.



except upon due compensation. This has proved an essentially wise and just provision, and has been generally construed with a liberality consistent with its intent, although the Supreme Court of Missouri has held that Sec. 21, Art. 2, of the Missouri Constitution, which provides "that private property shall not be taken or damaged for public use without just compensation," etc., refers to the exercise of the right of eminent domain, and not to special tax assessments for local improvements.<sup>14</sup>

**166.** But the general rule is to the contrary, and the same court seems to have promulgated opinions which apparently hold directly opposite to the one announced, and in much later cases. It has distinctly held that a public use which interferes with the incorporeal rights of light, air and egress and ingress, where the property is depreciated in value, is a damage to the property, and that a city is liable to an abutting owner for damages caused by changing the natural surface of a street to a grade established for the first time,<sup>15</sup> the same provision of the state constitution being under examination. The use of the word "damaged" embraces every case where there is a direct physical obstruction or injury to the right of user or enjoyment of private property, by which the owner sustains some special pecuniary damage in excess of that sustained by the public generally, which by the common law would, in the absence of any constitutional or statutory provision, give a right of action.<sup>16</sup> For in the absence of such provision, it has long been held that an action would not lie again a municipality for consequential damages caused by the lawful change of an established grade,<sup>17</sup> but

<sup>14</sup> *Keith v. Bingham*, 100 Mo. 658, 41 Am. St. Rep. 684, 25 S. W. 225.

<sup>15</sup> *Gans v. St. L. K. & N. R'y Co.*, 113 Mo. 308, 18 L. R. A. 339, 35 Am. St. Rep. 706, 20 S. W. 658; *Davis v. Mo. Pac. R. Co.*, 119 Mo. 180, 41 Am. St. Rep. 648, 24 S. W. 777; *Hickman v. Kansas City*, 120 Mo. 110, 23 L. R. A. 14 N. W. 812; *Smith v. Eau*

<sup>16</sup> *Rigney v. Chicago*, 102 Ill. 64.

<sup>17</sup> *Henderson v. Minneapolis*, 32 Minn. 319, 20 N. W. 322; *Alexander v. Milwaukee*, 16 Wis. 248; *Dore v. Milwaukee*, 42 Wis. 108; *Wallich v. Manitowoc*, 57 Wis. 9.



after the amendment to a state constitution to include the "damaging" of property, compensation must be made for all damages caused abutting property by the raising or lowering of the grade of a street, and it is immaterial that such improvement was made before or after the adoption of the constitutional amendment.<sup>18</sup>

### Of the constitutionality of statutes.

**167.** The constitution of a state is not a grant, but a limitation of power, and when a legislative act is challenged as unconstitutional, those assailing it must point to the provision which has been violated.<sup>19</sup> A statute is not unconstitutional merely because it is unjust,<sup>20</sup> and courts are reluctant to hold an act is contrary to the organic law unless it is clearly so. As Chief Justice Marshall tersely put it, "It is most true that this court will not take jurisdiction if it should not, but it is equally true that it must take jurisdiction if it should. The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the constitution. Questions may occur which we would gladly avoid, but we cannot avoid them."<sup>21</sup>

**168.** In passing on the constitutionality of a statute, the question is not as to whether the result is harmful in the particular case, but whether the statute, according to its terms, will violate the provisions of the constitution in its application to cases which may be expected to arise,<sup>22</sup> and the uninterrupted practice of a government through a long series of years, with the acquiescence of all its departments, is sometimes decisive even upon questions of constitutional construc-

Claire, 78 Wis. 457, 47 N. W. 830;  
Haubner v. Milwaukee, 124 Wis.  
153, 101 N. W. 930, 102 N. W. 578.

<sup>18</sup> Dickerman v. Duluth (Minn.),  
92 N. W. 1119.

<sup>19</sup> Hagar v. Supervisors, 47 Cal.  
222.

<sup>20</sup> Praigg v. Western P. & S. Co.,  
143 Ind. 358, 42 N. E. 750.

<sup>21</sup> Cohen v. Virginia, 6 Wheat.  
264, 404, 5 L. ed. 257, 291; Blan-  
chard v. Barre, 77 Vt. 420, 60  
Atl. 970; Chadwick v. Kelley, 187  
U. S. 540, 47 L. ed. 293, 23 Sup.  
Ct. Rep. 175.

<sup>22</sup> Dexter v. Boston, 176 Mass.  
247, 79 Am. St. Rep. 306, 57 N.  
E. 379.



tion.<sup>23</sup> The constitutional validity of a law is to be tested, not by what has been done under it, but by what may by its authority be done.”<sup>24</sup> The marginal note contains a compendium of the more notable opinions.<sup>24a</sup>

<sup>23</sup> *Dean v. Borschenius*, 30 Wis. 236.

<sup>24</sup> *Earl, J.*, in *Stuart v. Palmer*, 74 N. Y. 183, 30 Am. Rep. 289. Cited by *Matthews, J.*, in *Spencer v. Merchant*, 125 U. S. 358, 31 L. ed. 769, 8 Sup. Ct. Rep. 921.

**Acts held constitutional.**  
*California.*

<sup>24a</sup> A statute authorizing the board of supervisors to determine what property in a city is benefited by a street improvement and to assess the expense of such improvement on that property, and one authorizing the assessment of a portion of the expense of widening a city street upon lots on cross streets which are deemed benefited. *Piper's Appeal*, 32 Cal. 530.

An act for the widening of a certain city street, and for the levy of the assessment on the property benefited thereby, for the payment of the improvement, is not in violation of the California constitution, either on the ground that it was an attempt by the state to exercise the power of assessment for local improvements within the limits of a municipality, or on the ground that it denies due process of law to the parties. *Lent v. Tillson*, 72 Cal. 404, 14 Pac. 71,  
*Connecticut.*

An act authorizing city authorities to ascertain what persons will be specially benefited by the laying out or alteration of public highways, and assessing upon them re-

spectively the whole or such part of the damages caused by such alteration as the authorities shall judge reasonable. *Nichols v. Bridgeport*, 23 Conn. 189, 60 Am. Dec. 636.

*Illinois.*

Under the uniformity clause of the Illinois constitution, the legislature may pass laws relative to the construction of sidewalks which do not apply to other local improvements. *Gage v. Chicago*, 203 Ill. 26, 67 N. E. 477.

*Indiana.*

A statute which provides that after the construction of a drain the proper officers are to keep the same in proper repair, and free from obstructions, pay the expense thereof from the general fund, and that to reimburse that fund they should apportion and assess the cost thereof upon the lands benefited by such repairs, according to such benefits. *Dunkle v. Herron*, 115 Ind. 470, 18 N. E. 12.

And such repairs may be made, and the cost thereof assessed, without giving notice. *Johnson v. Lewis*, 115 Ind. 490, 18 N. E. 7.

An act authorizing street improvements by special assessment is not unconstitutional because authorizing an appeal to property owners in cities, but not in towns, notice to the property holder and a hearing being provided for, and that is all that is required.



*Deane v. Indiana, etc., Co.*, 161 Ind. 371, 68 N. E. 686.

**Kansas.**

A statute requiring every male citizen in a city, between the ages of twenty-one and forty-five, to do two days' work on the streets, or in lieu thereof pay three dollars, is in one sense an assessment, and is not unconstitutional. *State v. Topeka*, 36 Kan. 76, 59 Am. Rep. 529, 12 Pac. 310.

**Kentucky.**

One who was never bound, either legally or equitably, cannot have a demand created against him by mere legislative enactment. The Legislature can act retrospectively only for the purpose of furnishing a remedy for the enforcement of some pre-existing legal or equitable right or duty, and not for the purpose of creating such right or duty. *Bellevue v. Peacock*, 89 Ky. 495, 25 Am. St. Rep. 552, 12 S. W. 1042.

**Massachusetts.**

A statute requiring an assessment for the alteration of a street to be laid ratably upon all abutting estates thereby benefited. *Jones v. Boston*, 104 Mass. 461.

**Minnesota.**

A statute authorizing an annual tax of 10 cents per lineal foot of frontage for a water tax is not unconstitutional or void on the ground that it applies a uniform rate of assessment to all lands within the city limits. *State v. Robert P. Lewis Co.*, 72 Minn. 87, 42 L. R. A. 639, 75 N. W. 108.

**Missouri.**

A charter provision that the common council may order street improvements at the expense of

the property owners, on a petition of residents of the city owning a majority of the front feet on the street to be improved, is not a discrimination against non-resident owners. *Buchan v. Broadwell*, 88 Mo. 31.

**Nebraska.**

A statute authorizing a city to grade and improve streets, one-half of the expense to be paid by special tax or assessment on lots abutting thereon, is constitutional, under the provision authorizing the legislature to organize cities and towns, and restrict their power of taxation and assessment. *Hurford v. Omaha*, 4 Neb. 336.

**New York.**

An act ratifying and confirming the proceedings of a council regarding an assessment for repairs of a turnpike, is not in violation of the constitutional provision declaring it to be the duty of the Legislature, to restrict the power of assessment in cities so as to prevent abuse in assessments, as the provision is not a limitation upon the legislature, and the power of assessment created by the act is not a power exercised by the city, but by the legislature. *Tift v. Buffalo*, 82 N. Y. 204.

**Acts held unconstitutional.**

**California.**

An act for the storage of debris and the promotion of drainage. The former is a private enterprise, and the legislature has no power to impose taxes for the benefit of individuals, even though the private enterprise might benefit the local public in a remote or collateral way, but one which attempts to authorize a local board to levy a tax and two assessments



for a public purpose at the same time, on the same property, in addition to a tax levied by the state for the same purpose on all the property of the state, while none of the taxes are levied for a local purpose, is entirely unconstitutional. *People v. Parks*, 58 Cal. 624.

A drainage act which does not designate the locality where drainage is necessary; nor establish the boundaries of any drainage district, but delegates this duty to a board. The legislature is destitute of power to create a board composed of state executive officers, and invest it with legislative duties. *People v. Parks*, 58 Cal. 624. *Iowa*.

Where the constitution of a state is silent as to retroactive laws, such litigation is otherwise held to be invalid under the general provisions having reference to vested rights, and requiring in all cases due process of law. *Martin v. Oskaloosa (Iowa)*, 99 N. W. 557.

*Kansas.*

Under Sec. 5, Art. 12, Const. of Kansas, that "Provision shall be made by general law for the organization of cities, towns and villages, and their power of taxation, assessment, borrowing money, contracting debts, and loaning their credit, shall be so restricted as to prevent the abuse of such power," every law for street improvements must contain restrictions, but a charter provision limiting the costs upon adjacent property to the middle of the block, contains such restrictions. *Hines v. Leavenworth*, 3 Kan. 186. And see *Weeks v. Milwaukee*, 10 Wis. 243.

*Kentucky.*

Where a charter authorizes the council to improve any street upon petition of owners of a majority of the frontage thereon, an amendment to such charter authorizing the council by a unanimous vote to pave the northern portion of one street with Nicholson pavement. *Howell v. Bristol*, 8 Bush, 493.

*Michigan.*

A statute conferring upon a board of water commissioners already in office, the power not theretofore given it of imposing upon abutting property the cost of laying water mains, either directly, or indirectly by requiring the council to do so upon the report of the board. *Cook Farm Co. v. Detroit*, 124 Mich. 426, 83 N. W. 130.

*Minnesota.*

An act authorizing the laying out of a city street, and providing for the damages and expenses being apportioned upon the real estate deemed benefited is in conflict with Sec. 1, Art. 9, Const. which prescribes that "all property on which taxes are to be levied, shall have a cash valuation." *Stimson v. Smith*, 8 Minn. 366, Gil. 326.

A law authorizing the creation of a park, provided that, in determining the compensation for the property taken, the value thereof shall be awarded the benefit or damage to the owner with respect to adjacent property to be deducted therefrom or added thereto. Another section of the same law provided for the assessment of all property specially benefited.



**169.** A decision sustaining the validity of a special assessment necessarily involves the constitutionality of the statute authorizing it.<sup>25</sup>

**Legislative omnipotence.**

**170.** Aside from those restrictions which are inherent in the very conception of the system of special assessments, and the inhibitions of constitutional provisions, the authority of

So much of the latter section as provided for assessing "adjacent" property for the same benefits which, under the former section, had been deducted from the value of the land taken, was unequal taxation, and therefore unconstitutional, but does not affect the other section, that being an exercise of the right of eminent domain. *State v. District Court*, 66 Minn. 161, 68 N. W. 860.

*South Carolina.*

The statute of 1850 authorizing the city of Charleston, where a street has been widened by taking a strip of land off the lots on one side and adding it to the street, to assess the expense, or a portion of the expense, upon the lot-holders upon the opposite side of the street, whose lands have not been taken for public use, is unconstitutional. *State v. Charleston*, 12 Rich. L. 702.

*Washington.*

Under the constitutional delegation of powers to cities of the first class in Washington to frame their own charters, a charter provision that "no action shall be brought or maintained to test or question the validity of any assessment unless the plaintiff shall first pay into court the amount of the assessed tax," is not within such powers. *Wilson v. Seattle*, 2 Wash. 543, 27 Pac. 474.

*Wisconsin.*

A charter provided for the appointment of a jury to view premises proposed to be taken for public use, to decide the necessity for such taking, and also assess damages, but did not provide that the jury should be first sworn. It was held, that it is indispensable to the validity of the proceedings that the jury should be sworn, and the failure of the charter to require the swearing of the jurors violates the provisions of the Wisconsin constitution prohibiting taking private property for public use against the owner's consent without the necessity therefor being first established by the verdict of a jury. And the fact that they were sworn, in the absence of a statutory requirement therefor, does not validate their acts. *Lumsden v. Milwaukee*, 8 Wis. 485.

<sup>25</sup> *Cheney v. Beverly*, 188 Mass. 81, 74 N. E. 306.

A statute is not unconstitutional because it directs the street superintendent to assess benefits without prescribing the precise mode. *Greenwood v. Morrison*, 128 Cal. 350, 60 Pac. 971; *Harney v. Benson*, 113 Cal. 314, 45 Pac. 687; *O'Reilly v. Kingston*, 114 N. Y. 439, 21 N. E. 1004.



the legislature is supreme.<sup>26</sup> Municipal corporations are its creatures and over them it is practically omnipotent.<sup>27</sup> It can constitutionally delegate the sovereign power of taxation to local municipal governments, either with or without restrictions and limitations,<sup>28</sup> but it cannot by direct enactment make an assessment within an incorporated city.<sup>29</sup> It may authorize a special assessment to pay an amount in addition to the contract price of a local improvement, where the charter prohibits such payment,<sup>30</sup> and may provide the mode of assessing the expense of a street improvement, and the exercise of such discretion on its part is not reviewable by the courts.<sup>31</sup> It may lawfully erect any portion of the state it sees fit into a district for a special local improvement and assess the cost exclusively upon such district,<sup>32</sup> or it may authorize the council to judge what property is specially benefited, and define the taxing district accordingly.<sup>33</sup>

**171.** It has plenary power to determine, without notice to any one, the amount of money to be raised for a public improvement and the district to be taxed to raise the amount, and these questions may in the legislative discretion, be determined absolutely by an act, or may be referred to commissions or local boards.<sup>34</sup> While acting within the sphere

<sup>26</sup> *Philadelphia v. Field*, 58 Pa. St. 320; *Petition of New Orleans Draining Co.*, 11 La. Ann. 338.

<sup>27</sup> *Rosewater, Special Assessments*, p. 102.

<sup>28</sup> *Bradley v. McAtee*, 7 Bush, 667, 3 Am. Rep. 309.

<sup>29</sup> *Schumacker v. Toberman*, 56 Cal. 508.

<sup>30</sup> *Brewster v. Syracuse*, 19 N. Y. 116. In this case, after a sewer was constructed, an act was passed authorizing the defendant to levy and collect \$600 as an addition to the contract price, and by assessment on the property already assessed, to pay the two contractors who built the sewer.

This decision probably marks the extreme limit to which the courts will go in upholding the supremacy of the legislature.

<sup>31</sup> *King v. Portland*, 2 Or. 146.

<sup>32</sup> *Yeatman v. Crandall*, 11 La. Ann. 220.

<sup>33</sup> *Hoyt v. E. Saginaw*, 19 Mich. 39, 2 Am. Rep. 76; *Grand Rapids, etc., Co. v. Grand Rapids*, 92 Mich. 564, 52 N. W. 1028.

<sup>34</sup> *King v. Portland*, 38 Or. 402, 55 L. R. A. 812, 63 Pac. 2.

It may without notice to the property owners to be assessed, fix the amount per front foot, or square foot of area, for which property adjoining a sewer shall be



of its power in the making of laws, it judges finally upon all questions of policy and equity,<sup>35</sup> and its judgment defining the persons and property, which are benefited by a proposed public improvement, and which shall pay the contributions exacted therefore, cannot be judicially overruled without conclusive showing that, either by mistake or intention, it has imposed a contribution unsupported by any possible benefit, or out of all proportion to the possible benefit.<sup>36</sup> Its power in matters of taxation, either for general purposes or local improvements, is unlimited except by constitutional restrictions, and upon any basis of apportionment that the legislature may select and without regard to benefits.<sup>37</sup>

assessed for its construction. *English v. Wilmington*, 2 Marv. (Del.) 63, 37 Atl. 158.

<sup>35</sup> *Cooley, J., in Sheley v. Detroit*, 45 Mich. 431, 8 N. W. 52.

<sup>36</sup> *Minor v. Daspit*, 43 La. Ann. 337, 9 So. 49.

"However absolute the right of an individual may be, it is still in the nature of that right, that it must bear a portion of the public burdens, and that portion must be determined by the legislature. This vital power may be abused, but the interest, wisdom and justice of the representative body, and its relations with its constituents, furnish the only security against unjust and excessive taxation, as well as against unwise legislation." *Marshall, C. J., in Providence Bank v. Billings*, 4 Pet. 514, 7 L. ed. 939.

<sup>37</sup> *Re Madera Irrig. Dist.*, 92 Cal. 296, 14 L. R. A. 755, 27 Am. St. Rep. 106, 28 Pac. 272, 675.

It has power to determine where and when streets shall be constructed, their width and mode of improvement, and its action in reference thereto cannot be re-

viewed by the courts. *In re Sackett, etc., Streets*, 74 N. Y. 95.

*Sic utere tuis ut alienum non laedas.*

"The public right to regulate the common passways of the city is, of course, not arbitrary and unlimited. *Private rights must be regarded.* The public, like a private person, must so use its own as not to injure another's property." *Louisville v. Lyon (Ky.)*, Mss. Opinion, Dec. 19, 1856.

*Right of council to regulate highways.*

"The public right to regulate the common highways of the city is, of course, not arbitrary and unlimited; far from it. *Private rights must be regarded.* The public, like a common person, must so use its own as not to injure another's property. It cannot take private property for public use without paying a just equivalent; *nor can it disturb any personal right of enjoyment.* But, without touching plaintiff's lot, or in any way encroaching upon it, or interfering with any prescriptive right to light, or to private way,



**172.** One great reason for the differences in the opinions of the courts is the difference in the point from which the various state constitutions are viewed; whether as a grant of power, or as a limitation upon legislative power. If a constitution be a mere grant of power, then the legislature is powerless to enact valid legislation not permitted by that instrument, or clearly implied; and in such cases, where the power to authorize municipal corporations to levy special assessments be not given, it will be deemed withheld. But if the organic law be a restriction upon legislative power, then the legislature is sovereign within the limitations imposed, and in the exercise of the sovereign power of taxation may authorize the system of special assessment for local improvement. It is largely a branch of the old question of strict construction as against liberal construction that has come down to us from the fathers.

**173.** Some courts go to great extremes in upholding legislative authority in all matters of taxation. So it has been held that the legislature may provide for a local public improvement for the benefit of a portion of the state, and may tax all lands within a limited district to be benefited by such improvements, although some of the property may receive no benefits, and property outside the district be benefited,<sup>38</sup> while on the other hand, it is decided that cities have no absolute and uncontrollable right to order street improvements at the property owners' expense, and in utter disregard of their interests, without compensation; for it sometimes happens that such improvements will not only render the property entirely valueless to the owner, but result in destroying his

the city had a clear and perfect authority to raise its street higher or sink it lower than the level of his lot, as he would, undoubtedly, have had to elevate or sink his ground, without touching or otherwise injuring or interfering with the public street." *Keasy v.*

*Louisville*, 4 Dana, 154, 29 Am. Dec. 395.

<sup>38</sup> *Madera Irrig. Dist.*, 92 Cal. 296, 14 L. R. A. 755, 27 Am. St. Rep. 106, 28 Pac. 272, 675; *McLaughlin v. Miller*, 124 N. Y. 510, 26 N. E. 1104.



business and improvements, and at the same time compel him to contribute from his other means towards their destruction.<sup>39</sup>

**174.** The court of last resort in Indiana, having under discussion the Barrett law of that state, regarding street improvements, holds that it is the purpose, spirit and language of the act, to enable a city to require improvement, to dictate the character thereof, to contract therefor, to enforce the payment of benefits by property owners, to aid the property owner in meeting such payments by issuing the bonds of the city, from the proceeds of sales of which to pay the contractor, and from the annual payments of the property owners upon their assessments to meet the maturing bonds,<sup>40</sup> and the Supreme Court of Wisconsin recognizes the almost absolute power of the legislature over the entire subject of special assessments, in the following words:—"The manner of making street assessments in cities, and of collecting the assessments necessary to pay for such improvements, and the property which shall be charged with the cost thereof, is mainly a matter for the consideration of the legislature; and it would require a very strong showing of injustice and wrong to justify this court in setting aside the action of the legislature upon a subject of that nature."<sup>41</sup>

**175.** An act authorizing not to exceed one-half the cost of a street improvement to be assessed against adjacent property benefited thereby, does not transgress the limits of "just compensation," as a restriction on the right of eminent domain, nor conflict with the constitutional provision which declares that "the burdens of the state ought to be fairly distributed among its citizens."

**176.** But the legislature cannot arbitrarily fix a value on

<sup>39</sup> Louisville v. Louisville R. M. Co., 3 Bush, 416, 96 Am. Dec. 243.      10 Wis. 242; Soens v. Racine, 10 Wis. 271; Lumsden v. Cross, 10

<sup>40</sup> Porter v. Tipton, 141 Ind. 347,      Wis. 282; State v. Portage, 12 40 N. E. 802.      Wis. 563.

<sup>41</sup> Warner v. Knox, 50 Wis. 434,      <sup>42</sup> Matter of Dorrance Street, 4 7 N. W. 372; Weeks v. Milwaukee,      R. I. 230.



property, and tell the owner he shall take that. And an act providing for taking land for a public park, containing a proviso "that in all cases, the assessment of the county assessor for the year 1873, shall be taken as a guide in fixing the value of the property to be condemned," is to that extent unconstitutional and void.<sup>43</sup>

177. A leading case on the subject of this chapter, *Spencer v. Merchant*, arose in New York, and was affirmed upon review by the Supreme Court of the United States. It upholds the absolute autocracy of the legislative branch of the government to an extent to which the writer has never become reconciled, despite the strong language and virile reasoning of the opinion. The effect is, that where an assessment has been declared invalid because of the unconstitutionality of the act under which it is levied, and a subsequent legislative act fixed the amount of the cost and expense remaining unpaid by reason of the cancellation of the original assessment not paid, and directed such amount to be apportioned among and levied upon the several parcels of lands originally assessed, the assessments against which had been so canceled, and directed due notice to be given to the land-owners of the time and place of making the apportionment, such act is constitutional. The land-owners were not entitled to a hearing as to the aggregate amount to be collected, the legislature having determined this, and its determination cannot be reviewed in or changed by the courts, and the hearing provided was all to which they were entitled.<sup>44</sup>

<sup>43</sup> *County Court v. Griswold*, 58 Mo. 175.

<sup>44</sup> "The legislature may commit the ascertainment of the sum to be raised and of the benefited district to commissioners, but it is not bound to do so, and may settle both questions for itself; and when it does so its action is necessarily conclusive and beyond review. Here an improvement has been or-

dered and made; *the expense of which might justly have been imposed upon adjacent property benefited by the change.* By the act (of 1881), the legislature imposes the unpaid portion of the cost and expense *with the interest thereon* upon that portion of the property benefited which has thus far borne none of the burden. In so doing, it necessarily determines two



**178.** The constitutional requirement that the general assembly shall restrict the power of taxation and assessment by cities and villages, is addressed to the conscience and judgment of the legislature, and is not subject to judicial correction. The courts are without power to declare void a statute conferring on municipalities the power of special assessment for street improvements because it does not adequately restrict such power so as to prevent abuse.<sup>45</sup>

**179.** So, too, the legislature has power to determine absolutely and conclusively the amount of the tax to be raised, and the property to be assessed, and upon which it is to be apportioned;<sup>46</sup> to authorize and empower cities to reconstruct streets and assess the cost on property fronting the improvement, in the proportion that the linear feet front of each lot bears to the linear feet front of all the lots abutting the street,<sup>47</sup> and to impose on such abutting property one third of the cost of improving the street in front of it;<sup>48</sup> to put upon a municipality the whole or a part of a public improvement within its limits, either before it is undertaken or after its completion;<sup>49</sup> but the legislative power of taxation, at least as regards the purposes for which it is to be exercised, is not without limit, and it is within the province of the courts to examine and determine whether, in a par-

things, viz., the amount to be realized, and the property specially benefited by the expenditure of that amount. The lands might have been benefited by the improvement, and so the legislative determination that they were, *and to what amount of proportion of the cost*, even if it may have been mistakenly unjust, is not open to our review. The question of special benefit and the property to which it extends is of necessity a question of fact, and when the legislature determines it in a case within its general power, its decision

must of course be final." Finch, J., in *Spencer v. Merchant*, 100 N. Y. 585, 3 N. E. 682. Affirmed in S. C., 125 U. S. 345, 31 L. ed. 763, 8 Sup. Ct. Rep. 921.

<sup>45</sup> *Parsons v. Columbus*, 50 Ohio St. 460, 34 N. E. 677; *In re Mead*, 74 N. Y. 216.

<sup>46</sup> *Spencer v. Merchant*, *supra*.

<sup>47</sup> *Farrar v. St. Louis*, 80 Mo. 379.

<sup>48</sup> *Roundtree v. Galveston*, 42 Tex. 613; *Adams v. Fisher*, 63 Tex. 651.

<sup>49</sup> *State v. Road Commissioners*, 41 N. J. L. 83.



ticular case, the extreme boundary of legislative power has been reached and passed; it must be made quite clear, however, that the legislature has erred before the court can interfere with its action. It has no power to tax for private purposes<sup>50</sup> solely, nor can the taxing power be conferred upon a private corporation,<sup>51</sup> but it may impose a tax upon a locality for any purpose deemed proper.<sup>52</sup>

**180.** Under the Iowa constitution, it is competent for the legislature to authorize municipal authorities to cause streets to be paved, and charge the cost thereof direct upon the abutting lots.<sup>56</sup> And the question of how far the legislative determination as to benefits is absolutely conclusive, and binding on the courts, is still unsettled.

**181.** The fact that some particular piece of property along the line of work might not be benefited would not justify its owner in preventing the execution of the work on the ground of the unconstitutionality of the ordinance. It is not necessary for the purpose of the legality or constitutionality of the ordinance as to liability of the abutting property that it should be benefited, in every possible respect, or directly, or immediately benefited. The work is done for the benefit of the local public, and assessments levied upon the abutting lots, not because of any special benefits that each owner may derive from it, but because the local public demands it. When the legislature has itself fixed in what proportion and by what standard the cost of the work is to be apportioned, the judiciary is not authorized to alter it and substitute for a

<sup>50</sup> Weismer v. Douglas, 64 N. Y. 91, 21 Am. Rep. 586.

<sup>51</sup> Petition of New Orleans Draining Co., 11 La. Ann. 338.

<sup>52</sup> Litchfield v. Vernon, 41 N. Y. 123.

<sup>56</sup> Warren v. Henley, 31 Iowa, 31.

The court expressly rejects the theory of benefit to the property as the foundation of the power,

and puts it on the ground that the object of the taxation—the improvement of the streets—is a public object, and that the clause of the constitution prohibiting the taking of private property for public use without compensation is applicable only when property is taken in the exercise of the right of eminent domain, and does not limit the taxing power.



fixed legislative standard by frontage, a judicial standard based upon actual benefits received, measured by values, or enhanced values established by proof.<sup>57</sup>

**182.** If the legislature may arbitrarily impose a special tax on property that is not benefited, and to such extent as it may wish, it is not only a contradiction of all principles of "equality and uniformity" but ignores the very principle which justifies the system of local assessment, and presents but a thin haze of protection against confiscation. It is no answer to the objection to say the principles of "equality and uniformity" do not apply to local assessments, because the only power of the legislature to make the apportionment is on the theory that it is an exercise of the taxing power. But that the legislature has general directory power over the entire subject, as to what property shall be assessed, its location, and to determine that it is benefited, is undoubted.<sup>58</sup>

#### Of the delegation of power.

**183.** That delegated powers cannot be delegated, is a trite expression, and has become axiomatic,<sup>59</sup> but that the state may delegate the taxing power to her subordinate political and municipal corporations, restricting it so as to prevent abuse, and also as to amount, is equally true, and a necessary result of our political system, and it is an ordinary act of legislation.<sup>60</sup> While the general rule of construction is that the authority delegated to municipal corporations is to be strictly construed, and must be closely pursued, yet

<sup>57</sup> Kelly v. Chadwick, 104 La. Ann. 719, 29 So. 295.

<sup>58</sup> Lent v. Tillson, 72 Cal. 404, 14 Pac. 71; Prior v. Construction Co., 170 Mo. 439, 71 S. W. 205; Bacon v. Savannah, 86 Ga. 301, 12 S. E. 580; State v. Road Comr's, 41 N. J. L. 83; Wolff v. Denver (Colo.), 77 Pac. 364. But see Hammett's Case, 65 Pa. St. 146, 3 Am. Rep. 615, holding that by virtue merely of its general pow-

ers, the Legislature can neither levy, nor authorize a municipality to levy, a local tax for general purposes.

<sup>59</sup> Thomson v. Booneville, 61 Mo. 282.

<sup>60</sup> Little Rock v. Board of Improvements, 42 Ark. 152; *In re Zborowski*, 68 N. Y. 88; *Smith v. Aberdeen*, 25 Miss. 458; *Burnes v. Atchison*, 2 Kan. 454.



the sovereign power which delegates the authority may change or abrogate this rule of construction. And such is the case where the council is vested with legislative discretion as to the manner in which streets shall be improved.<sup>61</sup> The power of the council in street improvement proceedings is a specially delegated authority, and the acts of the city government thereunder are legal only when they are strictly in conformity with its directions,<sup>62</sup> and the discretion conferred upon one class of officers cannot be transferred to another.<sup>63</sup>

**184.** A municipal corporation has only such powers as are granted by the legislature, and the legislature can grant it powers, as of taxation and over streets and ways, only within the restrictions imposed by the constitution.<sup>64</sup> And delegations of power to municipal corporations have been upheld in the following instances. To make a sidewalk on a city street before grading, the mayor and council not being restricted as to the order in which improvements shall be made;<sup>65</sup> to commissioners to be appointed to examine contracts for public improvements for fraud, and to decide thereon, and such decision will confirm and ratify such contracts and the assessment based upon them;<sup>66</sup> that land may be taken for widening and laying out a street, assessing cost of same on abutting estates, in proportion to their value, the owner, if aggrieved, having right to jury trial, and that the owner of any estate, part of which is taken, may surrender the whole thereof, and after the value is estimated, convey same to the city and receive pay for the value.<sup>67</sup> And Congress may authorize Washington city to assess the expense of repairing streets with a new and different pavement, or of

<sup>61</sup> *Broadway, etc., Church v. McAttee*, 8 Bush, 508, 8 Am. Rep. 480.

<sup>62</sup> *State v. Passaic*, 41 N. J. L. 90.

<sup>63</sup> *Sheehan v. Gleeson*, 46 Mo. 100.

<sup>64</sup> *Mauldin v. Greenville*, 42 S. C. 293, 27 L. R. A. 284, 46 Am. St. Rep. 723, 20 S. E. 842.

<sup>65</sup> *Parker v. Challis*, 9 Kan. 155.

<sup>66</sup> *In re Kendall*, 85 N. Y. 302.

<sup>67</sup> *Dorgan v. Boston*, 12 Allen, 223.



repairing an old one, upon the adjacent proprietors of lots.<sup>68</sup>

### A continuing power.

**185.** The power to pave and otherwise improve streets is a continuing power, unless restrained by express words, and does not cease by being once executed,<sup>69</sup> and the fact that certain city charters expressly grant authority to repave, as well as pave, is not conclusive that the legislature intended to abrogate the rule that the right to make assessments for local improvements is a continuous one,<sup>70</sup> and that a street has

<sup>68</sup> Willard v. Presbury, 14 Wall. 676, 20 L. ed. 719.

There was apparently little discussion of the principle involved, and the court pass it over in the following words: "Some question has been made by the counsel for the appellees as to the power of Congress to confer upon the city authority to assess upon the adjacent proprietors of lots the expense of repairing streets with a new and different pavement, or repairing an old one. It is asserted this should be a general tax on the city. But the power, we think, cannot well be denied. The Constitution confers upon Congress the authority to exercise exclusive legislation over this District. Art. 1, Sec. 8." Op. by Nelson, J.

<sup>69</sup> Williams v. Detroit, 2 Mich. 560.

#### *Illinois.*

Gurnee v. Chicago, 40 Ill. 165; Galt v. Chicago, 174 Ill. 605, 51 N. E. 653.

#### *Indiana.*

Delphi v. Evans, 36 Ind. 90, 10 Am. Rep. 12; Kokomo v. Mahan, 100 Ind. 242; Board, etc., v. Falen, 111 Ind. 410, 12 N. E. 298.

#### *Iowa.*

Coates v. Dubuque, 68 Iowa, 550, 27 N. W. 750.

#### *Kentucky.*

Broadway, etc., Church v. McAttee, 8 Bush, 508, 8 Am. Rep. 480; Hackworth v. Louisville, 106 Ky. 234, 50 S. W. 33.

#### *Louisiana.*

Municipality No. 2 v. Dunn, 10 La. Ann. 57.

#### *Michigan.*

Williams v. Detroit, 2 Mich. 560; Sheley v. Detroit, 45 Mich. 431, 8 N. W. 52.

#### *Missouri.*

Morley v. Carpenter, 22 Mo. App. 640; McCormack v. Patchin, 53 Mo. 33, 14 Am. Rep. 440; Farrar v. St. Louis, 80 Mo. 379; Estes v. Owen, 90 Mo. 113, 2 S. W. 133; Skinker v. Heman, 148 Mo. 350, 49 S. W. 1026.

#### *New Jersey.*

State v. Newark, 35 N. J. L. 168; State v. Hotaling, 44 N. J. L. 347; State v. Hoboken, 45 N. J. L. 482; State v. Newark, 48 N. J. L. 101, 2 Atl. 627; State v. Bayonne, 56 N. J. L. 268, 28 Atl. 381.

<sup>70</sup> State v. District Court, 80 Minn. 293, 83 N. W. 183.



been once paved and property benefited thereby has been assessed for the cost thereof, does not render invalid an assessment upon the same property for the repaving of the street with an improved pavement.<sup>71</sup> The legislature has the same power to charge abutting property with the cost of a second pavement as it has to so charge the cost of a first pavement; and such an act is not of itself unjust or unreasonable.<sup>72</sup> And if the first paving of a street is a special benefit to the front proprietor, justifying the imposition upon him of a portion of the expense, so the removal of an insufficient pavement and the making of a new and sufficient one in its stead, is a matter of special benefit to the front proprietor, although it may also be of general utility.<sup>73</sup> Even a charter provision that a street may be improved at the expense of the abutting property owners, and that when so improved it shall not be so again improved, does not constitute a contract between the state and the owner who has paid for the improvement which cannot be impaired or repealed by subsequent litigation.<sup>74</sup>

<sup>71</sup> *State v. Newark*, 48 N. J. L. 101, 2 Atl. 627.

<sup>72</sup> *Warner v. Knox*, 50 Wis. 429, 7 N. W. 372.

<sup>73</sup> *McCormick v. Patchin*, 53 Mo. 33, 14 Am. Rep. 440; *Dickinson v. Detroit*, 111 Mich. 480, 69 N. W. 728.

<sup>74</sup> *Ladd v. Portland*, 32 Or. 271, 67 Am. St. Rep. 526, 51 Pac. 654; *State v. Mayor*, 37 N. J. L. 415, 18 Am. Rep. 729; *State v. Hoboken*, 45 N. J. L. 482; *State v. Mayor*, 35 N. J. L. 168. But see *Jelliff v. Newark*, 48 N. J. L. 101, 2 Atl. 627; *Bradley v. McAtee*, 7 Bush, 667, 3 Am. Rep. 309; *Philadelphia v. Yewdall*, 190 Pa. St. 412, 42 Atl. 956. And see generally, *Lafayette v. Fowler*, 34 Ind. 140; *Wilkins v. Detroit*, 46 Mich. 120, 8 N. W.

701, 9 N. W. 427; *In re Burmeister*, 76 N. Y. 174; *People v. Buffalo*, 166 N. Y. 604, 59 N. E. 1128, affirming S. C. 52 App. Div. 157, 63 N. Y. Supp. 163. *Contra*, *Mauldin v. Greenville*, 53 S. C. 285, 43 L. R. A. 101, 69 Am. St. Rep. 855, 31 S. E. 252, overruling S. C. 42 S. C. 293, 27 L. R. A. 284, 46 Am. St. Rep. 723, 20 S. E. 842; *Hammett v. Philadelphia*, 65 Pa. St. 148, 3 Am. Rep. 615; *Wistar v. Philadelphia*, 111 Pa. St. 604, 4 Atl. 511; *Alcorn v. Philadelphia*, 112 Pa. St. 494, 4 Atl. 185; *Prot. Orphan Asylum Appeal*, 111 Pa. St. 135, 3 Atl. 217. The court proceeded upon the principle that the constitution of 1895 has denied the right of the legislature to create special taxing districts. The court at first held



**Express statutory authority necessary.**

**186.** The power to levy special assessments exists only when conferred by express statutory authority,<sup>74a</sup> and is not included in either the authority to tax for general govern-

special assessments for sidewalks and drains were permissible, but now holds that even these exceptions are not allowable, although holding, in general terms, that what a public purpose is to the state, a corporate purpose is to the municipality. *Mauldin v. Greenville*, *supra*.

*U. S. Courts.*

*Allen v. Davenport*, 65 C. C. A. 641, 132 Fed. 209.

*California.*

<sup>74a</sup> *Beaudry v. Valdez*, 32 Cal. 276; *Himmelman v. Satterlee*, 50 Cal. 68; *Dyer v. Chase*, 52 Cal. 440; *Durrell v. Dorner*, 119 Cal. 411, 51 Pac. 628; *German, etc., Society v. Ramish*, 138 Cal. 120, 69 Pac. 89.

*Georgia.*

*Augusta v. Murphey*, 79 Ga. 101, 3 S. E. 326.

*Illinois.*

*Wright v. Chicago*, 20 Ill. 252; *Drake v. Phillips*, 40 Ill. 388; *Updike v. Wright*, 81 Ill. 49; *Chicago v. Law*, 144 Ill. 576, 33 N. E. 855.

*Indiana.*

*Niklaus v. Conklin*, 118 Ind. 289, 20 N. E. 797; *Bluffton v. Miller*, 33 Ind. App. 521, 70 N. E. 989, and cases cited.

*Iowa.*

*Fairfield v. Ratcliff*, 20 Iowa, 396.

*Kansas.*

*Leavenworth v. Rankin*, 2 Kan. 357; *Simpson v. Kansas City*, 46 Kan. 438, 26 Pac. 721.

*Kentucky.*

*Caldwell v. Rupert*, 10 Bush, 179.

*Louisiana.*

*New Iberia v. Weeks*, 104 La. 489, 29 So. 252.

*Maryland.*

*Annapolis v. Harwood*, 32 Md. 471, 3 Am. Rep. 161.

*Minnesota.*

*Minn. Linseed Oil Co. v. Palmer*, 20 Minn. 468, Gil. 424; *Newbery v. Fox*, 37 Minn. 141, 5 Am. St. Rep. 830, 33 N. W. 333; *In re Minnetonka, etc., Imp. Co.*, 56 Minn. 513, 45 Am. St. Rep. 494, 58 N. W. 295.

*New York.*

*Sharp v. Speir*, 4 Hill, 76; *People v. Coffey*, 66 Hun, 160, 21 N. Y. Supp. 34; *Matter of Second Ave. Church*, 66 N. Y. 395; *Alvord v. Syracuse*, 163 N. Y. 158, 57 N. E. 310.

*Ohio.*

*Griswold v. Pelton*, 34 Ohio St. 482; *Elliott v. Berry*, 41 Ohio St. 110; *Lima v. Lima Cemetery Ass'n*, 42 Ohio St. 128, 51 Am. Rep. 809.

*Oregon.*

*Paulson v. Portland*, 16 Or. 450, 1 L. R. A. 673, 19 Pac. 450.

*Pennsylvania.*

*Hammett v. Philadelphia*, 65 Pa. St. 146, 3 Am. Rep. 615; *Wistar v. Philadelphia*, 80 Pa. St. 505, 21 Am. Rep. 112; *Shoemaker v. Harrisburg*, 122 Pa. St. 285, 16



mental purposes, the general welfare clause contained in municipal charters, or under the general powers to make necessary improvements inherent in all municipalities.<sup>74b</sup>

Atl. 366; Mill Creek Sewer, 196 Pa. St. 183, 46 Atl. 312.

*Texas.*

Allen v. Galveston, 51 Tex. 302; Flewellin v. Proetzel, 80 Tex. 191, 15 S. W. 1043; Connor v. Paris, 87 Tex. 32, 27 S. W. 88. The power to make special assessment for local improvements exists only when distinctly conferred by legislative authority, and where the mode of exercising the power is prescribed it must be followed. And the assessment must affirmatively show on its face that it was made according to the rule prescribed, for the law regards it as of the substance of the proceedings, and it cannot be treated as immaterial, nor can presumption supply its place.

Blanchard v. Barre, 77 Vt. 420, 60 Atl. 970; Merritt v. Portchester, 71 N. Y. 309, 27 Am. Rep. 47; Liebermann v. Milwaukee, 89 Wis. 336, 61 N. W. 1112; Hayes v. Douglass Co., 92 Wis. 429, 31 L. R. A. 213, 53 Am. St. Rep. 926, 63 N. W. 482; State v. Commissioners, 38 N. J. L. 190, 20 Am. Rep. 380; Nichols v. Bridgeport, 23 Conn. 189, 60 Am. Dec. 636.

*Virginia.*

Green v. Ward, 82 Va. 324; Whiting v. West Point, 88 Va. 905, 15 L. R. A. 860, 29 Am. St. Rep. 750, 14 S. E. 698.

*Wisconsin.*

State v. Ashland, 71 Wis. 502, 37 N. W. 809; Dietz v. Neenah,

91 Wis. 422, 64 N. W. 299; Cooley, Taxation (3d Ed.), 1156.

*Alabama.*

<sup>74b</sup>Lott v. Ross, 38 Ala. 156; Hare v. Kennerly, 83 Ala. 608, 3 So. 683.

*Georgia.*

Mayor, etc. v. Hartridge, 8 Ga. 23.

*Illinois.*

Wright v. Chicago, 20 Ill. 252; Chicago v. Wright, 32 Ill. 192; Carlyle v. Clinton Co., 140 Ill. 512, 30 N. E. 782; Chicago v. Law, 144 Ill. 569, 33 N. E. 855; Morgan Park v. Wiswall, 155 Ill. 262, 40 N. E. 611.

*Indiana.*

Kyle v. Malin, 8 Ind. 34.

*Iowa.*

Fairfield v. Ratcliff, 20 Iowa, 396.

*Maryland.*

Annapolis v. Harwood, 32 Md. 471, 3 Am. Rep. 161.

*North Carolina.*

Asheville v. Means, 29 N. C. (7 Ired. L.) 406; Commissioners v. Taylor, 99 N. C. 210, 6 S. E. 114.

*Ohio.*

Mays v. Cincinnati, 1 Ohio St. 268; Cincinnati v. Bryson, 15 Ohio 625, 45 Am. Dec. 593.

*South Carolina.*

Columbus v. Hunt, 5 Rich. L. 550.

*Virginia.*

Richmond v. Daniel, 14 Gratt. 385; Green v. Ward, 82 Va. 324.



**Power of special assessment strictly construed.**

**187.** Proceedings to levy special assessments are *in invitum*, and grants of power to levy them, are strictly construed, and must be strictly followed,<sup>75</sup> except as to entirely immater-

*California.*

<sup>75</sup> *Himmelman v. Coffran*, 36 Cal. 411; *Stockton v. Whitmore*, 50 Cal. 554; *Dyer v. Miller*, 58 Cal. 585; *Brock v. Luning*, 89 Cal. 316, 26 Pac. 972; *Warren v. Chandos*, 115 Cal. 382, 47 Pac. 132; *Kelso v. Cole*, 121 Cal. 121, 53 Pac. 353.

*Colorado.*

*Keese v. Denver*, 10 Colo. 112, 15 Pac. 825.

*Connecticut.*

*Dann v. Woodruff*, 51 Conn. 203; but see *Nichols v. Bridgeport*, 23 Conn. 189, 60 Am. Dec. 636.

*District of Columbia.*

*Johnson v. District*, 6 Mackey, 21.

*Georgia.*

*Bacon v. Savannah*, 91 Ga. 500, 17 S. E. 749.

*Illinois.*

*Chicago v. Rock Island R. Co.*, 20 Ill. 286; *Chicago v. Wright*, 32 Ill. 192; *Scammon v. Chicago*, 40 Ill. 146; *Mix v. Ross*, 57 Ill. 121; *Workman v. Chicago*, 61 Ill. 463; *People v. Otis*, 74 Ill. 384.

*Indiana.*

*Greendale v. Suit*, 163 Ind. 282, 71 N. E. 658.

*Iowa.*

*Coggeshall v. City*, 78 Iowa, 235, 41 N. W. 617, 42 N. W. 650; *Zelie v. City*, 94 Iowa, 393, 62 N. W. 796; *Gill v. Patton*, 118 Iowa, 88, 91 N. W. 904; *Fitzgerald v. Sioux City*, 125 Iowa, 396, 101 N. W. 268.

*Kansas.*

*Hines v. Leavenworth*, 3 Kan. 186.

*Kentucky.*

*Murray v. Tucker*, 10 Bush, 240; *Henderson v. Lambert*, 14 Bush, 25.

*Louisiana.*

*Michel v. Police Jury*, 9 La. Ann. 67; *Barber Asphalt Pav. Co. v. Watt*, 51 La. Ann. 1345, 26 So. 70.

*Maryland.*

*Mayor, etc. v. Hughes' Adm'r*, 1 Gill & J. 480, 19 Am. Dec. 243.

*Massachusetts.*

*Pond v. Negus*, 3 Mass. 230, 3 Am. Dec. 131.

*Missouri.*

*St. Joseph v. Anthony*, 30 Mo. 537; *Fowler v. St. Joseph*, 37 Mo. 228; *Thomson v. Boonville*, 61 Mo. 282; *Wheeler v. Poplar Bluff*, 149 Mo. 36, 49 S. W. 1088; *St. Louis v. Koch*, 169 Mo. 587, 70 S. W. 143.

*Nebraska.*

*Smith v. Omaha*, 49 Neb. 883, 69 N. W. 402; *Hannan v. Omaha*, 53 Neb. 164, 73 N. W. 671; *Merrill v. Shields*, 57 Neb. 78, 77 N. W. 368; *Grant v. Bartholomew*, 58 Neb. 839, 80 N. W. 45; *Medland v. Linton*, 60 Neb. 249, 82 N. W. 866; *Farmers' L. & T. Co. v. Hastings*, 2 Neb. (Unof.) 337, 96 N. W. 104.

*New Jersey.*

*State v. Jersey City*, 25 N. J. L. 309.

*New York.*

*Merritt v. Port Chester*, 71 N. Y.



rial or merely directory matters.<sup>76</sup> As one court tersely expresses it, it is the A, B, C of the law of municipal corporations that the power to levy special assessments is to be construed strictly, that the mode prescribed is the measure of the power, and that all material requirements must be complied with before there is any liability.<sup>77</sup>

**188.** The rule applicable to general taxation, that no power can be exercised by the municipality which is not clearly granted, and that the power granted must be strictly pursued, applies with equal force to all species of special taxation for local improvement. When the power is clearly given, then, in the exercise of the power, the provisions for the imposition of the tax must be strictly followed.<sup>78</sup>

This rule is consonant with justice and equity, especially in view of the very liberal statutes providing for reassessments which generally prevail. When we consider the great power vested in the local authorities, we can readily see that such power holds out opportunities and temptations for the confiscation of property to such an extent that the protection of the rights of property demands that the courts should be insistent that the proceedings be of the utmost regularity.<sup>79</sup>

309, 27 Am. Rep. 47; *In re City of Buffalo*, 78 N. Y. 362; *Stebbins v. Kay*, 123 N. Y. 31, 26 N. E. 207; *Sharp v. Speir*, 4 Hill, 76; *Sharp v. Johnson*, 4 Hill, 92, 40 Am. Dec. 259.

*Oregon.*

*Dowell v. Portland*, 13 Or. 248, 10 Pac. 308; *Hawthorne v. E. Portland*, 13 Or. 271, 10 Pac. 342; *Smith v. Minto*, 30 Or. 351, 48 Pac. 166; *Allen v. Portland*, 35 Or. 420, 58 Pac. 509; *Bank of Columbia v. Portland*, 41 Or. 1, 67 Pac. 1112; *Oregon Transfer Co. v. Portland (Or.)*, 81 Pac. 575.

*Pennsylvania.*

*Rutherford v. Maynes*, 97 Pa. St. 78.

*South Dakota.*

*Mason v. Sioux Falls*, 2 S. D. 640, 39 Am. St. Rep. 802, 51 N. W. 770.

*Texas.*

*Connor v. Paris*, 87 Tex. 32, 27 S. W. 88.

<sup>76</sup> *Greensboro v. McAdoo*, 112 N. C. 359, 17 S. E. 178; *Johnson v. Oshkosh*, 21 Wis. 186.

<sup>77</sup> *Buckley v. Tacoma*, 9 Wash. 253, 37 Pac. 441.

<sup>78</sup> *Burroughs on Taxation*, 471; *Cooley on Taxation*, 209 *et seq.* 418; *Dillon on Mun. Corps.*, Secs. 605-610; *Cooley's Const. Lim.*, 646; *Davis v. Litchfield*, 145 Ill. 313, 21 L. R. A. 563, 33 N. E. 888.

<sup>79</sup> *Hutchison v. Omaha*, 52 Neb. 345, 72 N. W. 218.



It is requisite that the proceedings show affirmatively upon their face a compliance with all the conditions made necessary by the statute to a valid exercise of the taxing power, and the omission of the necessary facts in the record will not be supplied by presumption, nor will that which is uncertain in description be held certain; <sup>80</sup> but a failure to comply with

*California.*

<sup>80</sup> Smith v. Davis, 30 Cal. 536; San Diego Inv. Co. v. Shaw, 129 Cal. 273, 61 Pac. 1082; Bay Rock v. Bell, 133 Cal. 150, 65 Pac. 299.

*Illinois.*

McChesney v. People, 148 Ill. 221, 35 N. E. 739; Chicago v. Blair, 149 Ill. 310, 24 L. R. A. 412, 36 N. E. 829.

*Indiana.*

Niklaus v. Conkling, 118 Ind. 289, 20 N. E. 797.

*Iowa.*

McManus v. Hornaday, 99 Iowa, 507, 68 N. W. 812.

*Louisiana.*

McLaughlin v. Municipality No. Two, 5 La. Ann. 504.

*Missouri.*

A power given to a city by its charter to levy taxes by ordinance for the improvement of its streets can be exercised only in the manner prescribed. And an ordinance providing that abutting owners on streets may, on petition, obtain an order for their improvement to be paid for by special tax bills is not an exercise of such charter, where the ordinance neither levies the tax nor provides means for its levy. Trenton v. Coyle, 107 Mo. 193, 17 S. W. 643.

*Nebraska.*

Smith v. Omaha, 49 Neb. 883, 69 N. W. 402; Grant v. Bartholomew,

58 Neb. 839, 80 N. W. 45; Lincoln St. Ry. Co. v. Lincoln, 61 Neb. 109, 84 N. W. 802; Batty v. Hastings, 63 Neb. 26, 88 N. W. 139; Morse v. Omaha, 67 Neb. 426, 93 N. W. 734. Statutory provisions relative to drainage of swamp lands must be strictly complied with, or jurisdiction to establish the drain is not secured. Casey v. Burt county, 59 Neb. 624, 81 N. W. 851.

*New York.*

May v. Traphagen, 139 N. Y. 478, 34 N. E. 1064; Stebbins v. Kay, 123 N. Y. 31, 25 N. E. 207.

"A municipal corporation seeking to affect the property within its jurisdiction, by taxation or proceeding in the nature thereof, must produce express power therefor in legislative enactment, and must show that in its attempts to tax, it has strictly followed all legal requirements." *In re Second Ave. Church*, 66 N. Y. 395.

"Corporations and their officers, when they interfere with the rights of individuals, and especially when they attempt to divest and transfer the title to real estate, must show that the very case has arisen in which they were authorized to proceed. Showing that they have been misled by forgery will not aid them. Honest error cannot confer power." Brownson, J., Sharp v. Speir, 4 Hill, 76.



merely directory provisions regarding an entry of the due performance of a contract will not invalidate the assessment,<sup>81</sup> although whatever the legislature specifically directs may not be declared by the courts as immaterial.<sup>82</sup>

**189.** The entire doctrine of strict construction and the reasons for its rigid application to matters of taxation are strongly stated by Justice Campbell, in Powers' Appeal, 29 Mich. 506: "In proceedings whereby private property is taken for street purposes against the will of the owner, the settled principles of law require strict compliance with every provision which is not so purely formal as in no way to bear upon the protection or rights of the parties to be affected, and, inasmuch as by the same course of proceedings, the value of the land is determined, and the cost of the improvement is levied against the parties to be charged, the inquiry involves not only those principles governing the assumption of private property for public use, but also those bearing on assessments to apportion public burdens on the persons or property liable to pay them. The questions are more complex, and the difficulties are multiplied by this condition of things."

### Statutory powers.

**190.** Where the state constitution confers all legislative powers upon the state legislature or assembly, every subject

#### *North Carolina.*

Wilmington v. Yopp, 71 N. C. 76; Greensboro v. McAdoo, 112 N. C. 359, 17 S. E. 178.

#### *Ohio.*

Zanesville v. Richards, 5 Ohio St. 589; Reeves v. Wood Co., 8 Ohio St. 333.

#### *South Dakota.*

Lee v. Mellette, 15 S. D. 586, 90 N. W. 855.

#### *Virginia.*

Green v. Ward, 82 Va. 324.

#### *Wisconsin.*

Lieberman v. Milwaukee, 89 Wis. 336, 61 N. W. 1112.

The authority of commissioners to construct sewers and levy special assessments therefor is purely statutory, and the validity of their acts depends upon their having proceeded step by step in strict conformity to the statute.

Kneeland v. Milwaukee, 18 Wis. 411; Wells v. Burnham, 20 Wis. 113.

<sup>81</sup> Brady v. Bartlett, 56 Cal. 350.

<sup>82</sup> May v. Traphagen, 139 N. Y. 478, 34 N. E. 1064.



that is not withdrawn from them by the constitution, and which is within the scope of civil government, can be dealt with by that body.<sup>83</sup> That the power to lay special assessments for local improvements may be conferred by the legislature on municipal corporations and political subdivisions of the state, and that without such power being so conferred, it does not exist and that when conferred, it must be exercised in the manner prescribed, are principles thoroughly well settled.<sup>84</sup> There is no inherent power in municipalities to impose such burdens.<sup>85</sup>

**191.** Where the statute prescribes a mode and purpose of municipal taxation, it must be pursued, and no other mode or purpose can be substituted by officials exercising the power. A grant of power to a city to impose a special tax, or a special assessment for local improvements, confers no power to accomplish the same purpose by a general tax. The power must be strictly pursued when called into exercise.<sup>86</sup> And although a city charter authorizes the corporation to regulate and improve all streets, alleys and sidewalks, no power is conferred to levy a special assessment, and in the absence of such power the expense of doing the work must be raised by general taxation.<sup>87</sup> But a city is not limited to special assessments as

<sup>83</sup> *People v. Salomon*, 51 Ill. 37.

<sup>86</sup> *Webster v. People*, 98 Ill. 343.

<sup>84</sup> 2 *Dillon, Mun. Corp.*, Sec. 763.  
*Illinois.*

<sup>87</sup> *Fairfield v. Ratcliffe*, 20 Iowa, 396. The power to levy such assessments is derived solely from the Legislature acting either directly or through local instrumentalities, and the courts will not interfere with the exercise of the discretion vested in the Legislature as to the necessity for, or the manner of making such assessments, unless there is a want of power, or the method adopted for the assessment of the benefits is so clearly inequitable as to offend some constitutional principle. *Raleigh v. Peace*, 110 N. C. 32, 17 L. R. A. 330, 14 S. E. 521. Municipal cor-

*McBride v. Chicago*, 22 Ill. 574;  
*Riverside Co. v. Howell*, 113 Ill. 256; *Carlyle v. Clinton Co.*, 140 Ill. 512, 30 N. E. 782; *Chicago v. Law*, 144 Ill. 569, 33 N. E. 855.  
*Iowa.*

*Fairfield v. Ratcliff*, 20 Iowa, 396.

*Kansas.*

*Leavenworth v. Norton*, 1 Kan. 432.

*Mississippi.*

*Daily v. Swope*, 47 Miss. 367.

<sup>85</sup> *Connor v. Paris*, 87 Tex. 32, 27 S. W. 88.



a means of paying for street improvements where its charter gives it power to assess, levy and collect taxes for general municipal purposes, and general power to improve and repair its highways, although another section of the charter grants it power to levy a special tax for such improvements.<sup>88</sup>

**192.** Improving streets, making a levy to pay therefor, and enforcing payment against property, is the exercise of corporate power,<sup>89</sup> and the legislature may create a corporation within a county for drainage and sanitary purposes, and may create a corporation consisting of a city and the county in which it is situated, and invest it with similar powers,<sup>90</sup> this being in effect merely the creation of a special taxing district, which is an undoubted legislative prerogative.

**193.** That section of the Illinois constitution providing that the authorities of municipal corporations may be vested with power to assess and collect taxes for corporate purposes is a limitation upon the power of the legislature to authorize any other than corporate authorities to assess and collect taxes, but does not prevent the legislature from creating taxing districts and granting them all necessary power of taxation for improvements, government and control,<sup>91</sup> and under the Ohio constitution the legislature may confer upon a town council the duty of requiring the making of sidewalks by the lot owners, and, in case of their refusal, to cause the work to

porations can levy no taxes, general or special, upon the inhabitants or their property unless the power be plainly and unmistakably given. Such authority is wholly statutory and must be strictly pursued, and this rule applies to assessments for local improvements. *Caldwell v. Rupert*, 10 Bush, 179; *Kniper v. Louisville*, 7 Bush, 599; *Dillon on Mun. Corp.* 599. The legislature must afford the necessary power for constructing public improvements by municipalities, subject to con-

stitutional limitations, and when one mode of making such improvements is sanctioned by the constitution, no other can be adopted. *Gridley v. Bloomington*, 88 Ill. 554, 30 Am. Rep. 566.

<sup>88</sup> *Stephens v. Spokane*, 11 Wash. 41, 39 Pac. 266.

<sup>89</sup> *Atchison v. Bartholomew*, 4 Kan. 135.

<sup>90</sup> *Wilson v. Board of Trustees*, 133 Ill. 443, 27 N. E. 203.

<sup>91</sup> *People v. Salomon*, 51 Ill. 37; *Gage v. Graham*, 57 Ill. 144.



be done for them, and assess the cost as a tax upon the property.<sup>92</sup>

194. The legislative power over the source and method of payments is almost without limit. It may appropriate money from the state treasury to help pay for a system of sewage disposal, which benefits a number of cities and a large population, and may also provide that the cities and towns which shall be benefited may in time pay the cost, the money in the first instance to be advanced from the state treasury.<sup>93</sup> The mode of making payments for local improvements is within the discretion of municipal authorities, and that discretion is not subject to the control of the court. They may be paid for in any mode provided by law, either out of the ward fund, by special taxation or special assessments, and the adoption of either mode excludes the idea of payment in any other way.<sup>93a</sup>

#### Statutory construction.

195. It is not within the scope of this work to treat generally of the rules of statutory construction, but only to cite certain rules specially applicable to this subject, and give references to the decisions.

We have already seen that statutes conferring the power of special assessment are *in invitum*, and must be strictly construed. This general statement is subject to the qualification that in determining whether or not a power is conferred upon a municipal corporation, charters and statutes are strictly construed, but when the power is ascertained to be conferred, the exercise of authority within recognized limits is favored by the courts,<sup>94</sup> while if more than one construction of the statute be possible, the one least onerous to the taxpayer should be adopted. This is especially so of special as-

<sup>92</sup> *Bonsall v. Lebanon*, 19 Ohio, 418.

<sup>93</sup> *Klingman, et al., petitioners*, 153 Mass. 566, 12 L. R. A. 417, 27 N. E. 778.

<sup>93a</sup> *Gridley v. Bloomington*, *supra*.

<sup>94</sup> *McManus v. Hornaday*, 99 Iowa, 507, 68 N. W. 812; *People v. Hyde Park*, 117 Ill. 462, 6 N. E. 33.



assessments,<sup>95</sup> and it is always proper to resolve an ambiguity in a law in favor of a reasonable and equitable effect thereof.<sup>96</sup>

196. The following general statements of rules applicable to this subject have been made: A thing within the intention is within the statute though not within the letter, and a thing within the letter is not within the statute unless within the intention;<sup>97</sup> all the words of a statute should have effect rather than that any part should be meaningless;<sup>98</sup> city charters are public acts, of which courts will take judicial notice without their being pleaded;<sup>99</sup> unless a contrary opinion strongly and clearly appears, and is manifested in appropriate words, a statute will always be given a construction that will make it operate prospectively where to do otherwise would materially change existing rights.<sup>1</sup> Punctuation or the lack of it cannot be allowed to override plain rules for the construction of statutes, and qualifying or limiting words or clauses in a statute are to be referred to the next preceding antecedent unless the context or the evident meaning of the enactment requires a different construction;<sup>2</sup> the construction given to a statute by a body of men or officers who are directed to act upon it is always entitled to weight, and their construction should not be overridden by the courts, unless it be contrary to the clearly expressed meaning of the law;<sup>3</sup> the validity of a municipal ordinance with regard to the state constitution and laws is wholly a state, and not a Federal question, and cannot be re-

<sup>95</sup> Barber Asphalt Paving Co. v. Watt, 51 La. Ann. 1345, 26 So. 70.

<sup>96</sup> St. Louis v. Lane, 110 Mo. 254, 19 S. W. 533.

<sup>97</sup> People v. Chicago, 152 Ill. 546, 38 N. E. 744.

<sup>98</sup> St. Louis v. Lane, 110 Mo. 254, 19 S. W. 533.

<sup>99</sup> Janesville v. M. & W. R. R., 7 Wis. 484; State v. Lean, 9 Wis. 279; Clark v. Janesville, 10 Wis. 136; Terry v. Milwaukee, 15 Wis.

490; Swain v. Comstock, 18 Wis. 463; Alexander v. Milwaukee, 16 Wis. 248.

<sup>1</sup> Niklaus v. Conkling, 118 Ind. 289, 20 N. E. 797.

<sup>2</sup> Jorgenson v. Superior, 111 Wis. 561, 87 N. W. 565.

<sup>3</sup> Wright v. Forrestal, 65 Wis. 341, 27 N. W. 52; Scanlan v. Childs, 33 Wis. 663; Harrington v. Smith, 28 Wis. 43.



viewed by the U. S. Supreme Court,<sup>4</sup> and where, in a code of laws relating to a particular subject, a general policy is plainly declared, special provisions should, when possible, be given a construction which will bring them in harmony with that policy; <sup>5</sup> a general act providing for the manner in which assessments for benefits derived from public improvements shall be made, supersedes and annuls all special and local laws on the same subject; <sup>6</sup> but provisions in a city charter prescribing and regulating the proceedings necessary to make certain street improvements a charge upon specific lots, are not limitations upon the general power of the council to order such repairs and improvements, in the absence of some restriction in the character.<sup>7</sup>

**197.** More specific rules, as applied to special facts, are the following:

The word "of" will be rejected as surplusage, having no meaning in the statute for "the improvement of such lots and parcels of lots" where it occurs between the words "improvement" and "such"; <sup>8</sup> an act providing for a mode of assessing the damages on properties benefited by a street improvement was not intended to deprive the city of the general power

<sup>4</sup> The decision of a state supreme court that it was competent on a new assessment to determine the questions of benefit from the proof, even though in doing so a different result was reached from that which had been arrived at when the former assessment, which was set aside, was made, is a local, and not a Federal question. *Lombard v. Park Commissioners*, 181 U. S. 33, 45 L. ed. 731, 21 Sup. Ct. Rep. 507.

<sup>5</sup> Where one section of the general statutes limits the amount for which property may be assessed to twenty-five per cent of its value after the completion of the improvement, and another section

limits the assessment for a sewer to two dollars a front foot, the two are to be construed together and given to both, and they mean that the assessment shall not exceed twenty-five per cent of the value of the property, nor amount to more than two dollars per front foot of the property. *Cincinnati v. Connor*, 55 Ohio St. 82, 44 N. E. 582.

<sup>6</sup> *Hudson, etc., Protective v. Kearney*, 56 N. J. L. 385, 28 Atl. 1043.

<sup>7</sup> *Allen v. Janesville*, 35 Wis. 403.

<sup>8</sup> *Voris v. Pittsburg, etc., Glass Co.*, 163 Ind. 599, 70 N. E. 249.



to make those improvements at the expense of the city;<sup>9</sup> under a city charter making no provision for damage on regrading of streets, an amendment to provide for ascertaining and paying for such damages is germane to the original,<sup>10</sup> act under a statute specifying certain purposes for which taxes may be levied, and adding the words "or for any other purpose they may deem necessary," that clause will be construed as authorizing taxation only for the purpose of the same general scope as those already granted;<sup>11</sup> an act which adopts by reference the whole or a portion of another statute, means the law as existing at the time of the adoption, and does not include subsequent additions or modifications of the statute so adopted, unless it does so by express or strongly implied intent.<sup>12</sup>

**198.** Under a mere power to pass ordinances for paving streets, the municipality has no power to assess the entire expense upon the abutting owners;<sup>13</sup> a charter provision giving the common council authority to pave, grade or macadamize any street, avenue, etc., in whole or in part, is sufficiently comprehensive to include and authorize sidewalk paving;<sup>14</sup> under one authorizing the council to make ordinances and regulations for improving and keeping streets in repair, and to assess and collect a tax for so doing, general taxation is not the exclusive mode for so doing;<sup>15</sup> act No. 124, Laws of 1883, providing for taking private property for public use, fixing the district and other details and referring to the charter

<sup>9</sup> *Commonwealth v. George*, 148 Pa. St. 463, 24 Atl. 59, 61.

<sup>10</sup> *Sligh v. Grand Rapids*, 84 Mich. 497, 47 N. W. 1093.

<sup>11</sup> *Drake v. Phillips*, 40 Ill. 388.

<sup>12</sup> *Endlich on Inter. of Statutes*, sec. 85, and cases in note 107; *Sutherland on Stat. Const.*, sec. 257, and cases in note 4. *Charleston v. Johnston*, 170 Ill. 336, 48 N. E. 985; *Culver v. People*, 161 Ill. 89, 43 N. E. 812. So adopting the provisions of an act for

park improvements does not adopt the provisions of an amendment made thereafter permitting special assessments to be paid by installments. *Id.* also *Farrell v. W. Chicago*, 162 Ill. 280, 44 N. E. 527.

<sup>13</sup> *Mayor, etc. v. Harwood*, 32 Md. 471, 3 Am. Rep. 161.

<sup>14</sup> *City Council v. Foster*, 133 Ala. 587, 32 So. 610.

<sup>15</sup> *Greensburg v. Young*, 53 Pa. St. 280.



machinery for levying, collecting, etc., sufficiently complies with the provisions of the Michigan constitution that every tax law shall distinctly state in its title the tax and its object;<sup>16</sup> under the gravel road laws of Indiana, it was the legislative intention to make the land benefited by the improvement thereunder, bear the whole expense of such improvement.<sup>17</sup>

199. A legislative act, entitled, "An act to authorize the city of M. to change the grade of its streets," but authorizing a change of grade of streets only within a certain limited district — without compensation to abutting owners injured thereby, is essentially a local act, relating to a subject not expressed in its title, and void under Sec. 18, Art. IV, Constitution of Wisconsin; <sup>18</sup> one purporting to legalize contracts and special assessments for street improvements in certain cases, and which by its terms can only include one city, in so far as it attempts to cure past irregularities, is a special act and void under the constitution of Wisconsin; <sup>19</sup> and the same statute, which relates to assessments for paving and repaving streets "in any city having a population of 20,000 inhabitants or more," is construed as applying to all cities as soon as they attain that population, and is a general law, and not in conflict with the constitutional inhibition prohibiting the enactment of any special law "for incorporating any city, town or village, or to amend the charter thereof; <sup>20</sup> a legislative act authorizing the improvement of certain streets in a city ward, and authorizing a special assessment in said ward is a grant of corporate powers to such city, and an amendment to its charter, and is not a "special act for the assessment and collection of taxes" prohibited by the state constitution; and such special tax being one to pay for the improve-

<sup>16</sup> *Trowbridge v. Detroit*, 99 Mich. 443, 58 N. W. 368.

<sup>17</sup> *Commissioners v. Fullen*, 111 Ind. 410, 12 N. E. 298.

<sup>18</sup> *Anderton v. Milwaukee*, 82

Wis. 279, 15 L. R. A. 830, 52 N. W. 95.

<sup>19</sup> *Boyd v. Milwaukee*, 92 Wis. 456, 66 N. W. 603.

<sup>20</sup> *Boyd v. Milwaukee*, 92 Wis. 456, 66 N. W. 603.



ment of the streets named, the act does not embrace "more than one subject," and the subject is sufficiently expressed in the title.<sup>21</sup>

**200.** The Illinois constitution of 1870 provides that "the General Assembly may vest the corporate authorities of cities, towns and villages with power to make local improvements by special assessments, or by special taxation of contiguous property, or otherwise. For all other corporate purposes, all municipal corporations may be vested with authority to assess and collect taxes, but such taxes shall be uniform in respect to persons and property within the jurisdiction of the body imposing the same."

This clause must be construed as a limitation on the power of the legislature, and an inhibition on giving to private persons or corporations the power of taxation, or from imposing burden upon a locality without the consent of the citizens affected; <sup>22</sup> repeals by implication are not favored, and will not be declared unless it is manifest that the legislature so intended; <sup>23</sup> the re-enactment of a statute with modifications does not affect those parts of the original which remain unaltered.<sup>24</sup>

**201.** The construction placed by the highest courts of a state upon a statute providing for paving streets and distributing the assessment therefor is conclusive upon the Federal Supreme Court.<sup>25</sup>

<sup>21</sup> Warner v. Knox, 50 Wis. 429, 7 N. W. 372.

<sup>22</sup> Updike v. Wright, 81 Ill. 49; Cornell v. People, 107 Ill. 372; Givins v. Chicago, 188 Ill. 348, 58 N. E. 912.

<sup>23</sup> People v. Yancey, 167 Ill. 255, 47 N. E. 521.

<sup>24</sup> Hawes v. Fliegler, 87 Minn. 319, 92 N. W. 223, and cases cited.

"Canons of construction are not arbitrary or infallible, and should not be permitted to prevail against reason and justice in construing

inharmonious legislative enactments. They are not the masters of the courts, but merely their servants to aid them in ascertaining the legislative intent." Ibid.

<sup>25</sup> Schaefer v. Werling, 188 U. S. 516, 47 L. ed. 570, 23 Sup. Ct. Rep. 449; Forsyth v. Hammond, 166 U. S. 506, 518, 41 L. ed. 1095, 1100, 17 Sup. Ct. Rep. 665; Hibben v. Smith, 191 U. S. 310, 48 L. ed. 195, 24 Sup. Ct. Rep. 88; Treat v. Chicago, 64 C. C. A. 645, 130 Fed. 443.



*Charter Provisions as to Repairs.*

A charter provision that the city shall henceforth keep the streets in repair at the general expense after having been improved at the expense of the lot-owner, is neither a contract in the constitutional sense, nor a covenant running with the land. *Bradley v. McAtee*, 7 Bush, 667, 3 Am. Rep. 309.

*Conflicting Statutes.*

When two statutes cover, in whole or in part, the same matter, and are not absolutely irreconcilable, no purpose of repeal being clearly expressed or indicated, it is the duty of a court, if possible, to give effect to both. It will not be presumed that the Legislature intended a repeal of a prior statute by a later one on the same subject, unless the last statute is so broad in its terms, and so clear and explicit in its words, as to show that it was intended to cover the whole subject, and therefore

to displace the prior statute. *Diver v. Keokuk, etc.*, Bank, 126 Iowa, 691, 102 N. W. 542, and cases cited.

*Charter Provision as to Time, Mandatory.*

A charter provision that upon failure of a street contractor to perform his work in a given time, the superintendent of streets shall report the same to the board of supervisors, and they shall relet the work, is mandatory, and excludes the exercise of the power to extend beyond the contract time the performance of the work, either during or after the expiration of the contract time, and any such extension is void. *Beveridge v. Livingston*, 54 Cal. 54; *Turney v. Dougherty*, 53 Cal. 619.

*Conflict Between General Charter and Special Charter Statutes.*

*Diver v. Keokuk, etc.*, Bank, 126 Iowa, 691, 102 N. W. 542.



## CHAPTER III.

### OF THE LIMITATIONS UPON THE POWER OF SPECIAL ASSESSMENT.

In general, 202-203.

Public purpose, 204-209.

Apportionment, 210-232.

a. In general, 212.

b. Taxing districts, 213-218.

c. Apportionment by front foot,  
219-226.

d. Assessment according to cost

of work in front of each lot,  
227-228.

e. Apportionment by area, 229-  
230.

f. Assessment by value, 231.

g. Assessment by benefits, 232.  
Benefits, 233-241.

#### In general.

202. Although special assessments are levied under the power of taxation, it by no means follows that the rules applying to general taxation are applicable in all respects. These special levies are but one branch of a vigorous tree, and recourse is had to them only as the emergency arises. Comparatively few of the states have express constitutional authority for, or restrictions upon the power. But, under the principles of uniformity and justice which are the basis of the social contract, there must be well recognized legal principles which restrain the legislature from absolute control. The power of general taxation may result in confiscation of one's property and such result, although deplorable, may be strictly legal. But if the legislature were to authorize a municipal corporation to lay a special assessment against a single city lot for the expense of paying a street improvement in its front, it would not stand in any court, although decisions in some few cases have almost gone to



that extent. The legislature is supreme within its proper sphere, but cannot go beyond it without being subjected to judicial inquiry and control.

**203.** In common with all branches of the taxing power, that of special assessment must be exercised only for a public purpose, and within a fixed district, and according to some rule of practical uniformity. The limit of the amount is the benefit received by the property assessed. The three necessary limitations upon the unrestrained power of the legislature may be briefly discussed under the three heads of Public Purpose, Apportionment, and Benefits.

### Public purpose.

**204.** What is taken by taxation or assessment can be justified on no other theory than that it is taken for the public good, for private property cannot be taken for private purposes, even under the legislative power of taxation.<sup>1</sup> While private benefit must result in order to justify the special assessment, the object must primarily be a public one.<sup>2</sup> As one court has well and clearly stated, "It lays at the foundation of the right to impose taxes, that they should be levied

<sup>1</sup> *Stuart v. Palmer*, 74 N. Y. 183, 30 Am. Rep. 289; *Weismer v. Douglass*, 64 N. Y. 91, 21 Am. Rep. 586.

<sup>2</sup> "To lay with one hand the power of the government on the property of the citizen and with the other to bestow it on favored individuals to aid private enterprises and build up private fortunes, is none the less a robbery, because it is done under the forms of law and is called legislation. This is not legislation. It is a decree under legislative forms. Nor is it taxation. \* \* \* There can be no lawful tax which is not laid for a public purpose." *Miller, J.*, in *Loan Association v. Topeka*,

20 Wall. 655, 664, 22 L. ed. 455, 461.

The taxing power, whether it be asserted in the form of general taxation, or of local assessment, cannot be upheld when the purpose in view can be judicially seen to be other than public. *Matter of Market Street*, 49 Cal. 546.

And in this case, the levying of a special assessment for the purpose of paying for grading done on the streets a few years prior, under an abortive contract, is improper, as not being a public purpose. And see *Soens v. Racine*, 10 Wis. 271; *Anderson v. Kerns Drainage Co.*, 14 Ind. 199, 77 Am. Dec. 63.



for a public purpose, and laid according to some fixed rule of apportionment, so that practical uniformity may be arrived at in their imposition upon persons or property within the taxing district.”<sup>3</sup>

**205.** From the very wide scope of the term “public purpose,” it is obvious that the resultant benefits to individuals will vary from very material sums to amounts so small as to be incapable of being measured by an appreciable increase in value. Ordinarily, the general improvement of a public street in a city and the reclamation of swamp and arid lands, will result in a marked benefit to the owner of the property affected by reason of the increase in the market value of the property, whereas assessments on farm property for building improved roads are usually not allowed because of the resulting private benefit being too small to form a proper basis for assessment.<sup>4</sup> Some of the earlier cases go to an extent that would not receive judicial sanction at the present day.<sup>5</sup>

<sup>3</sup> *Lightner v. Peoria*, 150 Ill. 80, 37 N. E. 69; *Davis v. Litchfield*, 145 Ill. 313, 21 L. R. A. 563, 33 N. E. 888.

<sup>4</sup> *In re Washington Ave.*, 69 Pa. St. 352, 8 Am. Rep. 255.

<sup>5</sup> The legislature of New York passed an act in the spring of 1835, authorizing three designated commissioners to assess the sum of \$41,000 “upon the owners of all real estate situated in the city of Utica in proportion to the benefits which each shall be deemed to have acquired by the location of the northern terminus of the Chenango canal in said city, as nearly as can be determined.” This money was to be used to repay certain private citizens who had given a bond in that sum for the purpose of inducing the establishment of the canal terminus in Utica, and which they were compelled to pay. The court

before which the matter was brought, decided that these facts did not detract from the public purpose of the tax, and upheld the proceedings on the ground that individual personal benefit, aside from the benefit received as a member of the community, was unnecessary. *Thomas v. Leland*, 24 Wend. 65.

The courts have even compelled commissioners to include in their awards, for the payment of which special assessments were to be levied, damages to the franchise of a turnpike company claiming to have been injured by the construction of a street which permitted people to avoid the toll-gate. *In re Flatbush Ave.*, 1 Barb. 286; *Hamilton Ave.*, 14 Barb. 405; *Seneca Road Co. v. Auburn & R. R. R. Co.*, 5 Hill, 170; and in another case the referee reported “that if



And the public purpose must also be for a local improvement, an improvement made in a particular locality, by which real property in the immediate vicinity is specially benefited.<sup>6</sup> Whether the contemplated improvement is of such public utility as to justify a resort to the taxing power for its furtherance, is a matter to be decided by the legislature,<sup>7</sup> and while the decision of the corporate authorities as to what method of taxation shall be adopted to pay for a local improvement, is not reviewable by the courts, the question as to

the place of burial be taken for public use, the next of kin may claim to be indemnified for the expense of removing and suitably re-interring the remains," which expense was forthwith assessed "*upon the property owners benefited.*" *In re Beekman St.*, 4 Brad. 503. But the case of *Vernon v. Litchfield*, 41 N. Y. 123, goes beyond this. Under a legislative act providing for the closing of a railroad tunnel in a Brooklyn street, restoring the street to the proper grade, and for the relinquishment by the railroad company of its right to use steam power in the streets of the city, the expense was levied by special assessment upon the property within a specified district, as for benefits in that amount. The constitutionality of the act being questioned, the defendant offered to show that the entire scheme was for the benefit of the railroad company, and that the result was an injury to the property rather than a benefit, but the offer was rejected and all evidence on that point excluded. Upon appeal, although a new trial was granted on technical grounds, the constitutionality of the act was upheld, on the ground of the un-

limited power of taxation, the court saying that the assessment was based upon the ground that the property in the taxing district would be benefited by the change, and that upon this question the legislative authority was supreme. "The constitution has imposed no restriction upon their power in this respect. The counsel for the appellant concedes that this is true so far as closing the tunnel and grading the street are concerned, but insists that compensating the company for abandoning the use of steam and substituting therefor horse-power, does not come within the like principles. I am unable to see upon what ground the power of the legislature can be limited in this regard."

Rosewater on Special Assessments, 93, *et seq.* If these courts had adopted the principle of resulting benefits being the limit of the assessment, such unjust and unreasonable decisions would never have been made.

<sup>6</sup> *Rogers v. St. Paul*, 22 Minn. 494; *Hale v. Kenosha*, 29 Wis. 599; *Dorgan v. Boston*, 12 Allen, 223.

<sup>7</sup> *Tidewater Co. v. Coster*, 18 N. J. Eq. 518, 90 Am. Dec. 634.



whether the improvement is "local," within the powers conferred by the constitution and the statutes, may be reviewed.<sup>8</sup>

206. A local improvement has been defined as a public improvement which, by reason of its being confined to a locality enhances the value of adjacent property, as distinguished from benefits diffused by it throughout the municipality. The only basis for sustaining a special assessment is that by the proposed improvement the property properly subjected to the assessment will be enhanced in value to the extent of the burden imposed. If it appear from the nature of the work proposed that the market value of abutting or adjacent property would not be increased thereby, as a matter of law it would not be a local improvement, and no declaration of the corporate authorities could make it so.<sup>9</sup>

<sup>8</sup> *Morgan Park v. Wiswall*, 155 Ill. 262, 40 N. E. 611, following *Bloomington v. C. & A. R. Co.*, 134 Ill. 451, 26 N. E. 366, and explaining *L. & N. R. Co. v. E. St. Louis*, 134 Ill. 656, 25 N. E. 962. *Illinois*.

<sup>9</sup> *Chicago v. Blair*, 149 Ill. 310; 24 L. R. A. 412, 36 N. E. 829; *Morgan Park v. Wiswall*, 155 Ill. 262, 40 N. E. 611.

"In a general sense, all improvements within a municipality are local,—that is, they do not extend to all parts of the State; they have a locality; are nearer to some persons and property than to others. But it is evident that is not what is here meant by 'local improvements,' for if it were, it would have been more natural and lucid to have said 'improvements,' without other qualification, or, simply, 'municipal improvements.' We are to give all the words employed some meaning, if we can, and so we must consider 'local improvements,' in connection with 'spe-

cial assessments,' for the local improvement contemplated is one that can be made by special assessment, if only the corporate authorities shall elect to make it in that way. The words 'special assessment' had received a construction by this court in *Larned's case*, and in other like cases, under the constitution of 1848, and at the time of the adoption of the present constitution it was held, and has been since held, to mean an assessment to pay for an improvement for public purposes upon real property which is, by reason of the locality of the improvement, specially benefited, beyond the benefits by the improvement to real property, generally, throughout the municipality, proportioned by such benefits. \* \* \* In such cases, it is clear the improvement could not be made by special assessment." *Wilson v. Board of Trustees*, 133 Ill. 433-469, 27 N. E. 203. "The term 'local improvement' is one which



**207.** Only duly created municipal corporations, or corporations having certain municipal functions and organized for the specific purpose, may levy special assessments. This special power is exemplified in the case of boards of public

has been recognized as applying in cities and incorporated towns to the opening, grading, paving and otherwise improving streets and alleys, making sidewalks, the construction of drains and sewers, and other improvements of this character, — improvements designed to be of benefit to the locality where they are made." *Chicago v. Law*, 144 Ill. 569, 33 N. E. 855. The laying of water mains for the distribution of water within a particular street for the use of residents thereof, is a local improvement which may be paid for by special assessment. *Hewes v. Gloss*, 170 Ill. 436, 48 N. E. 922. Where the statute does not define a local improvement, the decision of the municipal authorities thereon, and their decision as to the utility of a street improvement, is final, in the absence of fraud. *L. & N. R. Co. v. E. St. Louis*, 134 Ill. 656, 25 N. E. 962. *Minnesota*.

"By common usage, especially as evidenced by the practice of the courts and text writers, the term 'local improvement' is employed as signifying improvements made in a particular locality by which the real property adjoining or near such locality is specially benefited. \* \* \* Our constitution is to be presumed to have employed the term in the sense which is thus attributed to it by common usage. *Rogers v. St. Paul*, 22 Minn. 494.

"It would be difficult to state in

what cases local assessments for benefits may or may not be made. In practice, the rule is usually adopted in the case of street improvements, sewers, water-mains, etc., while as respects public buildings or improvements of like general character for the use of the people of a city or district, the burden is properly apportioned by a general tax upon the property of the whole city, or of the district peculiarly benefited. \* \* \* In the case at bar, the fact that the improvement may open up a thoroughfare of great value and convenience to the city at large, or that it is expensive and costly, does not necessarily warrant the court in adjudging it one for which a local assessment may not be made upon property in the vicinity of the improvement, if found specially benefited thereby." *State v. District Court*, 33 Minn. 295, 23 N. W. 222.

"The only essential elements of a 'local improvement' are those which the term itself implies, viz., that it shall benefit the property on which the cost it assessed in a manner local in its nature, and not enjoyed by property generally in the city."

*State v. Reis*, 38 Minn. 371, 38 N. W. 97.

*Mississippi*.

The object of the assessment must be public, but not so exclusively public as to prevent its imposition in a particular locality;



park commissioners,<sup>10</sup> who may purchase lands for park purposes at an agreed price, part of which is the exemption of the owner's land from assessment for benefits,<sup>11</sup> but the legislature is without power to impose a local tax, as for a public park, without the consent of the people of the district,<sup>12</sup> and that it may require the consent of the taxpayers within a certain district as a condition precedent to burdening them with the cost of the improvement is unquestionable.<sup>13</sup>

**208.** To determine whether a matter is of public or mere-

its proceeds must be expended on an improvement plainly exceptive and beneficial to the property on which it is imposed, and its rate must not be excessive, beyond the cost of the improvement. *Macon v. Patty*, 57 Miss. 378, 34 Am. Rep. 451.

*Nebraska.*

In another case the collection of a special assessment for a sewer was perpetually enjoined, and the court in their opinion say: "The principal objects of the present sewer seem to be to furnish and determine channel for the creek, an outlet for sewers hereinafter constructed and permanent and substantial culverts across the streets intersecting the creek. In no sense can it be called a local improvement. It is for the benefit of the entire city, and not of particular individuals. So far as appears there is not a single lot exceptionally benefited, unless it be some of those in the bed of the creek." *Hanscom v. Omaha*, 11 Neb. 37, 7 N. W. 739.

*Ohio.*

"The popular, as well as legal, signification of this term had always indicated those special and local impositions upon the prop-

erty in the *immediate vicinity* of an improved street which were necessary to pay for the improvement, and laid with reference to the special benefits which such property derived from the expenditure of the money."

*Hill v. Higdon*, 5 Ohio St. 243, 67 Am. Dec. 289; *Chamberlain v. Cleveland*, 34 Ohio St. 551. *Pennsylvania.*

"Local assessments can only be constitutional when imposed to pay for local improvements clearly conferring special assessments on the properties assessed, and to the extent of those benefits. They cannot be so imposed when the improvement is either expressed or appears to be for general public benefit."

*Hammett v. Philadelphia*, 65 Pa. St. 146, 3 Am. Rep. 615; *In re Washington Ave.*, 69 Pa. St. 352, 8 Am. Rep. 255.

<sup>10</sup> *People v. Brislin*, 80 Ill. 423; *Dunham v. People*, 96 Ill. 331.

<sup>11</sup> *State v. District Court*, 33 Minn. 235, 22 N. W. 625, 632.

<sup>12</sup> *People v. Solomon*, 51 Ill. 37; *People v. Chicago*, 51 Ill. 17, 2 Am. Rep. 278.

<sup>13</sup> *Potter v. Ames*, 43 Cal. 75.



ly private concern, it is necessary to consider, not whether the interest of some individual will be promoted, but whether the whole or the greater part of the community will derive such benefit,<sup>14</sup> and the power of assessment in no wise rests upon the use to which the owner puts his land, or whether he puts it to any.<sup>15</sup>

209. The opening of city streets for public use is clearly a municipal purpose; and it is a matter of legislative discretion as to whether the cost shall be borne by general taxation of all property within the municipality, or by contiguous property, or a certain proportion to each,<sup>16</sup> but opening or improving a street for railroad purposes merely is not for a public purpose which will authorize a special assessment,<sup>17</sup> nor the cost of building a retaining wall upon property fronting a public street, made necessary for the purpose of affording lateral support by reason of the removal of the natural soil of the street.<sup>18</sup> The maintenance and repair of a boulevard or pleasure way is not a "local improvement,"<sup>19</sup> nor does an ordinance which recites that a street grading improvement is for the "public convenience" authorize a special assessment to pay for it.<sup>20</sup> And it may be safely stated as a general proposition that a specific grant of authority to grade or otherwise improve streets at the expense of abutting owners is, in the absence of other charter provisions relating to the subject, a limitation upon the power of the city authorities and exclusive of other methods,<sup>21</sup> except as limited by actual benefits.

<sup>14</sup> Soens v. Racine, 10 Wis. 271; Brodhead v. Milwaukee, 19 Wis. 636, 88 Am. Dec. 711.

<sup>15</sup> Powers v. Grand Rapids, 98 Mich. 393, 57 N. W. 250.

<sup>16</sup> Swinton v. Ashbury, 41 Cal. 525.

<sup>17</sup> Ligare v. Chicago, 139 Ill. 46, 32 Am. St. Rep. 179, 28 N. E. 934.

<sup>18</sup> Armstrong v. St. Paul, 30 Minn. 299, 15 N. W. 174.

<sup>19</sup> Crane v. W. Chi. Park Com'r's, 153 Ill. 348, 26 L. R. A. 311, 38 N. E. 943.

<sup>20</sup> Burns v. Mayor, etc., 48 Md. 198. This goes very far in the protection of private rights, and is criticised in the dissenting opinion in Mayor, etc. v. Johns Hopkins Hospital, 56 Md. 1.

<sup>21</sup> Findley v. Hull, 13 Wash. 236, 43 Pac. 28.



**Apportionment.**

**210.** Although no system of taxation that the brain of man has yet conceived works exact justice and equality, the requirement of uniformity is essential, regardless of what the basis of taxation may be. As an eminent jurist and text-writer has aptly stated, this principle applies to these local assessments as much as to any other species of taxation, the difference being only in the character of the uniformity and the basis on which it is established, and that to render the taxation uniform in any case, two things are essential. First, each taxing district should confine itself to the objects of taxation within its limits, that duplicate taxation and inequality may be avoided. Second, all the objects of taxation within the taxing district should be embraced to the end that there be uniformity in the manner of the assessment and approximate equality in the amount of the exactions throughout the district.<sup>22</sup>

**211.** In one of the earlier cases the court said

“This unlimited power to tax necessarily involves the right to designate the property upon which it is to be levied — in other words, to apportion the tax. And except in cases where the proceeding is merely colorable, and it is really and substantially an exercise of the right of eminent domain, the judicial tribunals cannot interfere with the legislative discretion, however onerous it may be.”<sup>23</sup>

That this statement of the law is extreme in some respects will be shown by later and better reasoned decisions, but it affords a convenient starting point. When the taxing power was first resorted to for justification of special assessments, the courts were not so careful to fix the limitations of the applications of that power to this special use, and with continual and repeated applications of the principle

<sup>22</sup> Cooley, Const. Lim., 615. As <sup>23</sup> Scoville v. Cleveland, 1 Ohio to general rule for apportionment, St. 126.  
see Bacon v. Savannah, 91 Ga. 500,  
17 S. E. 749.



to the new states of fact presented by the cases as they arose, the necessity of restraining the taxing power within well recognized limits was recognized. If the taxing power were indeed unlimited, then the simplest method of applying it to street improvements would be to compel each owner to pay the expense in front of his property, especially as it was almost universally held that the constitutional restrictions as to uniformity and equality did not apply to this special system. But it was very promptly held that this was in effect an arbitrary exaction, and repugnant to constitutional principles,<sup>24</sup> although there are cases that hold a contrary doctrine.<sup>25</sup>

— a. In general.

**212.** Although the power of taxation, which necessarily includes the apportionment of the assessment, is of necessity a purely legislative function,<sup>26</sup> and any attempt to exer-

<sup>24</sup> *Woodbridge v. Detroit*, 8 Mich. 274; *State v. Portage*, 12 Wis. 563.

"I admit that the power to tax is unbounded by any express limit in the Constitution—that it may be exercised to the full extent of the public exigency. I concede that it differs from the power of eminent domain, and has no thought of compensation by way of a return for that which it takes and applies to the public good, further than all derive benefit from the purpose to which it is applied. But nevertheless taxation is bounded in its exercise by its own nature, essential characteristics and purpose. It must therefore visit all alike in a reasonably practicable way of which the legislature may judge, but within the just limits of what is taxation. Like the rain, it may fall upon the people in districts and by turns, but still it must be public in its purpose, and reasonably just and

equal in its distribution, and cannot sacrifice individual right by a palpably unjust exaction. To do so is confiscation, not taxation, extortion not assessment, and falls within the clearly implied restriction, not a fair assessment." *Agnew, J., in re Washington Avenue*, 69 Pa. St. 363, 8 Am. Rep. 255.

<sup>25</sup> It has been held to be the settled law in New York that the power of taxation and of apportionment of taxation are vested in the legislature, and are identical and inseparable; that there is no constitutional restraint upon the exercise of that power; and that it includes the right and power of determining what portion of a public burden shall be borne by *any individual* or class of individuals. *Litchfield v. Vernon*, 41 N. Y. 123; *People v. Lawrence*, 41 N. Y. 137.

<sup>26</sup> The power of apportionment, with the power of taxation, is ex-



cise the taxing power without it renders the proceedings absolutely void,<sup>27</sup> yet we shall show later in this chapter that only property benefited is subject to the assessment. With this limitation always in view, when the legislature has exercised its right, and made the apportionment, the courts will not assume to declare it void, except for fraud, or manifest abuse, so that the invasion of a private right is flagrant and its demonstration clear,<sup>28</sup> although where the assessing board has adopted the wrong rule of apportionment, the tax-payer is not concluded thereby, but may resort to the courts.<sup>29</sup> In such a case, the board acts outside

clusively in the legislature, the constitution containing no inhibition to a tax for a local improvement, and prescribing no rule of apportionment. *Burnett v. Sacramento*, 12 Cal. 76, 73 Am. Dec. 518.

Taxation, whether special or general must be uniform, and must be distributed among those who are to pay it by a just ratio of apportionment. *Independence v. Gates*, 110 Mo. 374, 19 S. W. 728. The power of taxation and of apportioning taxation, or of assigning to each individual his share of the burden, is vested exclusively in the legislature, unless this power is limited or restrained by some constitutional provision. The power of taxing and the power of apportioning taxation are identical and inseparable. Taxes cannot be laid without apportionment; and the power of apportionment is therefore unlimited, unless it be restrained as a part of the power of taxation. *People v. Mayor, etc., of Brooklyn*, 4 N. Y. 419, 55 Am. Dec. 266. A tax or assessment upon property arbitrarily imposed, without reference to some just system of apportionment,

could not be upheld. *Stuart v. Palmer*, 74 N. Y. 183, 30 Am. Rep. 289. The mode of apportioning the tax and the extent of territory that may be embraced within it are necessarily matters of legislative discretion. *State v. Fuller*, 34 N. J. L. 227.

<sup>27</sup> The apportionment of the burden is a necessary element in all taxation, and any attempt to exercise the power without it, is absolutely void. *Motz v. Detroit*, 18 Mich. 495.

<sup>28</sup> *Allen v. Drew*, 44 Vt. 174; *Davis v. Saginaw*, 87 Mich. 439, 49 N. W. 667; *Shimmons v. Saginaw*, 104 Mich. 511, 62 N. W. 725; *Grand Rapids S. F. Co. v. Grand Rapids*, 92 Mich. 564, 52 N. W. 1028; *Keith v. Bingham*, 100 Mo. 300, 13 S. W. 683. "The legislature is not competent to ascertain and adjudicate upon facts in individual cases, so as to bind private rights. This is not one of the functions of legislative power." *Christianity, J., in Woodbridge v. Detroit*, 8 Mich. 274, citing *Parmlee v. Thompson*, 7 Hill, 80.

<sup>29</sup> *People v. County Court*, 55 N. Y. 604.



of its jurisdiction.<sup>30</sup> One court, which has gone to the extreme in sustaining the omnipotence of the legislature in all taxation matters, has stated that the security against the abuse of the power of apportionment rests in the wisdom and justice of the members of the legislature, and their responsibility to their constituents.<sup>31</sup> But experience has shown that this is a broken reed upon which to lean, because of the overwhelming influence of the corporate authorities in matters of this kind.

### — b. Taxing districts.

**213.** Fixing the taxing district, or, in other words, defining the territory within which the special assessment shall be made, is exclusively a legislative prerogative, although not an arbitrary or unrestricted one.<sup>32</sup> The legislative body may itself by enactment fix the district, or, as is more com-

<sup>30</sup> *Friedrich v. Milwaukee*, 118 Wis. 254, 95 N. W. 126.

<sup>31</sup> *Burnett v. Sacramento*, 12 Cal. 76, 73 Am. Dec. 518.

<sup>32</sup> Local assessment districts are not within the unrestricted discretion of the legislature, and the power to make them is not an arbitrary one; but among the limitations, arising from its nature and that of the taxing power, which the courts will enforce, is the one that the assessment cannot be imposed upon an individual, but must be apportioned among a sub-district of several. *Macon v. Patty*, 57 Miss. 378, 34 Am. Rep. 451. The legislature may limit the area of assessment for a public improvement; it need not include the whole territory benefited by the improvement; provided that the assessment upon such lands as are within the prescribed limits is restricted to the amount of benefit received by

them. *State v. Road Commrs.*, 41 N. J. L. 83. "The courts are generally agreed that the authority to require the property specially benefited to bear the expense of local improvements is a branch of the taxing power, or included within it. \* \* \* Whether the expense of making such improvements shall be paid out of the general treasury, or be assessed upon the abutting property or other property specially benefited, and, if the latter mode, whether the assessment shall be upon all property found to be benefited, or alone upon the abutters, according to frontage or according to the area of their lots, is, according to the present weight of authority, considered to be a question of legislative expediency."

*Dillon, Mun. Corp.* (4th Ed.) Sec. 752.

The major part of the cost of a local work is sometimes collected



mon, delegate it to municipal bodies under charter provisions or general acts. It is axiomatic that the legislature may authorize the whole expense of a local improvement to be paid by general taxation, or by special assessment on the property benefited, or by a portion to each, so that the legislative discretion as to how large the district may be can seldom be questioned. How small it may be has never been determined.

**214.** That the district wherein a special assessment is to be laid, should be fixed in advance, is according to orderly procedure and the regular course of taxation,<sup>33</sup> although it has been held not to be essential.<sup>34</sup> But the legislature can not clothe the corporate authorities with power to assess and collect taxes from only a part of the municipality, for a corporate purpose. Such purpose must extend to the entire city, and in the apportionment of the tax to effectuate the purpose, the principle of equality and uniformity must be observed.<sup>35</sup>

by general tax, while a smaller portion is levied upon the estates specially benefited.

The major part is sometimes assessed on estates benefited, while the general public is taxed a smaller portion in consideration of a smaller participation in the benefits.

The whole cost in other cases is levied on lands in the immediate vicinity of the work.

In a constitutional point of view either of these methods is admissible, and one may be sometimes just, and another at other times. In other cases it may be deemed reasonable to make the whole cost a general charge, and levy no special assessment whatever. The question is legislative, and, like all legislative questions, may be decided erroneously; but it is rea-

sonable to expect that, with such latitude of choice, the tax will be more just and equal than it would be were the legislature required to levy it by one inflexible and arbitrary rule." Cooley, *Taxation* (3d Ed.) 1203.

<sup>33</sup> Powers Appeal, 29 Mich. 504.

<sup>34</sup> *People v. Mayor, etc., of Brooklyn*, 4 N. Y. 419, 55 Am. Dec. 266.

<sup>35</sup> Under a charter authorizing the council "to create special improvement districts within the city, and to change the boundaries of said districts from time to time," the broad power is conferred of creating special improvement districts, commensurate with the improvement which was required to be made therein; and under such power, the whole city may be included in one district, if necessary



The taxing district may embrace an entire city,<sup>35a</sup> or it may be confined to contiguous or abutting property, or property fronting the improvement,<sup>36</sup> or composed of only part of the property in the municipality,<sup>37</sup> and under a general act authorizing an assessment upon any property which the city council believe will be benefited by the proposed improvement, the charter provision restricting such district to lands fronting the improvement, is in effect repealed.<sup>38</sup>

**215.** A political corporation may be created within the limits of another already created, and authority conferred upon commissioners to impose taxes for local improvements therein,<sup>39</sup> while provisions can be made for creation of a public park which lies within the limits of several towns,<sup>40</sup> or the creation of a taxing district in two counties.<sup>41</sup>

**216.** The legislature has undoubted authority to apportion a public burden among all the taxpayers of the state, or among those of a particular section if, in its judgment,

for an improvement which affected the whole. *M. & M. Land Co. v. Billings*, 50 C. C. A. 70, 111 Fed. 972.

<sup>35a</sup> *Primm v. Belleville*, 59 Ill. 142.

<sup>36</sup> A taxing district is essential to a valid local assessment, but it may be defined by statute generally, and confined to contiguous or abutting property. *Raymond v. Cleveland*, 42 Ohio St. 522. Or on property fronting the improvement. *State v. District Court*, 61 Minn. 542, 64 N. W. 190; *State v. Norton*, 63 Minn. 497, 65 N. W. 935.

<sup>37</sup> *Adams v. Shelbyville*, 154 Ind. 467, 49 L. R. A. 797, 77 Am. St. Rep. 484, 57 N. E. 114.

<sup>38</sup> *Goodrich v. Detroit*, 123 Mich. 559, 82 N. W. 255.

<sup>39</sup> *State v. Hackensack, etc., Commissioners*, 45 N. J. L. 113.

<sup>40</sup> The legislature may provide for the creation of a public park by several towns; and when those towns have voted to accept the provisions of the statute, the board of park commissioners created thereby may be vested by the legislature with the power to assess and collect taxes within the park district so created, for the special corporate purpose of its creation. *People v. Salomon*, 51 Ill. 37.

<sup>41</sup> Where a special act of the legislature creates a taxing district in two counties, the rate of assessment must be uniform throughout the district, notwithstanding the expense in one county was greater than the other, it being immaterial that parts of two counties are united in creating the district.

*Commissioners v. Commissioners*, 92 N. C. 180.



those of a special section may reap the principal benefit from the proposed expenditure,<sup>42</sup> and it may vest in a council, or other inferior board, the right to fix the districts, amount of tax, and method of raising it, and to declare that all the property within such district is benefited, and their action is conclusive, except for fraud or mistake.<sup>43</sup>

217. Under the present constitution of Illinois, the effect of an ordinance providing for the payment of the cost of a local improvement by special taxation, is to create a taxing district composed of the property contiguous to the improvement, but a public street or alley is not deemed "contiguous property," and is not, therefore, assessable.<sup>44</sup> A constitutional provision permitting the legislature to authorize "Assessments on real property for local improvements in towns and cities, under such regulations as may be prescribed by law, to be based upon the consent of a majority in value of the property-holders owning property adjoining the locality to be affected . . .", applies to any property adjoining or near the improvement, which is physically affected, or the value of which is commercially affected directly by the improvement to a degree in excess of the effect upon the property in the city generally.<sup>45</sup> And under an act of congress requiring a board of public works to assess a proportion of the cost of street improvements "upon the property adjoining and to be specially benefited by the improvement," these words designate the property to be charged, and not the condition. The duty of the board is to estimate the cost, and distribute the same among the owners according to frontage, and they

<sup>42</sup> *Cook v. Portland*, 20 Or. 580,  
13 L. R. A. 533, 27 Pac. 263;  
*Swinton v. Ashbury*, 41 Cal. 525.

<sup>43</sup> *Rogers v. St. Paul*, 22 Minn.  
494; *Little Rock v. Katzenstein*,  
52 Ark. 107, 12 S. W. 198; *Com-  
missioners v. Herrell*, 147 Ind. 500,

46 N. E. 124; *Burlington v. Quick*,  
47 Iowa, 222.

<sup>44</sup> *Lightner v. Peoria*, 150 Ill.  
80, 37 N. E. 69; *C. & N. W. R.  
Co. v. Elmhurst*, 165 Ill. 148, 46  
N. E. 437.

<sup>45</sup> *Little Rock v. Katzenstein*,  
52 Ark. 107, 12 S. W. 198.



were not charged with the duty of ascertaining if there be in fact any benefits.<sup>46</sup>

**218.** But the legislature, in fixing the amount of the tax and the area of assessment, is determining a public question, upon considerations of public interest and welfare, and it cannot provide for an apportionment of the tax among the persons affected without providing for a notice and a hearing on the amounts individually assessed.<sup>47</sup> This has been shown in the previous chapter.<sup>48</sup>

— c. Apportionment by front foot.

**219.** Whether or not a special assessment for a local improvement may be made upon what is familiarly known as the "front foot" rule, is a matter upon which the courts are divided, with the numerical superiority very strongly in the affirmative. So far as assessments for constructing lateral sewers and laying water pipes are concerned, the method is probably as fair and accurate a one as can be arrived at, the property being presumptively enhanced in value by the cost of the work. As a matter of fact it would in most cases be impossible to disprove the benefits, although in exceptional cases, where benefits have been absolutely disproved, the courts have set aside the assessments.

**220.** How far the presumption of benefit to property by reason of a local improvement, can be carried, has not been definitely determined, but it would seem as if it were logically limited by the actual facts of each case. In other

<sup>46</sup> United States ex rel. Henderson v. Edmunds, 3 Mackey, 142.

<sup>47</sup> In re Trustees Union College, 129 N. Y. 308, 29 N. E. 460.

"This requirement of the law which arises independent of any legislative provision for a notice and opportunity to be heard, is designed in the interest of justice to afford to individuals who are called upon to bear these ex-

traordinary burdens, an opportunity to be heard upon all questions of fact, as well as of law, on which their liability rests, and at a time and before the tribunal most favorable for the fair and unbiased determinations of all such questions. State v. Road Comm'rs, 41 N. J. L. 83.

<sup>48</sup> Supra, ch. II., etc.



words, the legal presumption is, in the absence of a contrary showing, that the property assessed is benefited to the amount of the assessment. But if the facts are that the property is either deteriorated in value, or at least not enhanced in value to any extent; or if the physical situation is such that it is manifest that the property could not be benefited by the improvement, the presumption is overcome, and the courts should undoubtedly, on a proper showing of such facts, set aside such an assessment. The author is absolutely convinced that actual benefits to property are the sole foundation for the right to lay a special assessment, and that under the protection of the Fourteenth Amendment, no assessment can stand which is in substantial excess of the actual enhancement in value of the property on which it is laid. It is to the extent of such excess, as so aptly stated by Justice Harlan, in *Norwood v. Baker*, a taking of private property for public use without due process of law.

**221.** In cases of grading and paving streets, where the expenses in front of the various lots are substantially the same, and there is no great difference in the value of the different properties or in the actual benefits received, the apportionment of the expense, not exceeding the benefits derived, upon the ratio that the number of feet front that each lot has as compared with the total frontage embraced in the improvement, is perhaps as fair and accurate a mode of apportionment as can be devised. Apportioning the cost by the frontage on the improvement is adopted by the legislature as constituting, in the judgment of its members, an apportionment in proportion to benefits as nearly as is reasonably practicable, and, as we understand it, is substantially the view taken by the authorities.<sup>49</sup>

**222.** In Pennsylvania, the front foot basis of apportionment has been sustained in many cases, but not without an occasional protest from the Supreme Court of that State.

<sup>49</sup> *Cooley on Taxation* (3d ed.), Dague, 130 Cal. 207, 62 Pac. 500. 1221, and cases cited; *Hadley v.*



In one case, Chief Justice Agnew said, "More than once lately we have had occasion to reprehend that legislation which seeks to cast the burdens of the public on the shoulders of individuals, often bringing ruin on men of moderate means. Such legislation is too often the fruit of designing schemers to promote their selfish ends. We may therefore say that while the frontage rule is conceded to be a legal mode of assessments, when properly applied, it is not to be used as an arbitrary mode of casting the public burthens upon the property of individuals."<sup>50</sup> But although valid where the properties do not differ materially in value, the front foot rule is unconstitutional where the street or improvement is made through rural or suburban districts.<sup>51</sup> In Illinois, under the present constitution, the system of special taxation of contiguous property in proportion to frontage is held valid.<sup>52</sup>

**223.** The extremity to which courts have gone in discussing this question is remarkable. One court of good repute holds that an arbitrary rule by which the expense of a sewer is apportioned among the adjoining owners, according to the number of front feet of their lots, without reference to other considerations, is unreasonable and cannot be sanctioned;<sup>53</sup> while another court holds that the legislature may distribute the cost of a local improvement upon the property located on the street where the improvement is made, according to frontage, or a stated sum per lineal foot, and that the property owner is not entitled to a hearing at any time upon the justice or propriety of the principle upon which the assessment is apportioned.<sup>54</sup> The latter case is

<sup>50</sup> *Seely v. Pittsburgh*, 82 Pa. St. 365, 22 Am. Rep. 760.

<sup>51</sup> *Seely v. Pittsburgh*, 82 Pa. St. 360, 22 Am. Rep. 760; *Craig v. Philadelphia*, 89 Pa. St. 265; *Washington Avenue*, 69 Pa. St. 352, 8 Am. Rep. 255; *Philadelphia v. Rule*, 93 Pa. St. 15; *Scranton*

*v. Penn. Coal Co.*, 105 Pa. St. 445.

<sup>52</sup> *C. & N. W. R. Co. v. Elmhurst*, 165 Ill. 148, 46 N. E. 437.

<sup>53</sup> *Clapp v. Hartford*, 35 Conn. 66.

<sup>54</sup> *People v. Pitt*, 169 N. Y. 521, 58 L. R. A. 372, 62 N. E. 662.



so extreme, and so opposed to well recognized principles of practically universal acceptance, that it is impossible to reconcile it with the current of judicial opinion. The court which pronounced it has strongly upheld the principle of benefits, and the necessity of notice, in several cases, but has gone to the extreme in recognizing the power of the legislature in taxing matters. From this decision to one making the cost of an improvement in front of each lot payable by the owner thereof, if so provided by legislative enactment is but a step. It seems clearly in violation of the Fourteenth Amendment to the Federal Constitution. Without benefits, there is no ground for a tax, and the fact as to whether or not there are benefits is one of fact, and the legislature cannot confer benefits by a simple enactment that certain property is in fact benefited. There must first be an inquiry into the fact, or an assessment, which is quasi judicial in nature, before a tax or imposition may be laid on the property.<sup>55</sup>

**224.** But where the legislature has made actual benefits the legal basis for an assessment, it is necessary that the return of the commissioners should show that they acted upon this principle; and a return showing an assessment by frontage does not affirmatively establish the fact of an assessment in accordance with the statute.<sup>56</sup>

<sup>55</sup> "That the benefits a property owner receives from an improvement can be ascertained only by a reasonable mode of assessment is plain. And, that to measure the fronts of all the abutting properties and divide the cost by an equal charge per front foot upon each, is not an assessment of advantages, but simply an arbitrary mode of charging, is equally plain. Therefore, to be just and equally fair to each, it is evident all the owners must stand in like, or in reasonably equal, circumstances;

otherwise the charge is an exaction, not a fair assessment." Agnew, C. J., in *Seely v. Pittsburgh*, 82 Pa. St. 365, 22 Am. Rep. 760. In this case the court review the cases on the method of assessing by benefits and front foot rule, and say the latter is but a substitute for actual assessment.

<sup>56</sup> *Lieberman v. Milwaukee*, 89 Wis. 336, 61 N. W. 1112; *Hayes v. Douglass Co.*, 92 Wis. 429, 31 L. R. A. 213, 53 Am. St. Rep. 926, 65 N. W. 482; *Hennessy v. Douglas Co.*, 99 Wis. 129, 74 N. W.



**225.** In those states which sustain the method of assessment by frontage, the principle of benefits as the limitation on the amount is generally recognized, and the apportionment by frontage considered as legislative authority for determining the benefits in that ratio. It must be admitted that the overwhelming volume of authority is in favor of sustaining this method of apportionment.<sup>57</sup> In some of the

893; *Kersten v. Milwaukee*, 106 Wis. 200, 48 L. R. A. 851, 81 N. W. 948, 1103; *Friedrich v. Milwaukee*, 114 Wis. 304, 90 N. W. 174; S. C., 118 Wis. 254, 95 N. W. 126; *Warren v. Grand Haven*, 30 Mich. 24; *State v. Hudson*, 27 N. J. L. 214; S. C., 28 N. J. L. 104; *State v. Bergen*, 29 N. J. L. 266; *Elma v. Carney*, 9 Wash. 466, 37 Pac. 707; *O'Reilly v. Kingston*, 114 N. Y. 439, 21 N. E. 1004. If the statute conferring the power to make such assessments limits its exercise to the benefits, by the improvements, to the property assessed, or is not broad enough to confer on the municipality the power to select the mode of assessment, then an assessment by frontage is an unwarranted assumption of benefits, and does not meet the requirements of the statute, but is in conflict therewith. *Violett v. Alexandria*, 92 Va. 561, 31 L. R. A. 382, 53 Am. St. Rep. 825, 23 S. E. 909.

#### *Alabama.*

<sup>57</sup> *City Council v. Birdsong*, 126 Ala. 632, 28 So. 522.

#### *California.*

*Emery v. San Francisco Gas Co.*, 28 Cal. 345; *Walsh v. Matthews*, 29 Cal. 123; *Chambers v. Satterlee*, 40 Cal. 497; *People v. Lynch*, 51 Cal. 15, 21 Am. Rep. 677; *Whiting v. Quackentush*, 54

Cal. 306; *Whiting v. Townsend*, 57 Cal. 515; *Jennings v. Le Breton*, 80 Cal. 8, 21 Pac. 1127; *Diggins v. Hartshorne*, 108 Cal. 154, 41 Pac. 283; *Harney v. Benson*, 113 Cal. 314, 45 Pac. 687; *Hadley v. Dague*, 130 Cal. 207, 62 Pac. 500; *Banaz v. Smith*, 133 Cal. 102, 65 Pac. 309; *San Francisco Paving Co. v. Bates*, 134 Cal. 39, 66 Pac. 2; *German Savings, etc., Society v. Ramish*, 138 Cal. 120, 69 Pac. 89.

#### *Colorado.*

*Keese v. Denver*, 10 Colo. 115, 15 Pac. 825; *Pueblo v. Denver*, 12 Colo. 593, 21 Pac. 899; *Denver v. Knowles*, 17 Colo. 204, 17 L. R. A. 135, 30 Pac. 1041; *Denver v. Campbell*, 33 Colo. 162, 80 Pac. 142.

#### *Delaware.*

*English v. Wilmington*, 2 Marv. (Del.) 63, 37 Atl. 158.

#### *District of Columbia.*

*Jones v. Dist. of Columbia* 3 App. D. C. 26.

#### *Georgia.*

*Hayden v. Atlanta*, 70 Ga. 817; *Bacon v. Savannah*, 86 Ga. 301, 12 S. E. 580; *Savannah v. Weed*, 96 Ga. 670, 23 S. E. 900.

#### *Illinois.*

*Green v. People*, 130 Ill. 515, 22 N. E. 602; *Springfield v. Green*, 120 Ill. 269, 11 N. E. 261; *Wilbur v. Springfield*, 123 Ill. 395,



states, there is held to be but little conflict between the front-age rule, and the rule that the assessment shall be made ac-

14 N. E. 871; *Springfield v. Sale*, 127 Ill. 359, 20 N. E. 86; *Green v. Springfield*, 130 Ill. 515, 22 N. E. 60; *Walker v. Aurora*, 140 Ill. 402, 22 N. E. 741; *Davis v. Litchfield*, 145 Ill. 313, 21 L. R. A. 563, 33 N. E. 888; *Chicago & N. A. R. Co. v. Joliet*, 153 Ill. 649, 39 N. E. 1077; *Payne v. S. Springfield*, 161 Ill. 285, 44 N. E. 105; *Job v. Alton*, 189 Ill. 256, 82 Am. St. Rep. 448, 59 N. E. 622.

#### *Indiana.*

*Palmer v. Stumph*, 29 Ind. 329; *Kirkland v. Board, etc.*, 142 Ind. 123, 41 N. E. 374; *Commissioners v. Herrell*, 147 Ind. 500, 46 N. E. 124; *Indianapolis v. Holt*, 155 Ind. 222, 57 N. E. 966, 988, 1100; *Martin v. Wills*, 157 Ind. 153, 60 N. E. 1021.

#### *Iowa.*

*Amery v. Keokuk*, 72 Iowa 701, 30 N. W. 780; *Gilcrest v. Macartney*, 97 Iowa 138, 66 N. W. 103; *Allen v. Davenport*, 107 Iowa 90, 77 N. W. 532; *Hackworth v. Ottumwa*, 114 Iowa 467, 87 N. W. 424.

#### *Kansas.*

*Barnes v. Atchison*, 2 Kan. 455; *Parker v. Challis*, 9 Kan. 155.

#### *Kentucky.*

*Covington v. Boyle*, 6 Bush, 204; *Howell v. Bristol*, 8 Bush, 493; *Covington v. Worthington*, 88 Ky. 206, 10 S. W. 790, 11 S. W. 1038; *Joyes v. Shadburn*, 11 Ky. L. Rep. 892, 13 S. W. 361; *Marshall v. Barber A. P. Co.*, 23 Ky. L. Rep. 1971, 66 S. W. 734.

#### *Louisiana.*

*Barber A. P. Co. v. Gogreve*, 41 La. Ann. 251, 5 So. 848; *Kelly*

*v. Chadwick*, 104 La. 719, 29 So. 295.

#### *Maryland.*

*Howard v. Baltimore etc. Church*, 18 Md. 451; *Baltimore v. Johns Hopkins Hospital*, 56 Md. 1; *Moale v. Baltimore*, 61 Md. 224; *Alberger v. Baltimore*, 64 Md. 1, 20 Atl. 988; *Mayor, etc., v. Stewart*, 92 Md. 535, 48 Atl. 165.

#### *Massachusetts.*

*Fairbanks v. Fitchburg*, 132 Mass. 42.

#### *Michigan.*

*Williams v. Detroit*, 2 Mich. 560; *Motz v. Detroit*, 18 Mich. 495; *Warren v. Grand Haven*, 30 Mich. 24; *Sheley v. Detroit*, 43 Mich. 431, 8 N. W. 52; *Kalamazoo v. Francoise*, 115 Mich. 554, 73 N. W. 801; *Cass Farm Co. v. Detroit*, 124 Mich. 433, 83 N. W. 108, 181 U. S. 396, 45 L. ed. 914, 21 Sup. Ct. Rep. 644.

#### *Minnesota.*

*In re Norton*, 61 Minn. 542, 64 N. W. 190; *State v. R. P. Lewis Co.*, 72 Minn. 87, 42 L. R. A. 639, 75 N. W. 108; *State v. Dist. Court*, 80 Minn. 293, 83 N. W. 183; *State v. Lewis Co.*, 82 Minn. 390, 53 L. R. A. 421, 85 N. W. 207, 86 N. W. 611.

#### *Missouri.*

*St. Joseph v. Anthony*, 30 Mo. 537; *Palmyra v. Morton*, 25 Mo. 593; *St. Joseph v. O'Donoghue*, 31 Mo. 345; *Powell v. St. Joseph*, 31 Mo. 347; *Fowler v. St. Joseph*, 37 Mo. 228; *St. Louis v. Clemens*, 49 Mo. 552; *Neenan v. Smith*, 50 Mo. 525; *Weber v. Schergens*, 59 Mo. 390; *Farrar v. St. Louis*, 80



cording to benefits. In other words, there is in the majority of cases, no necessary inconsistency between the two methods, it being sufficient if there be a proper distribution of the as-

Mo. 394; *Rutherford v. Hamilton*, 97 Mo. 543, 11 S. W. 249; *Moberly v. Hogan*, 131 Mo. 19, 32 S. W. 1014; *Heman v. Allen*, 156 Mo. 534, 57 S. W. 559; *Kansas City v. Bacon*, 157 Mo. 450, 57 S. W. 1045; *Barber A. P. Co. v. French*, 158 Mo. 534, 54 L. R. A. 492, 58 S. W. 934, 181 U. S. 324, 45 L. ed. 879, 21 Sup. Ct. Rep. 625; *St. Charles v. Deemar*, 174 Mo. 122, 73 S. W. 469; *Sedalia v. Coleman*, 82 Mo. App. 560.

*Nebraska.*

*John v. Connell*, 64 Neb. 233, 89 N. W. 806.

*New Jersey.*

*State v. Elizabeth*, 30 N. J. L. 365; *Jersey City v. Howeth*, 30 N. J. L. 521, S. C. 31 N. J. L. 547; *Hand v. Elizabeth*, 31 N. J. L. 547; *State v. Fuller*, 34 N. J. L. 227; *Pudney v. Passaic*, 37 N. J. L. 65; *Raymond's Est. v. Rutherford*, 55 N. J. L. 441, 27 Atl. 172; S. C. 56 N. J. L. 340, 29 Atl. 156; *State v. Elizabeth*, 56 N. J. L. 125, 27 Atl. 801; *Central, etc., v. Bayonne*, 56 N. J. L. 297, 28 Atl. 713; *Long Branch Commission v. Dobbins*, 61 N. J. L. 659, 40 Atl. 599; *Dooling v. Ocean City*, 67 N. J. L. 215, 50 Atl. 621.

*New York.*

*Stebbins v. Kay*, 51 Hun. 589, 4 N. Y. Supp. 566, reversed in S. C. 123 N. Y. 31, 25 N. E. 207; *Denise v. Fairport*, 11 Misc. 199, 32 N. Y. Supp. 97; *O'Reilly v. Kingston*, 114 N. Y. 439, 21 N. E. 1004; *Conde v. Schnectady*,

164 N. Y. 258, 58 N. E. 130; *People v. Pitt*, 169 N. Y. 521, 58 L. R. A. 372, 62 N. E. 662.

*North Carolina.*

*Raleigh v. Peace*, 110 N. C. 32, 17 L. R. A. 330, 14 S. E. 521; *Hilliard v. Asheville*, 118 N. C. 845, 24 S. E. 738.

*North Dakota.*

*Rolph v. Fargo*, 7 N. D. 640, 42 L. R. A. 646, 76 N. W. 242; *Roberts v. First Nat. Bank*, 8 N. D. 504, 79 N. W. 1049; *Webster v. Fargo*, 9 N. D. 208, 56 L. R. A. 156, 82 N. W. 732.

*Ohio.*

*Ernst v. Kunkle*, 5 Ohio St. 520; *Maloy v. Marietta*, 11 Ohio St. 636; *Reeves v. Wood Co.*, 8 Ohio St. 333; *Nor. Ind. R. Co. v. Connelly*, 10 Ohio St. 159; *Upington v. Oviatt*, 24 Ohio St. 232; *Wilder v. Cincinnati*, 26 Ohio St. 284; *Corry v. Folz*, 29 Ohio St. 320; *Spangler v. Cleveland*, 35 Ohio St. 469; *Jaeger v. Burr*, 36 Ohio St. 164; *Haveland v. Columbus*, 50 Ohio St. 471, 34 N. E. 679; *Sandrock v. Columbus*, 51 Ohio St. 317, 42 N. E. 255; *Cherington v. Columbus*, 50 Ohio St. 475, 34 N. E. 680; *Findlay v. Frey*, 51 Ohio St. 390, 38 N. E. 114; *Cincinnati v. Batsche*, 52 Ohio St. 324, 27 L. R. A. 536, 40 N. E. 21; *Schroeder v. Overman*, 61 Ohio St. 1, 47 L. R. A. 156, 76 Am. St. Rep. 354, 55 N. E. 158; *Walsh v. Barron*, 61 Ohio St. 15, 55 N. E. 164; *Walsh v. Sims*, 65 Ohio St. 211, 62 N. E. 120; *Shoemaker v. Cincinnati*, 68 Ohio St. 603, 68 N. E. 1.



*Oregon.*

King v. Portland, 2 Ore. 146;  
Wilson v. Salem, 24 Ore. 504, 34  
Pac. 9, 691; King v. Portland, 38  
Ore. 402, 55 L. R. A. 812, 63 Pac.  
2.

*Pennsylvania.*

Pennock v. Hoover, 5 Rawle,  
291; Spring Garden v. Wistar, 18  
Pa. St. 195; Schenley v. Allegheny,  
25 Pa. St. 128; Philadelphia  
v. Tryon, 35 Pa. St. 401; Schen-  
ley v. Commonwealth, 36 Pa. St.  
29, 78 Am. Dec. 359; McGonnigle  
v. Allegheny, 44 Pa. St. 118;  
Magee v. Commonwealth, 46 Pa.  
St. 358; Wray v. Pittsburgh, 46  
Pa. St. 365; Stroud v. Phila-  
delphia, 61 Pa. St. 255, Washing-  
ton Ave. 69 Pa. St. 352, 8 Am.  
Rep. 255; Wistar v. Philadelphia,  
80 Pa. St. 505, 21 Am. Rep. 112;  
Michener v. Philadelphia, 118 Pa.  
St. 535, 12 Atl. 174; Keith v.  
Philadelphia, 126 Pa. St. 575, 17  
Atl. 883; Harrisburg v. McCor-  
mick, 129 Pa. St. 213, 18 Atl. 126;  
Chester v. Black, 132 Pa. St. 570,  
6 L. R. A. 802, 19 Atl. 276; Beau-  
mont v. Wilkesbarre, 142 Pa. St.  
198, 21 Atl. 888; Hand v. Fellows,  
148 Pa. St. 456, 23 Atl. 1126;  
Scranton v. Bush, 160 Pa. St.  
499, 28 Atl. 926; McKeesport v.  
Soles, 165 Pa. St. 628, 30 Atl.  
1019; McKeesport v. Busch, 166  
Pa. St. 46, 31 Atl. 49; Witman  
v. Reading, 169 Pa. St. 375, 32  
Atl. 576; Scranton v. Koehler, 200  
Pa. St. 126, 49 Atl. 792; Harris-  
burg v. McPherran, 200 Pa. St.  
343, 49 Atl. 988.

*Rhode Island.*

Cleveland v. Tripp, 13 R. I. 50.  
*South Dakota.*

Winona & St. P. R. Co. v. Wat-  
ertown, 1 S. D. 46, 44 N. W.

1072; Tripp v. Yankton, 10 S. D.  
516, 74 N. W. 447.

*Vermont.*

Allen v. Drew, 44 Vt. 174.

*Virginia.*

Norfolk v. Ellis, 26 Gratt. 224;  
Davis v. Lynchburg, 84 Va. 861,  
6 S. E. 230.

*Washington.*

Austin v. Seattle, 2 Wash. 667,  
27 Pac. 557; New Whatcom v.  
Bellingham, etc., Co., 16 Wash.  
131, 47 Pac. 236; Ryan v. Sum-  
ner, 17 Wash. 228, 49 Pac. 487.

*Wisconsin.*

State v. Portage, 12 Wis. 563;  
Meggett v. Eau Claire, 81 Wis.  
326, 51 N. W. 566; Hennessy v.  
Douglas Co., 99 Wis. 129, 74 N.  
W. 983.

*United States Courts.*

Parsons v. Dist. of Columbia,  
170 U. S. 45, 42 L. ed. 943,  
18 Sup. Ct. Rep. 521; Loeb  
v. Trustees, etc., 179 U. S. 472,  
45 L. ed. 280, 21 Sup. Ct. Rep.  
174; French v. Barber A. P. Co.,  
181 U. S. 324, 45 L. ed. 879, 21  
Sup. Ct. Rep. 625; Tonawanda v.  
Lyon, 181 U. S. 389, 45 L. ed.  
908, 21 Sup. Ct. Rep. 609; Cass  
Farm Co. v. Detroit, 181 U. S.  
396, 45 L. ed. 914, 21 Sup. Ct.  
Rep. 644; Detroit v. Parker, 181  
U. S. 399, 45 L. ed. 917, 21 Sup.  
Rep. 624; Webster v. Fargo, 181  
U. S. 394, 45 L. ed. 912, 21 Sup.  
Ct. Rep. 623; Schaefer v. Werling,  
188 U. S. 516, 47 L. ed. 570, 23  
Sup. Ct. Rep. 449.

*Contra.**Alabama.*

Scruggs v. Huntsville, 45 Ala.  
220; Mobile v. Dargan, 45 Ala.  
310.

*Arkansas.*

Peay v. Little Rock, 32 Ark. 31;



Monticello v. Banks, 48 Ark. 251, 2 S. W. 952.

*Minnesota.*

State v. Dist. Court, 29 Minn. 62, 11 N. W. 133.

*New Jersey.*

State v. Jersey City, 24 N. J. L. 662; Zabriskie v. Jersey City, 24 N. J. L. 108; Woodruff v. Paterson, 36 N. J. L. 159; New Brunswick R. Co. v. Commissioners, 38 N. J. L. 190, 20 Am. Rep. 380; Cronin v. Jersey City, 38 N. J. L. 410.

*Washington.*

Elma v. Carney, 9 Wash. 466, 37 Pac. 707; Elma v. Wood, 9 Wash. 466, 37 Pac. 707.

*Wisconsin.*

Hayes v. Douglas Co., 92 Wis. 429, 31 L. R. A. 213, 53 Am. St. Rep. 926, 65 N. W. 482; Kerstens v. Milwaukee, 106 Wis. 200, 48 L. R. A. 851, 81 N. W. 948, 1103; Friedrich v. Milwaukee, 114 Wis. 304, 90 N. W. 174. It rests in the discretion of the legislature to say upon what principle the assessment on city lots fronting a street for the improvement thereof shall be apportioned among them. Emery v. San Francisco Gas Co., 28 Cal. 345. An assessment for the improvement of a city street is a tax, and must therefore be laid with equality and uniformity; and a system by which it is apportioned according to the frontage on the improvement, or by any other standard which shall approximate equality and uniformity, does not yet render it void. Whiting v. Quackenbush, 54 Cal. 306. A street improvement act providing for apportioning the expense of the street improvement according

to the frontage of the lots along the street is constitutional and valid. It is to be deemed a legislative declaration that the property within the district improved may receive a benefit from the improvement in proportion to its frontage upon the work; and in the absence of any facts showing that the particular assessment so based is unjust and not according to benefits, the statute will not be held unconstitutional, and it is the duty of the court to uphold the assessment. Hadley v. Dague, 130 Cal. 207, 62 Pac. 500. Assessments for local improvements upon the basis of frontage, where the lots abutting the improvement are of substantially equal depth, is proper, in the absence of a showing that it is unfair. Denver v. Knowles, 17 Colo. 204, 17 L. R. A. 135, 30 Pac. 1041; Pueblo v. Robinson, 12 Colo. 593, 21 Pac. 899. "For the purpose of making such improvement, the legislature may levy a tax upon all or part of the property in such district, by a uniform rule according to its value, or may charge the cost thereof to the property in such district according to what is known as the 'front foot' rule, thus determining in advance what property is benefited; or may direct to a subordinate agency the power to ascertain and report the benefit, if any, to the different tracts of real estate within said district. In other words, the legislature may declare that all or a portion of the property within such district is benefited, either according to its value, or in proportion to its actual benefit to be



determined by the legislature itself, or by persons selected for that purpose. *Commissioners v. Herrell*, 147 Ind. 500, 46 N. E. 124.

The Indiana local assessment act of 1889 known as the Barrett law and the amendments thereto, providing for the apportionment of the costs of a street improvement upon the abutting lots according to their frontage, are not in conflict with any provision of the State or Federal Constitution.

*Martin v. Wills*, 157 Ind. 153, 60 N. E. 1021.

The apportionment of the cost of a street pavement on the abutting lots according to frontage, under sec. 118, Iowa Code of 1897, providing that the cost of any street improvement shall be assessed as a special tax against the property abutting thereon in proportion to the number of lineal front feet of each parcel so abutting, is not unconstitutional, as taking property without due process of law.

*Hackworth v. Ottumwa*, 114 Iowa, 467, 87 N. W. 424; *Minn. & St. L. R. Co. v. Lindquist*, 119 Iowa, 144, 93 N. W. 103.

As the Iowa statute authorizes special assessments according to the front-foot rule, assessments not so levied are invalid, and a subsequent owner of the property covered by such assessments may contest the lien thereof.

*Fitzgerald v. Sioux City*, 125 Iowa, 396, 101 N. W. 268. A charter provision authorizing the cost of grading, paving, etc., of the street intersections, upon each block in such proportions as the council deem just and equita-

ble, is constitutional. *Motz v. Detroit*, 18 Mich. 495.

Where the charter requires the board, in making assessments for street improvements, to report the whole amount of lands benefited, and the amount that each lot assessed is benefited, but report only the whole cost, and the items making up the amount, an assessment of such amount on the several lots in proportion to their frontage on the street, is insufficient. *State v. Hudson*, 27 N. J. L. 214; *State v. Hudson*, 29 N. J. L. 104. The expense of paving a whole street, intersected by other streets, may be apportioned upon each block respectively, though the entire front upon the street belongs to the same owners. *Schenley v. Commonwealth*, 36 Pa. St. 29, 78 Am. Dec. 259. An act providing for the assessment of water rents according to frontage of lots abutting on the course of the aqueduct is not unconstitutional. *Allen v. Drew*, 44 Vt. 174.

This was replevin for a bale of buffalo robes. The question of personal liability was not raised.

The power to impose part of the expense of street paving on front foot rule, upheld in *Norfolk v. Ellis*, 26 Gratt. 224; *Sands v. Richmond*, 31 Gratt. 571, 31 Am. Rep. 742; *Davis v. Lynchburg*, 84 Va. 861, 6 S. E. 230. But denied in *Violett v. Alexandria*, 92 Va. 561, 31 L. R. A. 382, 53 Am. St. Rep. 825, 23 S. E. 909, unless the charter expressly authorizes that method.

Under a city charter specifying the various steps necessary to be taken to make a special assess-



assessment, and the return of the commissioners show that the question of benefits was considered.<sup>58</sup>

**226.** When the frontage method is adopted as the basis of an assessment, it is the general rule that difference in the depth of the various lots, and whether they lay at an obtuse or acute angle with the intersecting street, or whether they front on two streets, does not affect the validity of the assessment, or call for a variation in the front foot rate.<sup>59</sup> It is difficult to conceive any other logical method under the application of this rule, although some courts have modified it.<sup>60</sup>

— **d. Assessment according to cost of work in front of each lot.**

**227.** It has occasionally been attempted to levy the actual expense of the cost of the improvement in front of each lot, or a certain fixed proportion thereof, upon each lot, regardless of any inquiry as to benefits or proportion, or without any attempt to fix a taxing district. As Judge Cooley has accurately stated the plan, "If such a regulation constitutes the apportionment of a tax, it must be supported when properly ordered by or under the authority of the legislature. But it has been denied, on what seem the most conclusive

ment for street paving, and among others, that both the preliminary estimate and final assessment shall be made before letting the contract, an assessment made after the contract had been performed, charging the entire cost of the work — which was much greater than the first estimate — to the abutting lots, apparently by the front-foot rule, without determining that they were benefited in any amount, is void. *State v. Ashland*, 88 Wis. 599, 60 N. W. 1001.

<sup>58</sup> *Raymond's Est. v. Rutherford*, 55 N. J. 441, 27 Atl. 172;

*Hennessey v. Douglas Co.*, 99 Wis. 129, 74 N. W. 983.

<sup>59</sup> *Holbrook v. Dickinson*, 46 Ill. 285; *Moale v. Baltimore*, 61 Md. 224; *Long Branch, etc., Com. v. Dobbins*, 61 N. J. L. 659, 40 Atl. 599; *Tripp v. Yankton*, 10 S. D. 516, 74 N. W. 447. And the terms "front foot" and "abutting foot" are synonymous. *Moberly v. Hogan*, 131 Mo. 19, 32 S. W. 1014.

<sup>60</sup> *Haviland v. Columbus*, 50 Ohio St. 471, 34 N. E. 679; *Sandrock v. Columbus*, 51 Ohio St. 317, 42 N. E. 255.



grounds, that this is permissible. It is not legitimate taxation because it is lacking in one of its indispensable elements. It considers each lot by itself, compelling each to bear the burden of the improvement in front of it, without reference to any contribution to be made to the improvement by any other property, and it is consequently without any apportionment. From accidental circumstances, the major part of the cost of an important public work may be expended in front of a single lot; those circumstances not at all contributing to make the improvement more valuable to the lot thus specially burdened, perhaps even having the opposite consequence. But whatever might be the result in particular cases, the fatal vice in the system is that it provides for no taxing districts whatever. It is as arbitrary in principle, and would sometimes be as unequal in operation, as a regulation that the town from which a state officer chanced to be chosen should pay his salary, or that that locality in which the standing army, or any portion of it, should be stationed for the time being, should be charged with its support. If one is legitimate taxation the other would be.”<sup>61</sup>

**228.** Another vital objection is the fact that under such a plan the question of benefits is entirely ignored, unless it be a presumption that each lot is actually benefited to the extent of the cost of the improvement fronting it. Benefits must of necessity be a question of fact. While the legislative prerogative of fixing the district is conclusive that no benefits can be assessed on property situated outside such district, it by no means follows that all the property situated within such district is benefited to the extent of the cost, or at all, and it may even suffer a marked depreciation in value. A presumptive benefit will support a general tax, but the benefit necessary to support a special assessment must be an actual one. It is gratifying to know that the courts have almost uniformly discountenanced assessment according to ex-

<sup>61</sup> Taxation (3d Ed.), 1224.



pense,<sup>62</sup> and that in some cases where it has been upheld it has been because of special circumstances which rendered the assessment equitable,<sup>63</sup> with the exception of cases of sidewalks, which are laid under the police power.<sup>64</sup>

### — e. Apportionment by area.

**229.** An assessment by area, or according to the number of acres contained in a tract benefited by the improvement, has frequently been adopted, and uniformly sustained in levee, drainage, and irrigation cases. A method of apportionment by superficial area, or number of square feet con-

#### *Illinois.*

<sup>62</sup> Davis v. Litchfield, 145 Ill. 313, 21 L. R. A. 563, 33 N. E. 888; Palmer v. Danville, 154 Ill. 156, 38 N. E. 1067.

#### *Kansas.*

Parker v. Challis, 9 Kan. 155; Lawrence v. Kielam, 11 Kan. 499.

#### *Kentucky.*

Lexington v. McQuillan's Heirs, 9 Dana, 513, 35 Am. Dec. 159.

#### *Michigan.*

Motz v. Detroit, 18 Mich. 495.

#### *Minnesota.*

Weller v. St. Paul, 5 Minn. 95, Gil. 70; Morrison v. St. Paul, 5 Minn. 108, Gil. 83.

#### *Missouri.*

St. Louis v. Clemens, 49 Mo. 552; Neenan v. Smith, 50 Mo. 525.

#### *New Jersey.*

Baxter v. Jersey City, 36 N. J. L. 188; Van Tassel v. Jersey City, 37 N. J. L. 128.

#### *Pennsylvania.*

McKeesport v. Busch, 166 Pa. St. 46, 31 Atl. 49.

#### *Texas.*

Allen v. Galveston, 51 Tex. 302.

#### *Washington.*

Seattle v. Yesler, 1 Wash. T. 572; New Whatcom v. Bellingham Bay I. Co., 9 Wash. 639, 38 Pac. 163.

#### *Wisconsin.*

State v. Portage, 12 Wis. 563; State v. Portage, 14 Wis. 550; Kerstens v. Milwaukee, 106 Wis. 200, 48 L. R. A. 851, 81 N. W. 948, 1103.

#### *Contra.*

Warren v. Henley, 31 Iowa 31; Covington v. Bayle, 6 Bush. 204; Dallas v. Emerson, (Tex. Civ. App.) 36 S. W. 304; Schenley v. Commonwealth, 36 Pa. St. 29, 78 Am. Dec. 359; Weeks v. Milwaukee, 10 Wis. 242. In this case, the question really decided was that under the taxing power, assessments might be laid for the expense of building the street in front of abutting property. It does not go to the extent to which it is commonly quoted in the reports.

<sup>63</sup> Springfield v. Sale, 127 Ill. 359, 20 N. E. 86; Howe v. Cambridge, 114 Mass. 388.

<sup>64</sup> Cooley, Taxation, (3d Ed.) 1129.



tained in urban lots abutting an improvement, is not infrequent, and has also been sustained. By this method, the rule of uniformity is preserved, and it will work as impartially in the cases to which it is applicable as any other method. The tax may be either specific, or ad valorem, according to the views of the courts of the various states as to the constitutional provisions as to taxation. In one case it was expressly held that the legislature may arbitrarily fix the value of lands for an assessment for levee purposes, and then levy a special per centage tax thereon.<sup>65</sup> In one state, it was held that a statute authorizing a uniform specific tax of ten cents per acre per annum upon all lands in certain counties of a state, for levee purposes, and directing a sale on a specified day, without notice, is constitutional.<sup>66</sup> The court of last resort in Louisiana held in one case that an ad valorem tax on all property holders within the district was deemed to

<sup>65</sup> *Daily v. Swope*, 47 Miss. 367. By the statute under consideration by the court in this case, the value of improved and unimproved land was fixed at \$30 per acre and \$5 per acre respectively, except in two counties, where it was fixed at \$20 and \$3 per acre respectively, and a tax of 2½ per centum laid on the land. In an earlier case, the act provided for a uniform tax not exceeding ten per cent per acre "upon all lands lying upon or within ten miles of the river, in said county, subject to taxation; and a uniform act of not exceeding five per cent per acre on all lands in said county subject to taxation lying ten miles from the Mississippi River," and the act was sustained. *Williams v. Cammack*, 27 Miss. 209, 61 Am. Dec. 508. See also, *Egyptian Levee Co. v. Hardin*, 27 Mo. 495, 72 Am. Dec. 276; *Crowley v. Cop-*

*ley*, 2 La. Ann. 329; *Yeatman v. Crandall*, 11 La. Ann. 220; *Bishop v. Marks*, 15 La. Ann. 147; *McGehee v. Mathis*, 21 Ark. 40; *Munson v. Atchafalaya etc.*, Dist. 43 La. Ann. 15, 8 So. 906; *Ellis v. Pontchartrain etc. Dist.*, 43 La. Ann. 33, 8 So. 914. "It has been repeatedly decided in the supreme court of this state that the legislature may establish an arbitrary standard of estimating the amount of benefit derived by each tract of land within an assessment district declared to be benefited as a whole; as by reference to the number of front feet in the case of street assessments, or to the number of acres in cases of reclamation." *Reclamation District v. Evans*, 61 Cal. 107. See, also, *Smith v. Aberdeen*, 25 Miss. 458; *Alcorn v. Hamer*, 38 Miss. 652.

<sup>66</sup> *O'Reilly v. Holt*, 4 Woods 645, Fed. Cas. No. 10, 563.



be the only method, outside of payment from the proceeds of general taxation, which would comply with the constitutional requirements of equality and uniformity, in a proceeding for opening a street,<sup>67</sup> while in later cases they held that a specific tax for levee purposes was constitutional.<sup>68</sup>

**230.** As sewers are but in fact a species of drain, although perhaps more particularly used in urban communities, it is not strange that an apportionment of the cost on the area drained thereby is, in some communities, deemed an equitable method of apportionment. This practice has been sanctioned by the courts in many cases,<sup>69</sup> but an act authorizing an assessment of the superficial area of such lots as the common council shall determine, without consideration of benefits, and whether contiguous to the sewer or not, is unconstitutional.<sup>70</sup> And for all purposes of local improvement there seems to be no reason why apportionment by area is not equally just with any other standard, unless it be that by benefit alone.<sup>71</sup>

<sup>67</sup> Municipality No. 2 v. White, 9 La. Ann. 446.

<sup>68</sup> Wallace v. Shelton, 14 La. Ann. 498; Selby v. Levee Commissioners, 14 La. Ann. 437; Char-nock v. Fordoche etc. Co., 38 La. Ann. 323.

<sup>69</sup> St. Joseph v. Farrell, 106 Mo. 437, 17 S. W. 497; Johnson v. Duer, 115 Mo. 366, 21 S. W. 800; Heman v. Allen, 156 Mo. 534, 57 S. W. 559; Swain v. Fulmer, 135 Ind. 8, 34 N. E. 639; Grimmell v. Des Moines, 57 Iowa 144, 10 N. W. 330.

*Contra.*

New Brunswick R. Co. v. Commissioners, 38 N. J. L. 190, 20 Am. Rep. 380; Gillette v. Denver, 21 Fed. 822. Acts providing for sewer assessments at fixed rate per front foot, and per square foot of designated area, not unconsti-

tutional. Cleveland v. Tripp, 31 R. I. 50.

<sup>70</sup> Thomas v. Gain, 35 Mich. 155, 24 Am. Rep. 535.

<sup>71</sup> Broadway etc. Church v. McAtee, 8 Bush. 508, 8 Am. Rep. 480; Bradley v. McAtee, 7 Bush. 667, 3 Am. Rep. 309; Preston v. Roberts, 12 Bush. 570; Marshall v. Barber A. P. Co. (Ky.), 66 S. W. 182; De Koven v. Lake View, 129 Ill. 399, 21 N. E. 813; People v. Buffalo, 54 App. Div. 629; Clapp v. Hartford, 35 Conn. 66; Webster v. Fargo, 181 U. S. 394, 45 L. ed. 912, 21 Sup. Ct. Rep. 623. Where the statute provides that the assessment for sewers shall be on the front foot plan, it is immaterial that the assessment was made according to the number of square feet in the various lots, all being of the same length. Minn.



## — f. Assessment by value.

**231.** Another method of apportioning assessments is that based upon the valuation of the real estate within the taxing district. It is more frequently adopted in drainage and levee cases, because of the large surface of lands upon which it operates, but is occasionally adopted for street improvements. When adopted for the latter purpose, the value of the land only is taken into consideration, the value of the improvements being excluded, upon the belief that while the land may be enhanced in value by the work, the improvements thereon very rarely are.<sup>72</sup> But a constitutional pro-

& St. L. R. Co. v. Lindquist, 119 Iowa 144, 93 N. W. 103. A statute, which provides that when a public improvement is made within a previously determined district, is not obnoxious as not affording due process of law because of the provision that the council shall by ordinance enact that the expense of such improvement shall be paid by the entire district, each lot or parcel of land therein to be assessed for the part of the whole expense which its area bears to the area of the entire district, exclusive of streets, alleys and public places, such act being a legislative declaration that all the property in the district is benefited by the improvement, and fixes the measure by which such benefit is ascertained. *McMillan v. Butte*, 30 Mont. 220, 76 Pac. 203.

<sup>72</sup> "The defendants in error, plaintiffs below, also claim that the statute authorizing the construction of sewers and drains is unconstitutional, for the further reason that it does not provide for levying taxes with reference to the special benefits resulting from the

improvements to the property taxed or to the owners thereof; and they also claim that the taxes were not in fact levied with reference to resulting benefits. The taxes were in fact levied in proportion to the value of the lots taxed, without the improvements thereon. Now as the statute does not prescribe any mode for the apportionment of the taxes, we would think the city would have a right to adopt any mode that would be fair and legal; and we would also think that the mode adopted by the city was fair and legal. Of course it might in particular instances work injustice or hardship, and not be legal or valid; and in all probability there are such instances in the present case; but, looking at it as a mere rule of apportionment, we think it is valid. There are various modes of apportionment, among which are the following: (1) In accordance with the special benefits directly ascertained by assessors or appraisers; (2) in accordance with the value of the lots, without the improvements on them; (3) in accordance with the



vision requiring assessments for general taxation to be made on a cash valuation has no application to special assessments.<sup>73</sup>

— g. Assessment by benefits.

**232.** From what has gone before, we believe it must be deemed certain that assessment according to benefits actually received, is the only logical and practical method of assessment by which practical justice and equity can be obtained by both parties under the system of special assessment. This requires an actual view of the property by the board of commissioners of appraisement, who are appointed by or under legislative authority, and who are required to estimate

value of the lots, with the improvements on them; (4) in proportion to the frontage of the lots; (5) in proportion to the superficial area of the lots. The first would undoubtedly be valid, though it might be difficult to make it practicable. The second we think is also valid as a general rule of apportionment. With reference to the other modes, we do not now wish to express any opinion." *Gilmore v. Hentig*, 33 Kan. 156, 5 Pac. 781.

<sup>73</sup> *Newman v. Emporia*, 41 Kan. 583, 21 Pac. 593; *Mason v. Spencer*, 35 Kan. 512, 11 Pac. 402; *Downer v. Boston*, 7 Cush. 277; *Wright v. Boston*, 9 Cush. 233; *Brewer v. Springfield*, 97 Mass. 152; *Workman v. Worcester*, 118 Mass. 168; *Snow v. Fitchburg*, 136 Mass. 183; *Williams v. Cammack*, 27 Miss. 209, 61 Am. Dec. 508; *State v. Newark*, 31 N. J. L. 360; *Hoffeld v. Buffalo*, 130 N. Y. 387, 29 N. E. 747; *Creighton v. Scott*, 14 Ohio St. 438; *Northwestern etc. Bank v. Spokane*, 18 Wash. 456, 51 Pac. 1070.

*Contra.*

*Findlay v. Frey*, 51 O. St. 390, 38 N. E. 114; *Walker v. Ann Arbor*, 118 Mich. 251, 76 N. W. 394. But these two cases were under special statutes, and do not seem to depart from the general principle asserted in the text. An ad valorem tax on all property holders within the district deemed the only method, outside of payment by general taxation, which would comply with the constitutional requirements of equality and uniformity, in a proceeding for opening a street. *Municipality No. Two v. White*, 9 La. Ann. 446. A provision for considering benefits to the residue of a tract of property, part of which is taken for public use, is in effect a tax on benefits; being such, and not a tax on property, properly speaking, it is not in conflict with the provisions of the constitution requiring that all property subject to taxation shall be taxed in proportion to value. *Newby v. Platte Co.*, 25 Mo. 258.



the result of the contemplated improvement upon all the property situated within the district. This district may be either fixed by law, or left to the discretion of the commissioners. The result is usually arrived at by a double process of appraisement of benefits and damages, including an estimate of the cost of the improvement. While it may not be theoretically so logical to consider this method by itself, we believe better practical results will be achieved by considering the subject under the general head immediately following.

### **Benefits.**

**233.** Outside of the state of South Carolina, which repudiates the system of taxation by special assessment, and Iowa, whose Supreme Court, until legislation to the contrary was obtained, steadily ignored the principle of benefits in special assessment, the Federal Courts, and the courts of last resort of all the other states that have passed upon the question, agree that the principle of apportionment by benefit is legal. Although the statute may provide that the assessment may be made according to frontage, or area, or value, or some other uniform method, the courts are by no means agreed that these methods are strictly legal, but they are practically unanimous in holding the apportionment by benefit conferred, when so directed by statute, to be legal. It is the only method which is elastic enough to cover all cases, and render that exactness of justice which it should be the aim of all tax legislation to accomplish; and the tax cannot materially exceed the cost of the work.<sup>73a</sup>

**234.** There is a substantial unanimity of opinion by courts and text writers, that actual benefit conferred upon property by a local improvement, in excess of the benefit conferred by the public at large, is the foundation of the power of taxation by special assessment, and it is only logical that

<sup>73a</sup> Motz v. Detroit, 18 Mich. 495.



the apportionment should also be made on that basis. "The right to thus assess by benefits has been often affirmed, and can no longer be regarded as a controverted question."<sup>74</sup>

**235.** But in a larger sense, the actual benefit conferred must be regarded as the limitation upon the amount of the assessment, and in the absence of some constitutional inhibition, there can be no other restriction upon the power of taxation. The difference between the courts who hold in accordance with the above expressed opinion, and those who hold that there is no restriction upon the power, unless contained in the constitution, either state or federal, is gradually becoming narrowed, and the more recent decisions seem to be all tending to uphold this essential limitation.

**236.** No benefit, no tax, is the rule, tersely expressed. An able text writer lays down the general rule that special taxation for a local improvement, as well as special assessments of benefits for the same, necessarily proceeds upon the theory of benefits to the property upon which it is levied, and that a burden imposed upon any other theory is a mere arbitrary exaction; a taking of private property for public use without just compensation.<sup>75</sup> Judge Dillon says, "Special benefits to the property assessed; that is, benefits received by it in addition to those received by the community at large, is the true and only just foundation upon which local assessments can rest; and to the extent of special benefits it is everywhere admitted that the legislature may authorize local taxes or assessments to be made."<sup>76</sup> Judge Cooley writes

<sup>74</sup> Cooley on Taxation, (3d Ed.) 1206. It is entirely competent for the legislature to authorize municipal corporations to assess the whole or any part of the expense of local improvements upon the property deemed peculiarly benefited thereby, in proportion to the benefit received. The constitution does not expressly prohibit it, nor is there aught in the power of

taxation which is inconsistent with it. *Hoyt v. E. Saginaw*, 19 Mich. 39, 2 Am. Rep. 76.

<sup>75</sup> Burroughs on Taxation, 467-8, and cases; *Davis v. Litchfield*, 145 Ill. 313, 21 L. R. A. 563, 33 N. E. 888.

<sup>76</sup> "When not restrained by the constitution of the particular state, the legislature has a discretion commensurate with the broad



that "there can be no justification for any proceeding which charges the land with an assessment greater than the benefits; it is a plain case of appropriating private property to public uses without compensation," and that "a clear case of abuse

domain of legislative power, in making provisions for ascertaining what property is specially benefited, and how the benefits shall be apportioned. This proposition as stated, is nowhere denied; but the adjudged cases do not agree upon the extent of legislative power. The courts which have followed the doctrine of the leading case in New York have asserted that the authority of the legislature in this regard is quite without limits; but the decided tendency of the later decisions, including those of the courts of New Jersey, Michigan and Pennsylvania, is to hold that the legislative power is not unlimited, and that these assessments must be apportioned by some rule capable of producing reasonable equality, and that provisions of such a nature as to make it legally impossible that the burden can be apportioned with proximate equality are arbitrary exactions and not an exercise of legislative authority." *Dillon Mun. Corp.* sec. 761. "Whether it is competent for the legislature to declare that no part of the expense of a local improvement of a public nature shall be borne by a general tax, and that the whole of it shall be assessed upon the abutting property and other property in the vicinity of the improvements, thus for itself conclusively determining, not only that such property is specially benefited, but that it is thus

benefited to the extent of the cost of the improvement, and then to provide for the apportionment of the amount by an estimate to be made by designated boards or officers, or by frontage or superficial area, is a question upon which the courts are not agreed. Almost all of the earlier cases asserted that the legislative discretion in the apportionment of public burdens extended this far, and such legislation is still upheld in most of the states. But since the period when express provisions have been made in many of the state constitutions requiring uniformity and equality of taxation, several courts of great respectability, either by force of this requirement or in the spirit of it, *and perceiving that special benefits actually received by each parcel of contributing property was the only principle upon which such assessments can justly rest, and that any other rule is unequal, oppressive and arbitrary*, have denied the unlimited scope of legislative discretion and power, and asserted what must upon principle be regarded as the just and reasonable doctrine, that the cost of a local improvement can be assessed upon particular property only to the extent that it is specially and peculiarly benefited; and since the excess beyond that is a benefit to the municipality at large, it must be borne by the general treasury." *Id.*



of legislative authority, in imposing the burdens of a public improvement on persons or property not specially benefited, would undoubtedly be treated as an excess of power and void.”<sup>77</sup>

**237.** An eminent jurist, more than a generation ago, laid down the principle that “local assessments can only be constitutional when imposed to pay for local improvements, clearly conferring special benefits on the properties assessed, and to the extent of those benefits. They cannot be so imposed when the improvement is either expressed, or appears, to be for general public benefit,”<sup>78</sup> and Mr. Justice Harlan, in a very vigorous and strongly reasoned opinion, holds that the exaction from a property owner, under the guise of a special assessment, of an amount in substantial excess of the benefit actually conferred by the improvement is, to the extent of such excess, a taking of private property without due process of law.<sup>79</sup>

**238.** The principles that the assessment must be limited to the actual amount of the benefit received, and that the legislature may fix the taxing district and assess the whole amount of the cost of the improvement to the property in such district, are diametrically opposed to each other, both in

<sup>77</sup> Cooley on Taxation, (3d Ed.), 1179.

<sup>78</sup> Sharswood, J. in *Hammett v. Philadelphia*, 65 Pa. St. 146, 3 Am. Rep. 615. “If the sovereign breaks open the strong box of an individual or corporation and takes out money, or, if not being paid on demand, he seizes and sells the lands or goods of the subject, it looks to me very much like a direct taking of private property for public use. It certainly cannot alter the case to call it taxation. Whenever a local assessment upon an individual is not grounded upon, and measured by, the extent of his particular bene-

fit, it is, *pro tanto*, a taking of his private property for public use without any provision for compensation. . . . It is none the less so if it be the act of the hydra-headed monster, a numerical majority, or that of a single autocrat. It is the solemn duty of the judiciary, under our constitution, to guard and protect the right of property, as well from indirect attacks under any specious pretext, as from open and palpable invasion.” *Id.*

<sup>79</sup> *Norwood v. Baker*, 172 U. S. 269, 43 L. ed. 443, 19 Sup. Ct. Rep. 187.



principle and in practice. It is not a sufficient answer that the power of taxation is an attribute of sovereignty, and knows no limitation other than such as may be fixed by the constitution. To say that because a special assessment is levied under the taxing power, that the legislature is clothed with all the authority regarding special assessments that it is with regard to general taxation, is as monstrous as a claim that under the police power of issuing licenses, the right to foster a monopoly is conferred. One principle or the other must give way. They cannot live and flourish together under shade of the tree of the constitution.<sup>80</sup>

**239.** Eliminate the principle of benefits, and nothing remains to justify the imposition of a special assessment. It then becomes, pure and simple, a taking of private property for public use without just compensation, and without due process of law. Courts may continue to evade this principle, or discourse learnedly of the power of the legislative branch of the government, but there can be no greater justification for the refusal of courts to interfere in a case of special assessment where manifest and substantial injustice has been done, than they have to interfere to set aside any unconstitutional enactment that is properly brought before them for review.

<sup>80</sup> "The text books are full of the general statement 'that the only basis for special assessments is special benefits.' Concerning this proposition there has never been any disagreement, so far as I have been able to learn. But from this common starting point, two very dissimilar lines of thought have been followed. In one it was said: 'Special benefits are the only legitimate basis for special assessments, but the legislature may declare as a matter of law that the property owners' special benefits are exactly equal to his special assessment by front-

age.' In the other it was said: 'Special benefits are the only legitimate basis for special assessments, but the property owner may not be specially assessed beyond his special benefit found as a matter of fact.' So, finding in reported cases the expression that special benefits are the only legitimate basis for special assessments does not of itself show which theory a court has adopted." *Adams v. Shelbyville*, 154 Ind. 467, 49 L. R. A. 797, 77 Am. St. Rep. 484, 57 N. E. 114; dissenting op. by Baker, J.



It is gratifying to note that the apparent trend of judicial opinion is in this direction.

**240.** The theory of the New York Court of Appeals seems to be that benefits are the proper foundation for the right to impose a special assessment, but that if the legislature arbitrarily determines that the property in a certain district is in fact benefited to the amount of the tax imposed (whether such finding be true or false), that such action of the legislature is final, and that the courts cannot interfere.<sup>81</sup> To so hold, is to get the unfortunate property owner into a legislative cul-de-sac, from which he may not escape without being sorely fleeced. Why courts should continue to maintain the theory of legislative supremacy, thereby continually working grave and frequent injustice, when the adoption of the theory of benefits would evade such grave results, is an example of the longevity of error which is not pleasant to contemplate.

**241.** A careful study of the cases cited in the appended note will show many expressions of strong feeling and clear conviction on the principles laid down in the text, and establish overwhelmingly the doctrine for which we are contending.<sup>82</sup> This constitutes a general review of the subject

<sup>81</sup> *Spencer v. Marchant*, 100 N. Y. 587, 3 N. E. 682. *Alabama*.

<sup>82</sup> A municipality possessing due charter authority may levy assessments upon abutting property for sidewalk improvements to the extent that the property is particularly benefited, and require the owner thereof to pay to the extent his property is benefited by such improvement. It is not denied that such assessments against particular property for street and sidewalk improvement may be constitutionally authorized, to the extent that the property is specially and peculiarly benefited. *City Council v. Birdsong*, 126 Ala. 632,

650, 28 So. 522. A municipal corporation may not levy an assessment for a local improvement in excess of the increased value of the property, by reason of the special benefits derived from such improvement. *City Council v. Foster*, 133 Ala. 587, 596, 32 So. 610. *Arkansas*.

Local assessments for the improvement of property can be justified only upon the idea of benefits.

*Davis v. Gaines*, 48 Ark. 370, 382, 3 S. W. 184; *Carson v. St. Francis Levee Dist.*, 59 Ark. 513, 537, 27 S. W. 590; *Ahern v. Board of Improvement*, 69 Ark. 68, 61 S. W. 575.



by cases, and has been made very full because of the fundamental importance of the subject.

### *California.*

*Emery v. San Francisco Gas Co.* 28 Cal. 345; *Burnett v. Sacramento*, 12 Cal. 76, 73 Am. Dec. 518. Where an assessment for opening a street is made under a statute requiring it to be levied on the lots benefited "according to the enhanced value of the respective parcels of land as fixed" in a report of the board of public works, the assessment must not include the value of the lot before the improvement, but it is limited to the enhancement in value caused by the improvement. *People v. Austin*, 47 Cal. 353. A tax upon specific property to pay the expense of opening and grading a street, can be supported only on the ground that the property taxed is benefited by the improvement. *Matter of Market Street*, 49 Cal. 546.

### *Colorado.*

In the absence of constitutional restraint upon the taxing power, the legislature may authorize the whole or a portion of the cost of a local improvement to be assessed upon the property benefited. *Palmer v. Way*, 6 Colo. 106, *Brown v. Denver*, 3 Colo. 169. If in respect to the particular estate, the proprietor derives a substantial benefit from the maintenance of municipal government, he must contribute to its support. *Brown v. Denver*, 3 Colo. 169; *Durant v. Kaufman*, 34 Iowa 194.

### *Connecticut.*

*Nichols v. Bridgeport*, 23 Conn. 189, 60 Am. Dec. 636; *Cone v.*

*Hartford*, 28 Conn. 363. So long as the injury to the owner's property does not exceed the benefit for laying out a road, he has no claim for damages. *Trinity College v. Hartford*, 32 Conn. 452. To render legal a special assessment, it must appear that the benefit is direct and immediate, not contingent and remote. *Hartford v. West Middle Dist.*, 45 Conn. 462, 20 Am. Rep. 687. In view of the uniform practice of assessing property only for special benefits, a statute authorizing an assessment for benefits, without in terms specifying only special benefits, will be construed as intending only such. *Ferguson v. Stamford*, 60 Conn. 432, 22 Atl. 782.

### *Georgia.*

Benefit to the owner, so far as necessary to be passed upon, as well as the necessity for or reasonableness of, the improvement, being for the determination of the legislature, is concluded by the act authorizing the assessment, and will not be enquired into by the courts unless in extraordinary cases presenting a manifest abuse of legislative authority. *Speer v. Athens*, 85 Ga. 49, 9 L. R. A. 402, 11 S. E. 802.

"As a general proposition, upon the question of benefit, general or special, the owner is concluded by an expression of the legislative will. . . . As to whether a lot owner is benefited or not, is a question which should address itself to the discretion of the muni-



cipal authorities, but it is not allowable that they, under the guise of a public improvement, should arbitrarily deprive the citizen of his estate. If, therefore, in the levy of such assessments, the cost of the improvement be so disproportioned to the value of the estate sought to be improved, as that the levy of the assessment amounts to a virtual confiscation of the lot owners' property, such assessment cannot be upheld as a legal or valid exercise of the power to tax for such improvements." Atkinson, J., in *Atlanta v. Hamlein*, 96 Ga. 381, 23 S. E. 408.

*Illinois.*

Special assessments are not a tax, but an equation between burden and benefit. *Canal Trustees v. Chicago*, 12 Ill. 406.

The assessment is precisely in the ratio of the advantages accruing to the property in consequence of the improvement. It is but an equivalent or compensation for the increased value the property derives from the improvement. *Canal Trustees v. Chicago*, 12 Ill. 403. In special assessments for local improvements the burden must be distributed among those who are benefited and upon all who are directly benefited by the proposed improvement, and in the ratio of benefits. *Chicago v. Baer*, 41 Ill. 306. Under Sec. 5, Art. 9, Ill. Const., the legislature may authorize special assessments for public improvements which concern the whole public, to the amount of the benefit actually derived, the residue of the cost to be paid by equal and uniform taxation. *Bedard v. Hall*, 44 Ill. 91, following *Chicago v. Larned*, 34 Ill. 203;

*Ottawa v. Spencer*, 40 Ill. 211. See *White v. People*, *infra*. Special taxes are unconstitutional unless levied upon the valuation of the lands assessed, or according to the benefits accruing. *Lee v. Ruggles*, 62 Ill. 427; *Hundley v. Commissioners*, 67 Ill. 559. "Property can only be assessed for public improvements, on the principle of benefits received by the property from the construction of the work, and that the assessment should never exceed the benefits conferred; and it is essential that it shall appear, from the proceedings themselves, that such was the principle on which the assessment was made. *Crawford v. People*, 82 Ill. 557. When the statute gives the authorities power to determine how a public improvement shall be paid for, the courts have no power to interfere with their discretion. *Fagan v. Chicago*, 84 Ill. 227. Under the Illinois Const. of 1870, whether the tax assessed for constructing a sidewalk exceeds the benefits or not, is immaterial. *White v. People*, 94 Ill. 604. The former decisions of *Chicago v. Larned*, 34 Ill. 203, and *Ottawa v. Spencer*, 40 Ill. 211, were made under the peculiar provisions of the constitution of 1848, and are no longer authority. *Id.* Benefits to be derived are essential elements to sustain a special assessment, and without benefits it cannot be imposed, and it must not exceed the benefits to be derived from the proposed improvement. *Commissioners v. Kelsey*, 120 Ill. 482, 11 N. E. 256. Under the Illinois drainage act of 1885, property is not author-



ized to be assessed beyond benefits. *Illinois C. R. Co. v. Commissioners, etc.*, 129 Ill. 417, 21 N. E. 925. Municipal authorities may not arbitrarily provide that an improvement within the corporate limits shall be deemed a public improvement to be paid for by special taxation of contiguous property, without reference to benefits, without subjecting their action to review by the courts. The only difference in special assessments and special taxation as to benefits is, that in the latter case the determination of the city council is final — not an arbitrary, unreasonable determination, but one which can be seen to be fairly and reasonably made. *Bloomington v. C. & A. R. Co.*, 134 Ill. 451, 26 N. E. 366. (Both proceed on the theory of an equivalent.) A special benefit to pay for a local public improvement must not in any case exceed the benefit which will be conferred upon the property assessed by the construction of the improvement, and the benefit must be real and actual, and not merely based on conjecture. *I. C. R. Co. v. Chicago*, 141 Ill. 509, 30 N. E. 1036. In a proceeding by a city to make a local improvement by the levy of a special tax upon contiguous property, no authority is given by express words, or necessary implication, to arbitrarily assess against any particular lot, or tract of land, more than its proportionate share of the cost of the improvement ordered to be raised by special taxation, and the expense of levying and collecting the same. *Davis v. Litchfield*, 145 Ill. 313, 21 L. R. A.

563, 33 N. E. 888. The benefits sought to be set off against the damages to the land not sought to be condemned must be real and not chimerical, otherwise the constitutional safeguard is rendered of no avail to protect the citizen in the enjoyment of his property free from being damaged for a public use without just compensation. *Washington Ice Co. v. Chicago*, 147 Ill. 327, 37 Am. St. Rep. 222, 35 N. E. 378. A special assessment for local improvements is to be levied upon property benefited, not to exceed the special benefits conferred by the making of the improvement, and unlike special taxation, which by the statute must be upon contiguous property, special assessments may extend to lands and lots specifically benefited whether abutting upon the improvement or not. *Kelly v. Chicago*, 148 Ill. 90, 35 N. E. 752; *Roberts v. Evansville*, 218 Ill. 296, 75 N. E. 923.

Corporate authorities under the guides of a supplemental assessment, cannot impose upon the property assessed a greater burden than the benefits accruing to it from the proposed improvement, or cast upon it more than its just proportion and share of the total cost of the improvement made by the municipality. *Greeley v. Cicero*, 148 Ill. 632, 36 N. E. 603.

"Special assessments and special taxes imposed for local improvements, unlike general taxes, are based upon benefits to the property against and upon which they are assessed and levied, arising from its increased value in consequence of the improvement.



They proceed upon the basis of benefits to the particular property, and are authorized only when the local improvement, either actually or presumptively, benefits the particular property in an amount equal to the burden imposed." *Shope, J., in Lightner v. Peoria*, 150 Ill. 80, 37 N. E. 69. The imposition of a special tax is of itself a determination by legislative authority that the benefit to contiguous property will be as great as the burdens imposed, and courts will not interfere with the discretion of the municipal authorities except in case of abuse. *Id.* A special assessment cannot exceed the benefits the property derives from the improvement, and when the special benefits are less than the total cost, the excess must be assessed against the municipality. *Newman v. Chicago*, 153 Ill. 469, 38 N. E. 1053. The rule that the measure of benefit conferred by an improvement upon land restricted to a particular use is its increased value for that use, applies as well to special taxation as to special assessments. *C. & A. R. Co. v. Joliet*, 153 Ill. 649, 39 N. E. 1077.

In drainage proceedings, it is improper, as against a railroad, to show that the country adjacent would be improved and the revenues of the company thereby increased. The measure of benefits is the increased market value of the property against which the assessment is made. *Rich v. Chicago*, 152 Ill. 18, 38 N. E. 255.

Where a party has had a hearing in court as to benefits to his property by a local improvement, and, after evidence produced on

both sides, the court decided the property was benefited, such party has not been deprived of his property without due process of law by reason of the imposition thereon of a special tax. *C. & N. W. R. Co. v. Elmhurst*, 165 Ill. 148, 46 N. E. 437. By a wise piece of legislation, the principal objection to the Illinois system of special taxation has been removed. The determination of benefits derived in cases of special assessment, was vested in the council, and its exercise was not ordinarily subject to review. In case of special assessments the question might be reviewed by a court and jury, but prior to July 1, 1895, an ordinance of the council levying a special tax was conclusive as to benefits. The law was then changed to provide that no special tax should be levied upon property in excess of the benefit derived by it from the improvement, that the ordinance should not be conclusive as to such benefits, but the amount of the special tax should be subject to review by the county court. *Palmer v. Danville*, 166 Ill. 42, 46 N. E. 629. Whether property specially assessed for an improvement is benefited thereby, and whether it is assessed more or less of its proportionate share of the cost thereof, are questions of fact for the jury. *Brooks v. Chicago*, 168 Ill. 60, 48 N. E. 136. Property should not be assessed to pay for a proposed improvement unless clearly benefited thereby, and then only to the amount which it is actually benefited. *Chicago v. Adcock*, 168 Ill. 221, 48 N. E. 155. The Illinois statute of 1895 does



not abolish all distinctions between assessment and special taxation, but takes from the city council the power to conclusively determine the question of benefits. *Pfeiffer v. People*, 170 Ill. 347, 48 N. E. 979. Special assessments for local improvements, though levied under the taxing power, are not regarded as ordinary taxes, but as an equivalent for benefits in the increased value of the property. *Huston v. Tribbetts*, 171 Ill. 547, 63 Am. St. Rep. 275, 49 N. E. 711. Evidence that the paving of a street will afford better fire protection to the property, and that fire protection is an element of value in city real estate, is admissible upon the question of benefits from the improvement. *Chicago Union Traction Co. v. Chicago*, 202 Ill. 576, 67 N. E. 383.

#### *Indiana.*

A tax or assessment for local improvements is based upon the theory that it is a return for the benefit received by the person who pays the tax or by the property assessed. *Commissioners v. Harrell*, 147 Ind. 500, 46 N. E. 124.

The taxing district as a whole may be assessed only to the extent of the sum of the special benefits actually received by the several parcels of contributing property. . . . Where the cost of a local improvement exceeds the total sum of special benefits accruing therefrom, the deficit must be provided from the general revenues of the city. . . . Each parcel of contributing property may be assessed only to the extent that it actually receives special benefits. *Adams v. Shelbyville*, 154 Ind. 467,

49 L. R. A. 797, 77 Am. St. Rep. 484, 57 N. E. 114. "This court has consistently held for thirty years that special benefits are the only foundation for special assessments." *Hadley, C. J.*, in *Adams v. Shelbyville*, 154 Ind. 467, 49 L. R. A. 797, 77 Am. St. Rep. 484, 57 N. E. 114, citing *New Albany v. Cook*, 29 Ind. 220; *Ross v. Stackhouse*, 114 Ind. 200, 16 N. E. 501; *Quill v. Indianapolis*, 124 Ind. 292, 7 L. R. A. 681, 23 N. E. 788; *Barber, etc., Co. v. Edgerton*, 125 Ind. 455, 465, 25 N. E. 436.

#### *Iowa.*

An assessment in substantial excess of benefits will be set aside. *Iowa Pipe & Tile Co. v. Callanan*, 125 Iowa, 358, 67 L. R. A. 408, 106 Am. St. Rep. 311, 101 N. W. 141. Permanent improvements are not made solely with reference to present conditions. They are for the future as well as the present, and benefits to be derived therefrom should be estimated accordingly. *Minn. & St. L. R. Co. v. Lindquist*, 119 Iowa, 144, 93 N. W. 103.

#### *Kansas.*

*Simpson v. Kansas City*, 46 Kan. 438, 26 Pac. 721

#### *Kentucky.*

The right of the state government to assess the costs of the improvement of streets on the property fronting the same grows out of the sovereign power of taxation, and when such assessments are imposed to pay for local improvements, clearly conferring special benefits on the property taxed to the extent of the assessment, the constitutionality of the same cannot now be questioned.



*Bradley v. McAtee*, 7 Bush, 667, 3 Am. Rep. 309; *Howell v. Bristol*, 8 Bush, 493.

*Louisiana.*

The principal of apportionment by benefits, was held constitutional under the Louisiana Constitution of 1845. *Municipality No. Two v. White*, 9 La. Ann. 446; *Yeatman v. Crandall*, 11 La. Ann. 220. An assessment in excess of the benefits conferred is a taking, etc., pro tanto. *Petition of New Orleans Draining Co.*, 11 La. Ann. 338. The exact proportion of benefits cannot be established in levying local assessments for public improvements. *St. George v. Young*, 45 La. Ann. 1232, 14 So. 137; *Minor v. Daspit*, 43 La. Ann. 337, 9 So. 49.

*Maine.*

A land owner may be required to contribute towards the cost of a public work, a sum equal to the increased value of his property by reason of peculiar and special benefits thereby given, in addition to those bestowed upon him in common with the general public. *Auburn v. Paul*, 84 Me. 212, 24 Atl. 817.

*Maryland.*

A law providing for the opening of a street and imposing all the costs on those who are more immediately benefited instead of the community at large, is constitutional. *Moale v. Mayor, etc.*, 5 Md. 314, 61 Am. Dec. 276; *Alexander v. Mayor, etc.*, 5 Gill, 383, 46 Am. Dec. 630.

Under the act of 1797, the city of Baltimore had no power to tax any particular part of the city for paving unless such paving is for the benefit of such part specially.

*Mayor, etc., v. Moore*, 6 Harr. & J. 375.

"I take it to be clear that, for the same reason that the courts cannot be concluded upon the question of what is a public use, the Legislature could not arbitrarily, and wholly irrespective of the fact, conclude the question here involved, by simply declaring that special benefits to abutting property would accrue from the particular improvement authorized, whether it be street, railway, turnpike road or other highway, and therefore direct either the whole or a part of the cost of the improvement to be assessed upon such property, and thus appropriate private property to public use. And if the Legislature could not thus conclude the question, I know of no principle by which a municipal corporation can do so by ordinance. To say that either the Legislature or a municipal corporation can so proceed, is at once to break down all limitation or restriction as to the right, and to leave the whole matter entirely at the mercy of those who may be clothed with power to authorize the assessments, and the only answer that can be offered to the objection made to such unlimited power is, that we must not suppose that those entrusted with its exercise will ever abuse it. But that, as we may easily perceive, is no answer at all, for it is simply begging the whole question." Dissenting opinion by Alvey, J., in *Mayor, etc., v. Johns Hopkins Hospital*, 56 Md. 44. The system of special assessment according to benefits held to be a constitutional exercise of legislative



power in *Alexander v. Mayor*, etc., 5 Gill 383, 46 Am. Dec. 630; *Moale v. Mayor*, etc., 5 Md. 314, 61 Am. Dec. 276; *Baltimore v. Cemetery Co.*, 7 Md. 517; *Howard v. Church*, 18 Md. 451; *Zion Church v. Baltimore*, 71 Md. 524, 18 Atl. 895.  
*Massachusetts.*

*Wright v. Boston*, 9 Cush. 233; *Dorgan v. Boston*, 12 Allen 223; *Brewer v. Springfield*, 97 Mass. 152; *Jones v. Boston*, 104 Mass. 461. The theory of our provisions of law authorizing the assessment of betterments, now contained in Pub. Sts. c. 51, and some additional statutes is that in some instances it is just that the public should be reimbursed in whole or in part for the expense of a public improvement by the owners of lands which it peculiarly benefits, *limiting the maximum contribution from any particular owner to an amount well within that of his own peculiar or special benefit which he receives in the increased value of his land.*" *Barker, J., Atkinson v. Newton*, 169 Mass. 243, 47 N. E. 1029. It is well established that taxation of this kind is permissible under the constitution of this commonwealth and under the constitution of the United States only when founded upon special and peculiar benefits to the property from the expenditure on account of which the tax is laid, and then *only to an amount not exceeding such special and peculiar benefits.*" *Sears v. Street Commissioners*, 173 Mass. 352, 53 N. E. 876. "It is now the settled law in this court, as it is in the Su-

preme Court of the United States, and in many other courts, that after the construction of a public improvement a local assessment for the cost of it cannot be laid upon real estate in substantial excess of the benefits received by the property. Such assessments must be founded on the benefits, and be proportional to the benefits. So far as there is anything in the earlier cases which seems at variance with this doctrine, it is controlled by the later decisions." *Knowlton, J., Dexter v. Boston*, 176 Mass. 251, 79 Am. St. Rep. 306, 57 N. E. 379; citing *Boston v. B. & A. R. Co.*, 170 Mass. 95, 49 N. E. 95; *Weed v. Boston*, 172 Mass. 28, 42 L. R. A. 642, 51 N. E. 204; *Bears v. Boston*, 173 Mass. 71, 43 L. R. A. 834, 53 N. E. 138; *Bears v. Street Commissioners*, 173 Mass. 350, 53 N. E. 786; *Norwood v. Baker*, 172 U. S. 269. Because a statute attempts to give the board authority to levy special assessments upon other grounds than the receipt of special benefits, and for expenses which are improper, it is unconstitutional. *Id.* Upon the facts found, the court found the statute unconstitutional "inasmuch as it purports to authorize a taking of property to pay a charge which is not founded on a special benefit or equivalent received by the estate or its owner. Such a taking would be without due process of law." *Id.*, citing *Norwood v. Baker*, 172 U. S. 269, 43 L. ed. 443, 19 Sup. Ct. Rep. 187; *New Brunswick R. Co. v. Street Comrs.*, 38 N. J. L. 190, 20 Am. Rep.



380; *Barnes v. Dyer*, 56 Vt. 469; *Thomas v. Gain*, 35 Mich. 155, 24 Am. Rep. 535.

*Michigan.*

*Hoyt v. E. Saginaw*, 19 Mich. 39, 2 Am. Rep. 76; *Steckert v. E. Saginaw*, 22 Mich. 104; *Brevvoort v. Detroit*, 24 Mich. 322. A statute authorizing a special assessment upon such lots as the common council may determine are increased in value by the improvement, whether occupied or not, contiguous or not, whether near or remote, city lots or not, is unconstitutional and void. It is an unlawful and arbitrary exaction. *Thomas v. Gain*, 35 Mich. 155, 24 Am. Rep. 535.

"It is generally agreed that an assessment levied without regard to actual or probable benefits is unlawful, as constituting an attempt to appropriate private property to public uses. \* \* \*

When it is not legally possible that an apportionment of the cost of sewers can be just or equal, or in proportion to benefits, and when injustice must result from its adoption, we have no alternative but to reject the assessment as an unlawful exaction." *Cooley, C. J.*, in *Thomas v. Gains*, 35 Mich. 163, 24 Am. Rep. 535. The legislature has no power to fix an arbitrary percentage of a public improvement to be imposed upon a local assessment district, regardless of the benefits received. And a statute requiring a city to assess one half of the cost of taking private property for public use to be assessed within the district to be fixed by the common council is therefore unconstitutional. *Detroit v. Judge, etc.*, 112

Mich. 588, 42 L. R. A. 638, 71 N. W. 149. *GRANT, J.*,—"The power of taxation granted by this act is not one of necessity conferred upon the state, involving the right to apportion to each political subdivision of the state its share of the public burdens. The sole ground for imposing a part or all of the cost of a public improvement upon one part of a municipality is that the part burdened with the cost receives corresponding benefits, which the general public does not receive." *Id.* The learned judge seems to be unquestionably right in his opinion, but the court of which he is a member has not permitted this decision to be strictly logical. See *Sheley v. Detroit*, 45 Mich. 433, 8 N. W. 52. If the legislature may not decide, by what principal of law is it permissible that its creature, the council, shall decide? See also *Beecher v. Detroit*, 92 Mich. 268.

*Minnesota.*

A tax for public improvements materially greater than the expense thereof is void. *Minn. L. O. Co. v. Palmer*, 20 Minn. 468, Gil. 424. The proper officials, in levying special assessments for street grading can make such assessment for the cost thereof upon no other ground than that the property assessed is specially benefited by such improvement; and only to the extent of such special benefits. They must be distributed upon the property specially benefited in proportion to the benefits received. *State v. District Court*, 29 Minn. 62, 11 N. W. 133.

"In all the cases involving the



question of local assessment for public improvements which have been before this court, the statutes under consideration provided for the two essential elements: First, consideration and determination by some properly selected body of the benefits to accrue by the improvements; and, second, suitable notice to the owner of the property, and an opportunity to be heard on the question. . . . Although this court has held that the legislature may delegate its power to make such assessments to the various bodies connected with municipal governments, and that the action of such delegated body in reference thereto is final, except in case of fraud or demonstrable mistake of fact, the whole trend of the discussion has centered around those two safeguards of the property owner. And there can be no question that, if any of the statutes before this court had failed to provide a proper method of estimating the benefits as a basis for the assessment and proper opportunity to the owner to be heard thereon, the court would have declared them prohibited by the state constitution as to equality of taxation, notwithstanding the amendment to section 1, article 9, authorizing assessments for local improvements upon the property fronting upon such improvements. *State v. Robert P. Lewis Co.*, 82 Minn. 397, 53 L. R. A. 421, 85 N. W. 207, 86 N. W. 611; *op. by Lewis, J. Mississippi.*

A tax, whether for state revenue or local objects, must rest equally and uniformly upon all the property selected, according to its con-

dition and situation, and upon the basis of benefits. *Daily v. Swope*, 47 Miss. 367.

*Missouri.*

The benefits to be charged against adjacent land owners are, it seems, the direct and peculiar benefits resulting to them in particular, and not the general benefit accruing to them in common with other land owners from the building of the road. *Newby v. Platte Co.*, 25 Mo. 258; *Garrett v. St. Louis*, 25 Mo. 505, 69 Am. Dec. 475; *St. Joseph v. O'Donoghue*, 31 Mo. 345; *St. Louis v. Clemens*, 36 Mo. 467; *St. Louis v. Armstrong*, 38 Mo. 29; *Uhrig v. St. Louis*, 47 Mo. 458; *Tyler v. St. Louis*, 56 Mo. 60. "Where private property is benefited by public improvement the assessment against it by the proper authorities for its proportionate share of the cost of the improvement, not exceeding the benefit which the property derives by reason of such improvement, does not in any way increase the burdens of the owner as a taxpayer, and is not the taking of private property without due process of law, but is simply an assessment for benefits. The benefits to the property by reason of the improvements compensate for the assessment." *Heman v. Allen*, 156 Mo. 534, 57 S. W. 559. It is competent for the legislature to provide that the benefits to the residue unappropriated may be considered in estimating the damages to be awarded for the part condemned. *Newby v. Platte Co.*, 25 Mo. 258. "Local assessments are constitutional only when imposed to pay for local improve-



ments conferring special benefits. *State v. Leffingwell*, 54 Mo. 477. A charter provision that the special benefit to property in proximity to a contemplated park, over and above the benefits to be derived therefrom by the city generally, is to be charged against the property so benefited, is not in contravention of the constitutional provision which prohibits the taking of private property for public use without just compensation. *Kansas City v. Ward*, 134 Mo. 172, 35 S. W. 600. "It is upon the principle that property assessed for local improvements derives an equal or greater benefit from the improvements than the amount assessed against it, that special tax bills for street improvements are sustainable under the taxing power." *Heman v. Allen*, 156 Mo. 534, 57 S. W. 559. In this case, the facts showed that the property affected could not possibly be benefited, but the assessment was nevertheless sustained. It is one of the most remarkable decisions we have ever read. The case went to U. S. Sup. Court and was affirmed. *Shumate v. Heman*, 181 U. S. 402. *Nebraska*.

Under the Nebraska Constitution, assessments for local improvements can only be made in proportion to the benefits received. *State v. Dodge Co.*, 8 Neb. 124, 30 Am. Rep. 819. The power to levy special assessments for local improvements is limited to cases where the improvement confers special benefit on the property assessed, and to the extent of those benefits. *Hanscom v. Omaha*, 11 Neb. 37, 7 N.

W. 739. "The whole and only foundation for special assessments lies in the special benefits conferred upon the property assessed, and an assessment in excess of the benefit so conferred is a taking of property for a public use without compensation, and is illegal." *Morse v. Omaha*, 67 Neb. 426, 93 N. W. 734. "That property shall be assessed according to the benefits specially accruing is mandatory. It would be impossible to adopt any other construction without opening the door to the gravest dangers and holding out to extravagant municipal authorities the strongest temptations to the confiscation of private property. . . . Unless the benefits are equal, the foot-frontage rule is taking of private property without due process of law, and is illegal." *Morse v. Omaha*, 67 Neb. 426, 93 N. W. 734. The amount of special benefits is a question of fact to be determined by the evidence. *Lansing v. Lincoln*, 32 Neb. 457, 49 N. W. 650. "It is elementary constitutional law that the only foundation for a local assessment lies in the special benefits conferred by the improvement, and that a local assessment beyond the special benefits conferred is a taking of private property for public use without compensation." *Cain v. Omaha*, 42 Neb. 120, 60 N. W. 368, by *Irvine, J.* The constitution, and the Omaha charter by implication, limit assessments for local improvements, to the special benefits conferred. *Smith v. Omaha*, 49 Neb. 883, 69 N. W. 402. *New Jersey*.

To compel the owner of property



to bear the expense of an improvement except to the extent of his particular advantage, is, *pro tanto*, to take private property for public use without compensation.

A scheme for drainage of large tracts of land belonging to various persons, and authorizing the assessment thereon of a fair proportion of the contract price, is illegal and void, the expense not being limited to the amount of benefits conferred. . . .

The cost of a public improvement may be imposed on the property peculiarly benefited, to the extent of such benefits; but any excess of cost over such special benefits must be borne by the public at large. *Tide-Water Co. v. Coster*, 18 N. J. Eq. 518, 90 Am. Dec. 634.

The principle of benefits, as the foundation and limit of special assessment, the court say, "is one of great importance; for if the burthens of the community can be thrown upon a small class, whose position is not peculiar or different from that of the rest of the people, there can be no security for private possessions. To permit individuals to be taxed to pay for a public improvement to the extent of the peculiar benefit which they receive from such improvement, is not unjust or inequitable; but any exaction beyond this, exclusively from such individuals, is an act which involves the ability, on the part of the community, to confiscate, for its own purposes, the property of the citizen. Such power has not, by the constitution of this state, been placed in the hands of the legislature; and as the act in question has, in the par-

ticular adverted to, exercised such power, it is in my opinion void." *Beasley, C. J.*, in *Tide-Water Co. v. Coster*, 18 N. J. Eq. 518, 531, 90 Am. Dec. 634. "The theory upon which such assessments are sustained, as a legitimate exercise of the taxing power, is that the party assessed is locally and peculiarly benefited over and above the ordinary benefit which, as one of the community, he receives in all public improvements, to the precise extent of the assessment. If the assessment made upon the railroad company is to be regarded as an exercise of the power of taxation, without reference to the special benefit conferred upon the company, then clearly the assessment is illegal." *Green, C. J.*, in *State v. Newark*, 27 N. J. L. 185.

"It must be taken as a principle that the legislature can provide for the whole cost of such local improvements as the one before us (improvement of streets and sidewalks) to be assessed upon lands peculiarly benefited. It is the imposition of a tax for a mere local improvement, so classed and regarded in the law, according to the benefit received by the ownership of lands in the necessity of the improvement. *State v. Fuller*, 34 N. J. L. 227.

The special and peculiar benefit which legalizes an assessment for local improvements must be a present benefit accruing from the construction of the work, the test of which is the influence of the proposed improvement on the present market value of the property. *State v. Elizabeth*, 37 N. J. L. 330.



Assessments for paving and similar local improvements may be made against the property peculiarly benefited, but only to the extent of such peculiar benefits. *State v. Newark*, 37 N. J. L. 415, 18 Am. Rep. 729.

But this rule does not apply to sidewalks, which are regarded as subservient to the premises to which they are attached, and the extent of improving which may be charged wholly to the owner. *Id.*

A statute authorizing the expense of paving the road-bed of a city street, to be assessed in the proportion of two-thirds on the property abutting the street, and the remaining third on the public at large is unconstitutional. *State v. Newark*, 37 N. J. L. 415, 18 Am. Rep. 729.

The opinion of the court in this case is a very strong and well reasoned one. The benefit to the property is the limit of the tax.

An act to authorize the improvement of public roads, so far as it provides a principle for the assessment of the cost and expense of any improvement of the roads and streets provided for by the act, is unconstitutional. *N. Y. & G. L. R'y Co. v. Kearney*, 55 N. J. L. 463, 26 Atl. 800.

"The doctrine that the standard to be fixed by statutory enactment must be that the assessment can only be laid upon the principle of exceptional benefits, and not in excess thereof, has been so frequently established in our own reports of decided cases that a further discussion on the subject here by the court appears to be useless." *Id.*, and cases cited.

*New York.*

*Livingston v. New York*, 8 Wend. 86, 22 Am. Dec. 622.

Where the enforcement of the assessment would compel the owners of adjacent property to pay beyond its enhanced value, all such excess is private property, taken for public use, without just compensation. *Canal Street, In re*, 11 Wend. 154.

"There is no injustice in requiring those individuals to make the compensation who receive from the improvement an equivalent and more, in the enhanced value of their own adjacent property." *Savage, C. J., in Owners of Ground v. Mayor*, 15 Wend. 374.

An assessment for a local improvement must be limited to the buildings and lots benefited by it. *Smith v. Buffalo*, 90 Hun, 118, 35 N. Y. Supp. 635.

The provisions of a city charter authorizing the common council of such city to cause streets to be graded and improved, and to assess the expense thereof upon the owners and occupants of all the lands and premises benefited thereby, in proportion to the amount of such benefit, are constitutional, and valid. *People v. Mayor, etc., of Brooklyn*, 4 N. Y. 419, 55 Am. Dec. 266.

Such an assessment is an exercise of the power of taxation necessarily vested in the legislature, and does not conflict with the constitutional inhibitions against depriving any person of life, liberty or property without due process of law, nor taking private property for public use without just compensation. *Id.*

"The right to make a public



street is based upon public necessity, and the public should pay for it. To force an expensive improvement (against the consent of the owners or a majority of them) upon a few property owners against their consent, and compel them to pay the entire expense, under the delusive pretense of a corresponding specific benefit conferred upon their property, is a species of despotism that ought not to be perpetuated under a government which claims to protect property equally with life and liberty. Besides its manifest injustice, it deprives the citizen practically of the principal protection (aside from constitutional restraints) against unjust taxation, viz.: the responsibility of the representative for his acts to his constituents. As respects general taxation where all are equally affected, this operates, but it has no beneficial application in preventing local taxation for public improvements. The majority are never backward in consenting to, or even demanding improvements which they may enjoy without expense to themselves." Church, C. J., in *Guest v. Brooklyn*, 69 N. Y. 506.

"Assessments for local improvements can be justified only upon the theory that the lands upon which they are laid are specially benefited by the improvements for which they are laid and hence ought to bear the burden rather than property generally; and if a law should authorize such assessments to be laid, without reference to benefits, it would either take property for the public good, without compensation, or it would take

property from one person for the direct benefit of another; and in either aspect it would be unconstitutional." Earl, J., in *Stuart v. Palmer*, 74 N. Y. 189, 30 Am. Rep. 289.

*North Carolina.*

Such assessments are founded on the principle that the land abutting upon the improvement receives a benefit over and above the property of the citizens generally, and should be charged with the value of such peculiar benefits. *Raleigh v. Peace*, 110 N. C. 32, 17 L. R. A. 330, 14 S. E. 521; *Shuford v. Commissioners*, 86 N. C. 552.

*Ohio.*

Legislation authorizing special assessments on real estate peculiarly and specially benefited, and in proportion to such benefits, is not repugnant to any provision of the constitution. *Hill v. Higdon*, 5 Ohio St. 243, 67 Am. Dec. 289.

The judgment of the council that the amount of the assessment does not exceed the value of the benefits specially conferred, is final and conclusive in the absence of fraud, where the statute so provides. . . .

The right to resort to special assessments is not, like the right of general taxation, founded on necessity, but on a principle of justice, by which the public may take from an individual whose lands, owing to their proximity to the improvement, are specially benefited thereby, such a portion of the cost thereof as is the equivalent, but not in excess of the special benefits conferred by the improvement; and this principle



of justice, in itself, impliedly furnishes the measure of, and limits the extent of the right. *Chamberlain v. Cleveland*, 34 Ohio St. 551.

The whole amount of the assessment must be apportioned amongst the several lots and parcels of land specially benefited, in the proportion that the special benefit to each lot or parcel bears to the whole special benefits conferred by such improvement. *Chamberlain v. Cleveland*, 34 Ohio St. 551.

"An assessment is sustainable only on the theory of special benefits conferred on the land by the improvement over those received by the general public, and is necessarily limited to the value of the benefits so conferred. The value of the entire benefits so conferred may be assessed upon the land for the cost of the improvement; more, however, cannot be exacted, without impairing the inviolability of private property, guaranteed by the constitution, or in other, if not more appropriate words, confiscating it." *Walsh v. Barron*, 61 Ohio St. 15, 55 N. E. 164; *Dayton v. Bauman*, 66 Ohio St. 379, 64 N. E. 433. See, also, *Reid v. Toledo*, 18 Ohio 161; *Scofield v. Cleveland*, 1 Ohio St. 126; *Hill v. Higdon*, 5 Ohio St. 243, 67 Am. Dec. 289; *Marion v. Eppler*, 5 Ohio St. 250.

#### *Oregon.*

Special assessments for local improvements are sustained on the theory that by the proposed improvement a particular part of the community will be specially benefited, owing to its location with reference to the place where the funds are to be expended, but they

should not in any case be enforced beyond the benefits received. *King v. Portland*, 38 Or. 402, 55 L. R. A. 812, 63 Pac. 2.

#### *Pennsylvania.*

"The assessment or charge is an equivalent from the owner for the improvement made to the value of the property." *Northern Liberties v. St. John's Church*, 13 Pa. St. 104.

The rule is, local taxation for local purposes, or taxation on the benefits conferred, and not beyond the extent of those benefits. *Hammett v. Philadelphia*, 65 Pa. St. 146, 3 Am. Rep. 615; *Erie v. Russell*, 148 Pa. St. 384, 23 Atl. 1102.

"Whenever a local assessment upon an individual is not grounded upon, and measured by, the extent of his particular benefit, it is, *pro tanto*, a taking of private property for public use without any provision for compensation." *Hammett v. Philadelphia*, 65 Pa. St. 146, 3 Am. Rep. 615.

"Assessments on property peculiarly benefited by local improvements, and in consideration of such benefits, are constitutional—thus far have the judicial decisions in this and other states gone, and no further." *Id.*

"Taxation, according to benefits received, is neither unequal nor unjust, and cannot, therefore, come into conflict with those clauses in the Bill of Rights, which regard as sacred the right of private property. So long, therefore, as a law faithfully and reasonably provides for a just assessment according to the benefits conferred, and does not impose unfair and unequal burdens, it cannot be said



to exceed the legislative power of taxation, when exercised for proper objects." . . .

"So long, therefore, as a law faithfully and reasonably provides for a just assessment according to the benefits conferred, and does not impose unfair and unequal burthens it cannot be said to exceed the legislative power of taxation when exercised for proper objects. It is on this ground only that assessments according to the frontage of property on a public street to pay for its opening, grading and paving, can be justified. As a practical result in cities and large towns the per foot front mode of assessment reaches a just and equal apportionment in most cases." And again, "But it is an admitted substitute only because practically it arrives as nearly as human judgment can ordinarily reach, at a reasonable and just apportionment of the benefits on the abutting properties. . . .

But this rule as a practical adjustment of proportional benefits can apply only to cities and large towns where the density of population along the street and the small size of the lots make it a reasonably certain mode of arriving at a true result. To apply it to the county and to farm lands would lead to such irregularity and injustice as to deprive it of all soundness as a rule, or as a substitute for a fair and impartial valuation of benefits in pursuance of law." *Washington Avenue*, 69 Pa. St. 352, 8 Am. Rep. 255.

The foundation of the power to tax specially, is the benefit the object of the tax confers on the

owner of the property. *Wistar v. Philadelphia*, 80 Pa. St. 505, 21 Am. Rep. 112.

An act providing for the assessment of damages for opening, widening and vacating streets, and the apportionment of the same among and against the owners of lands benefited thereby is constitutional. *In re Vacation of Centre Street*, 113 Pa. St. 247, 8 Atl. 56.

The assessment of benefits is an exercise of the taxing power. The tax is defensible on the ground that it rests on an actual benefit conferred on the particular piece or pieces of property on which it is levied. It is a local tax resting on a local benefit. . . . An assessment levied in order to cover all the cost of a given improvement, without regard to the actual benefits conferred by it, is simply confiscation. . . . The benefits to be assessed are simply such as are peculiar to the property assessed. A mere general increase in the value of property in that part of the city is not enough. It must relate to the increase that is peculiar to the property liable to assessment, and is due simply to the improvement proposed.

In the absence of any special benefit, and in a case where the courts can declare as a matter of law that no such benefit can arise, the legislature is powerless to impose such a burden. It would not be a tax in any proper sense of the term; it would be in the nature of a forced loan, and would practically amount to confiscation. . . .

"The constitutionality of assessments for street improve-



ments can be sustained only upon the ground that the property assessed is benefited by the improvement. This is the doctrine of all the authorities." *Allegheny v. West. Penn. R. Co.*, 138 Pa. St. 375, 21 Atl. 763.

The basis of the liability of the lot owner is the benefit accruing to his property. *Hand v. Fellows*, 148 Pa. St. 456, 23 Atl. 1126.

Local assessments, which are a species of taxation, can be made only for improvements which confer peculiar local benefits upon property which adjoins the improvement. *Morewood Ave.*, 159 Pa. St. 20, 28 Atl. 123, 132. See also *Schenley v. Commonwealth*, 36 Pa. St. 29, 78 Am. Dec. 359; *Extension of Hancock Street*, 18 Pa. St. 26; *Schenley v. Allegheny*, 25 Pa. St. 128; *Fenelon's Petition*, 7 Pa. St. 173; *Commonwealth v. Woods*, 44 Pa. St. 113; *Wray v. Pittsburgh*, 46 Pa. St. 365; *Greensburg v. Young*, 53 Pa. St. 280; *Allentown v. Henry*, 73 Pa. St. 404.

#### *Rhode Island.*

An act authorizing not to exceed one half the expense of laying out and altering streets, to be assessed upon the adjacent proprietors benefited thereby, is constitutionally valid. *Matter of Dorance Street*, 4 R. I. 230.

#### *Texas.*

The legislature cannot authorize a municipal corporation to assess upon abutting property the cost of a public improvement, in a sum materially exceeding the special benefits which that property may derive from the work. *Hutcheson v. Storrie*, 92 Tex. 685,

45 L. R. A. 289, 71 Am. St. Rep. 884, 51 S. W. 848.

#### *Vermont.*

A municipal corporation may be authorized to make a special and local tax or assessment for building sewers, sidewalks, drains and aqueducts, and apportion the expense according to the benefits received. *Allen v. Drew*, 44 Vt. 174.

A statute authorizing municipal authorities to lay local assessments for sidewalks against abutting property "for so much of the expense thereof as *they shall deem just and equitable*," is unconstitutional; in that, there is no fixed, certain and legal standard for assessment. Such assessments should be made in view of the benefit to the abutting land; but under such a statute they may be made in view of the owner's ability to pay. *Barnes v. Dyer*, 56 Vt. 469.

#### *Virginia.*

Such an assessment " (for street improvement) " regards nothing but the benefits to be conferred on the particular estate." *Asberry v. Roanoke*, 91 Va. 562, 42 L. R. A. 636, 22 S. E. 360; *Green v. Ward*, 82 Va. 324.

#### *Wisconsin.*

"What we do mean to hold is, that it is the amount of the benefit, not exceeding the cost, and not the amount of the cost exceeding the benefit, with which property is chargeable in these assessments." *Ryan, C. J.*, in *Johnson v. Milwaukee*, 40 Wis. 326.

A special assessment in which the amounts are arbitrarily determined, as by adding fifty per cent to the estimated cost of the work



in front of each lot, upon a false and illegal basis, irrespective of the actual benefit to each lot, cannot be sustained. *Watkins v. Zwietusch*, 47 Wis 513, 3 N. W. 35.

In respect to benefits to be assessed, it has finally been decided and followed that such benefits must be *actual* and not constructive or arbitrary; and that an assessment which is in excess of such benefits falls within the rule of the constitution as taxation, or, in other words, actual benefits are assessments proper for local improvements, the power over which existed in the legislature, antecedent to the adoption of the constitution, as an inherent municipal power, and to that extent is not affected by the constitution; but all in excess of such actual benefits is a general or public tax, to be borne by the people of the district according to the constitutional rule of uniformity. *Donnelly v. Decker*, 58 Wis., p. 465 op., 46 Am. Rep. 637, 17 N. W. 389. And see *Lathrop v. Racine*, 119 Wis. 461, 97 N. W. 192.

#### *United States Courts.*

A special assessment proceeds on the theory that the property charged therewith derives an increased value from the improvement, the enhancement in value being the consideration for the charge. *Ill. Cent. R. Co. v. Decatur*, 147 U. S. 190, 202, 37 L. ed. 132, 136, 13 Sup. Ct. Rep. 293.

The right of a lot owner to have the burden of a special assessment ratably distributed among the lots benefited, does not depend alone upon the state constitution, exacting equal taxation, but has its foundation in those elementary

principles of equity and justice which lie at the root of the social compact. *Fay v. Springfield*, 94 Fed. 409; *Lyon v. Tonawanda*, 98 Fed. 361; *Loeb v. Trustees*, 91 Fed. 37.

"Special assessments to pay for local improvements of public streets and highways do, in practical effect, deprive owners of their property without due process of law, unless the property subject to assessment is benefited by the improvement correspondingly to the amount of the assessment. *White v. Tacoma*, 109 Fed. 34; *Hanford, D. J.*

If lands are included which cannot possibly be benefited, the decision would be subject to review. *Fallbrook Ir. Dist. v. Bradley*, 164 U. S. 112, 41 L. ed. 369, 17 Sup. Ct. Rep. 56.

In *French v. Barber Asphalt Pav. Co.*, 181 U. S. 324, 45 L. ed. 879, 21 Sup. Ct. Rep. 625, Justice Harlan wrote the dissenting opinion. As he wrote the opinion of the court in *Norwood v. Baker*, his explanation of what was actually decided in that case is entitled to great weight. He says of *Norwood v. Baker*, that "the affirmance of the judgment in that case was upon the sole ground that the assessment was made under a rule that absolutely excluded any inquiry as to special benefits. Such a rule was held to be void because it rested upon the theory that to meet the cost of opening a street private property could be specially assessed for an amount in substantial excess of special benefits accruing to it from the improvement made in the interest of the general public." *French v. Barber*



Asphalt Paving Co., 181 U. S. 324, 45 L. ed. 879, 21 Sup. Ct. Rep. 625.

"The question of special benefit and the property to which it extends is of necessity a question of fact, and when the legislature determines it in a case within its general power, its decision must of course be final." *Spencer v. Merchant*, 125 U. S. 353, 31 L. ed. 767, 8 Sup. Ct. Rep. 921, op.

The ingrained error is in assuming that the legislature has "within its general power" the right to determine the extent of benefits. From its very nature, that question is one for judicial determination.

A resolution that the common council fix and determine that a specified district is benefited by the opening of a certain street, and that there be assessed and levied upon the real estate therein included a certain amount, in proportion, as near as may be, to the advantage which each lot or parcel is deemed to acquire by the improvement is in substantial conformity to *Mich. Comp. Laws 1897, Sec. 3406*, which in effect provides that the common council may assess upon such district as it deems benefited the whole or a part of the cost of the improvements, in proportion, as nearly as may be, to the advantage which each lot derives, and limits the assessment on any lot to the benefits received. *Goodrich v. Detroit*, 184 U. S. 432, 46 L. ed. 627, 22 Sup. Ct. Rep. 397; *Voigt v. Detroit*, 184 U. S. 115, 46 L. ed. 459, 22 Sup. Ct. Rep. 337.

Assessment of portion of cost of a public park upon property spe-

cially benefited, held legal in *Shoemaker v. U. S.*, 147 U. S. 282, 37 L. ed. 170, 13 Sup. Ct. Rep. 361.

In *Norwood v. Baker*, the decision of the court, in its broad sense, was that where there was no inquiry into special benefits, even in the absence of an allegation that plaintiff's property was not benefited by the improvement and to the amount of the full cost thereof, a rule of assessment authorizing the full expense of the taking of the land and the improvement thereof to be charged against the abutting property was unconstitutional as authorizing a taking of private property for public use without compensation.

The minority dissent on 4 grounds, opinion by Brewer, J.

1. That the Const. of Ohio authorized the procedure.

2. Also the Const. U. S. under decision *Shoemaker v. U. S.*, 147 U. S. 302; 37 L. ed. 186, 13 Sup. Ct. Rep. 361; *Bauman v. Ross*, 167 U. S. 548, 42 L. ed. 270, 17 Sup. Ct. Rep. 966.

3. The cost of the improvement being settled judicially, plaintiff being a party, and receiving the award, is estopped to deny that the cost was properly ascertained.

4. That it is a legislative function to determine the area of the assessment district, and that such determination is final.

As to the last reason, the opinion in *Spencer v. Marchant*, 100 N. Y. 585, 3 N. E. 682, is quoted to the effect that the legislative act in question determined absolutely and conclusively, the amount of the tax to be raised, and the property to be assessed and upon which it was to be proportioned.



"Each of these things was within the power of the legislature, whose action cannot be reviewed in the courts upon the ground that it acted unjustly or without appropriate and adequate reasons." While it is unquestionably true that legislative action upon a subject which is a matter of legislative discretion cannot be reviewed by the courts, yet no one denies the power of the courts to interfere when the fundamental law of the Constitution is violated. The decision of the court in *Norwood v. Baker* was to the effect that the Fourteenth Amendment was violated, and neither the provisions of the Constitution of Ohio nor the act of its legislature which contravene the provisions of the Great Amendment will be valid or allowed to prevail. If this contention be true, then the 4th objection in the dissenting opinion seems not well taken.

*Contra.*

"The imposition of burdens for local improvements not infrequently results in a practical confiscation of the property sought to be benefited."

Kinne, J., in *Farwell v. Des Moines etc. Co.*, 97 Iowa, 302, 35 L. R. A. 63, 66 N. W. 176. There could hardly be a more striking commentary upon the Iowa theory.

The improvement of a street is a public object which will support a special assessment therefor on abutting property, regardless of the question of benefits to such property. *Dewey v. Des Moines*, 101 Iowa, 416, 70 N. W. 605.

In exercising the power of local assessment, the legislature is not limited to the actual increase in

value of the property assessed resulting from the local assessment. *Rolph v. Fargo*, 7 N. D. 640, 42 L. R. A. 646, 76 N. W. 242; *Webster v. Fargo*, 9 N. D. 208, 56 L. R. A. 156, 82 N. W. 732.

"The owners of adjacent lots on either side must be at the expense of making the street; they must pay all necessary expenses. Each lot must pay for half the street in front, make the street and pay all incidental expenses. If one person owned the whole, he must give the land for the street and pay all expenses. If one owned the street and two others the lots on either side, the owners of the lots would pay for the street itself and all expenses. If, indeed, any improvement benefits other property, the assessments may be extended to it." *Savage, C. J.*, in the matter of opening Twenty-sixth street, 12 Wend. 203 (1834).

*Note.* All dictum, and no authorities cited in entire opinion.

*Special Taxation.*

The power of special taxation of contiguous property for making local improvements, does not depend upon the fact of an equivalent benefit to the property taxed. The power is given unqualifiedly, with no restriction as to benefits resulting to contiguous property. *Galesburg v. Searles*, 114 Ill. 217, 29 N. E. 686.

Where it is apparent that a local improvement cannot benefit contiguous property, a special tax on such property for making such an improvement cannot be sustained. *Bloomington v. C. & A. R. Co.*, 134 Ill. 451, 26 N. E. 366.

Where the council of an Illinois



city adopts special taxation as the method of paying for a street improvement, it has power to require that the cost of the same shall be assessed upon the lots abutting upon the streets in proportion to the frontage of the lots upon the same. *Enos v. Springfield*, 113 Ill. 65; *Davis v. Litchfield*, 155 Ill. 384, 40 N. E. 354.

The owners of property affected by a special assessment have the

right to have the question of benefits passed on by a jury, but they have no such right where contiguous property is specially taxed. *Springfield v. Green*, 120 Ill. 269, 11 N. E. 261.

Under Art. 9, of the Ill. Const. the total amount of benefits to be assessed is fixed by the commissioners, and is thereby conclusively determined. *Jones v. Lake View*, 151 Ill. 663, 38 N. E. 688.



## CHAPTER IV.

### OF THE PURPOSES FOR WHICH SPECIAL ASSESSMENTS ARE AUTHORIZED.

In general, 242-243.

Streets, 244.

a. Opening, widening and vacating, 245-247.

b. Grading and paving, 248-249.

c. Repairing and maintenance, 250.

d. Culverts, 251.

Sidewalks, 252.

Country roads and highways, 253-254.

Bridges and viaducts, 255.

Public parks, 256-257.

Levees, dykes and breakwaters, 258.

Waterworks, pipes and mains, 259-262.

Drains and sewers, 263-270.

Irrigating arid lands, 271.

Sweeping, sprinkling and lighting streets — Removing snow, 272-273.

Improving water courses, 274

Personal property, 275.

Miscellaneous, 276-278.

#### In general.

**242.** Having thus far examined the origin of the power of special assessment, the basis upon which it rests, and the general limitations of its application in principle, we will now examine the particular purposes to which it may be applied. That the purpose must be a public and local one has already been seen,<sup>1</sup> but beyond that it is difficult, if not impossible, to lay down a general rule, or define an even approximately correct class of property or subjects which are liable to the imposition.

**243.** It is both the power and the duty of the proper public authorities to reasonably declare what shall constitute local improvements, and their nature and character, having due reference to benefits, and involving the idea of permanence.<sup>2</sup> As a general rule property not abutting on the line

<sup>1</sup> Ch. III, Public Purpose.

<sup>2</sup> A local improvement is a pub-

lic improvement, which, by reason of being confined to a locality, en-



of the improvement is not subject to an assessment for benefits,<sup>3</sup> but it is for the legislature to decide in the first instance, as we have already seen.<sup>4</sup>

### Streets.

**244.** It is in the improvement of streets and highways that the power to levy special assessments is more generally employed.

#### — a. Opening, widening and vacating.

**245.** As the opening and widening of streets involves the appropriation of private property to public use, the power of eminent domain is invoked to obtain the requisite authority for taking the land, but the condemnation proceedings

hances the value of adjacent property, as distinguished from general benefits. As applied to a street, such improvement signifies the actual or presumptive betterment of the street. Ill. Cent. R. Co. v. Decatur, 154 Ill. 173, 45 Am. St. Rep. 124, 38 N. E. 626. And see Hagar v. Supervisors, 47 Cal. 222; Macon v. Patty, 57 Miss. 384, 34 Am. Rep. 451.

<sup>3</sup> In re Fifty-fourth Street, 165 Pa. St. 8, 30 Atl. 503. In re Orkney Street, 194 Pa. St. 425, 48 L. R. A. 274, 45 Atl. 314.

#### Connecticut.

<sup>4</sup> Nichols v. Bridgeport, 23 Conn. 189, 60 Am. Dec. 636; Trinity College v. Hartford, 32 Conn. 452.

#### Louisiana.

Municipality No. 2 v. White, 9 La. Ann. 446.

#### Maryland.

Alexander v. Mayor, etc., 5 Gill, 383, 46 Am. Dec. 630; Moale v. Mayor, etc., 5 Md. 314, 61 Am. Dec. 276.

#### Michigan.

Powers' Appeal, 29 Mich. 504; Detroit v. Daly, 68 Mich. 503, 37 N. W. 11.

#### New Jersey.

Holmes v. Mayor, etc., 12 N. J. Eq. 299; State v. Dean, 23 N. J. L. 335; State v. W. Hoboken, 51 N. J. L. 267; 17 Atl. 110.

#### New York.

Livingston v. Mayor, &c., 8 Wend. 85, 22 Am. Dec. 622. In re Twenty-sixth Street, 12 Wend. 203. In re De Graw Street, 18 Wend. 568. Litchfield v. Vernon, 41 N. Y. 123.

#### Pennsylvania.

McMasters v. Commonwealth, 3 Watts, 292; Wray v. Pittsburgh, 46 Pa. St. 365; Hammett v. Philadelphia, 65 Pa. St. 146, 3 Am. Rep. 615.

#### Wisconsin.

Holton v. Milwaukee, 31 Wis. 27.

#### United States.

Bauman v. Ross, 167 U. S. 548, 42 L. ed. 270, 17 Sup. Ct. Rep. 966.



are not infrequently combined with those for levying the special assessment to raise the necessary funds to pay in whole or in part for the expense of the taking and the improvement. The power has been expressly conferred by statute in most of the various states, and is settled beyond dispute.<sup>5</sup> The power to widen streets is included in the greater power to open,<sup>6</sup> but is usually given to cities by express charter authority.

**246.** A railway contiguous to a proposed street improvement may be specially taxed for the making of such improvement,<sup>7</sup> as well as a railroad passenger station and ground used as a freight station or lumber yard.<sup>8</sup> But the latter case holds that an assessment upon a railroad right of way for street paving cannot be upheld, because of the impossibility of a benefit being conferred on the right of way by such paving, and the whole theory which justifies such a charge fails in such case.<sup>9</sup> And for the same reason, railroad property in tunnels under the street, and enclosed ornamental grounds on the surface thereof, over such tunnels, which tend to beautify the street, but are neither useful nor beneficial to the public, cannot be deemed benefited by the pavement of the street, nor capable of assessment therefor.<sup>10</sup> But an act providing for the assessment of property benefited, to pay a railroad company for closing the entrance to a tunnel in a city street, and relinquishing the right to use steam within the city limits, and also to pave the street, lay rails upon the

<sup>5</sup> *Meyer v. Covington*, 103 Ky. 546, 45 S. W. 769; *Cook v. Slo-cum*, 27 Minn. 509, 8 N. W. 755; *Jones v. Board, &c.*, 104 Mass. 461; *Sears v. Com'rs*, 180 Mass. 274, 62 L. R. A. 144, 62 N. E. 397; *Hancock St. Extension*, 18 Pa. St. 26.

<sup>7</sup> *C. & A. R. Co. v. Joliet*, 153 Ill. 649, 39 N. E. 1077; *C. R. I. & P. R. Co. v. Moline*, 158 Ill. 64,

41 N. E. 877. And see note in 28 L. R. A. 249.

<sup>8</sup> *Mount Pleasant v. B. & O. R. Co.*, 138 Pa. St. 365, 11 L. R. A. 520, 20 Atl. 1052.

<sup>9</sup> *Allegheny v. W. Penn. R. Co.*, 138 Pa. St. 375, 21 Atl. 763; *C. & M. & St. P. R. Co. v. Milwaukee*, 89 Wis. 506, 28 L. R. A. 249, 62 N. W. 417.

<sup>10</sup> *People v. Gilon*, 41 Hun, 510.



surface, and run horse cars thereon, is a constitutional and valid exercise of the taxing power.<sup>11</sup>

**247.** A strictly analogous power is that of paying for a turnpike or toll-road along a public street by levying a special assessment on the property abutting the part condemned,<sup>12</sup> or vacating streets by action of the common council.<sup>13</sup> And although an ordinance provides that the cost of the improvement shall be raised by a special assessment alone, it is within the power of the commissioners appointed under the Illinois statute to assess a portion of the cost to the city or village as a whole, and it is necessarily implied that such portion be paid from the funds raised by general taxation.<sup>14</sup>

#### — b. Grading and paving.

**248.** It was early held in Wisconsin, that under the constitution of that state and the charter of the city of Milwaukee, every lot might be compelled to build the street in front of it, with such exceptions as the law may provide, and the only remedy for abuses under the rule is such restrictions as the wisdom of the legislature may impose on the exercise of this power.<sup>15</sup> Although this decision has not been expressly overruled, it is the law in that state that the assessment cannot exceed the benefit.<sup>16</sup> But Illinois has held practically the same doctrine,<sup>17</sup> and its validity has been

<sup>11</sup> *Litchfield v. Vernon*, 41 N. Y. 123; *People v. Lawrence*, 41 N. Y. 137. In the latter case, the court say: "This assessment was made for a public object, for a public improvement of the street. That object was the removal of an injurious and dangerous mode of using the street for a railroad to run by steam, and the substitution of a horse railroad in its stead; embracing, also, the filling up of an objectionable tunnel in the street."

<sup>12</sup> *Winslow v. Cincinnati*, 200, 291.

<sup>13</sup> *In re Barclay*, 91 N. Y. 430. *In re Howard Street*, 142 Pa. St. 601, 21 Atl. 974.

<sup>14</sup> *Newman v. Chicago*, 153 Ill. 469, 38 N. E. 1053.

<sup>15</sup> *Weeks v. Milwaukee*, 10 Wis. 242; *Lumsden v. Cross*, 10 Wis. 282.

<sup>16</sup> *Lathrop v. Racine*, 119 Wis. 461, 97 N. W. 192.

<sup>17</sup> Although the difference in expense between compelling a person to lay an expensive Nicholson pavement in front of his property, and a simple board sidewalk, is very great, yet there is no differ-



vigorously assailed.<sup>18</sup> In the control and improvement of the public streets, a municipal corporation in the absence of any lawful restriction to the contrary, has the same rights and powers as a private owner has over his land, and, as to abutting owners, is subject to the same liabilities.<sup>19</sup> The power of grading and paving streets,<sup>20</sup> and of regrading and

ence in the principle governing them. *Ottawa v. Spencer*, 40 Ill. 211; *Bedard v. Hall*, 44 Ill. 91.

<sup>18</sup> *Christiancy, J.*, in *Woodbridge v. Detroit*, 8 Mich. 304, says: "With the exception of the case of *Weeks v. Milwaukee*, which rests upon a peculiar feature of their charter not found in ours, and where the absence of a rule of apportionment seems to have been overlooked, I have met with but one reported case in which it has been directly held that the duty and the whole expense of making a street improvement in front of the owner's property could be imposed upon the owner without reference to any ratio or rule of apportionment." Citing *State v. Dean*, 23 N. J. L. 335.

<sup>19</sup> *Munger v. St. Paul*, 57 Minn. 9, 58 N. W. 601.

*English.*

<sup>20</sup> Assessments for paving are a charge against the property, and the amount may be recovered of the future owners of the premises. *Plumstead Board of Works v. Ingoldby*, L. R. 8 Exch. 63; *Vestry of Bermondsey v. Ramsey*, L. R. 6, C. P. 247.

*United States.*

*Willard v. Presbury*, 14 Wall. 676, 20 L. ed. 719; *Lent v. Tillson*, 140 U. S. 316, 35 L. ed. 419, 11 Sup. Ct. Rep. 825; *Norwood v.*

*Baker*, 172 U. S. 269, 43 L. ed. 443, 19 Sup. Ct. Rep. 187.

*Indiana.*

*Shank v. Smith*, 157 Ind. 401, 55 L. R. A. 564, 61 N. E. 932.

*Kentucky.*

*Louisville Steam Forge Co. v. Mehler*, Ky.

*Minnesota.*

*Rogers v. St. Paul*, 22 Minn. 494.

*Mississippi.*

*Macon v. Patty*, 57 Miss. 378, 34 Am. Rep. 451.

*New Jersey.*

*State v. Atlantic City*, 34 N. J. L. 99.

*New York.*

*In re Dugro*, 50 N. Y. 513.

*Pennsylvania.*

*Northern Liberties v. St. John's Church*, 13 Pa. St. 104; *In re Hancock Street*, 18 Pa. St. 26; *Pray v. Northern Liberties*, 31 Pa. St. 69; *Schenley v. Commonwealth*, 36 Pa. St. 29, 78 Am. Dec. 359; *McGonigle v. Allegheney*, 44 Pa. St. 118; *Wray v. Pittsburgh*, 46 Pa. St. 365; *Hammett v. Philadelphia*, 65 Pa. St. 155, 3 Am. Rep. 615; *In re Beechwood Avenue*, 194 Pa. St. 86, 45 Atl. 127; *Harrisburg v. Funk*, 200 Pa. St. 348, 49 Atl. 1135.

*Texas.*

*Adams v. Fisher*, 75 Tex. 657, 6 S. W. 772.



repaving,<sup>21</sup> is too well settled to be within the municipal authority to be open to question. It is a necessary adjunct of the governing power, and although to a considerable extent payable by general taxation, the prevalent custom is to pay for such improvements by special assessment. Many important questions regarding the procedure to be followed, the damages recoverable, and cognate matters, are discussed in a subsequent chapter.<sup>22</sup>

**249.** Street paving is an exercise of the taxing power, and not of eminent domain.<sup>23</sup> There is no rule of law which requires a portion of the street to be set aside for foot passengers, and the council may order a street paved the entire width, in effect abolishing the sidewalk.<sup>24</sup> In Pennsylvania it is the rule that repaving is not a charge upon an abutter,<sup>25</sup> but this is not the general rule. The power to make local

*California.*

<sup>21</sup> *McVerry v. Boyd*, 89 Cal. 304, 26 Pac. 885.

*Indiana.*

*Indianapolis v. Mansur*, 15 Ind. 112; *Lafayette v. Fowler*, 34 Ind. 140.

*Louisiana.*

*O'Leary v. Sloo*, 7 La. Ann. 25; *Municipality No. Two v. Dunn*, 10 La. Ann. 57.

*Michigan.*

*Sheley v. Detroit*, 45 Mich. 431, 8 N. W. 52; *Wilkins v. Detroit*, 46 Mich. 120, 8 N. W. 701, 9 N. W. 427.

*Minnesota.*

*State v. District Court*, 80 Minn. 293, 83 N. W. 183.

*New York.*

*People v. Mayor, &c.*, 4 N. Y. 419, 55 Am. Dec. 266; *In re Astor*, 53 N. Y. 617; *In re Burmeister*, 76 N. Y. 174; *In re Garvey*, 77 N. Y. 523; *Genet v. Brooklyn*, 99 N. Y. 306, 1 N. E. 777; *Spencer v. Merchant*, 100 N. Y. 585, 3 N. E.

682; *Jones v. Tonawanda*, 158 N. Y. 438, 53 N. E. 280.

*Ohio.*

*Cleveland v. Wick*, 18 Ohio St. 303; *Richards v. Cincinnati*, 31 Ohio St. 506.

*Wisconsin.*

*Dean v. Borschenius*, 30 Wis. 236; *Blount v. Janesville*, 31 Wis. 648; *Adams v. Beloit*, 105 Wis. 363, 47 L. R. A. 441, 81 N. W. 869.

<sup>22</sup> See Chapter IX, *infra*.

<sup>23</sup> *Mayor, &c., v. Green Mountain Cemetery*, 7 Md. 517.

<sup>24</sup> *Brevoort v. Detroit*, 24 Mich. 322.

<sup>25</sup> *In re Morewood Ave.*, 159 Pa. St. 20, 28 Atl. 123, 132; *Hammett v. Philadelphia*, 65 Pa. St. 146, 3 Am. Rep. 615.

The cost of repaving a public street cannot be assessed upon and collected from the property abutting on the street, even though the cost of the original paving was not borne by the then owners of



assessments upon property specially benefited, is a continuing one, in the absence of charter restrictions, and abutting owners may have the cost of repaving, as well as of paving, streets assessed upon their property.<sup>26</sup>

### — c. Repairing and maintenance

**250.** As a general rule, the repairing and maintenance of streets is chargeable to and payable out of some general fund, and it is apparent that the proper care of the streets after they are once made, is for the benefit of the public at large, and should be at the public charge. The elements of local improvement and resulting benefit are wanting. In those states which hold repaving to be a proper subject for local assessment, and a continuing power, the line between a practical reconstruction and repair is sometimes very narrow, and is generally the subject of legislation. In Pennsylvania it has been held that repairing is to be paid by the public at large, and that the owner shall not be charged for repairing, repaving, or an improvement of the street after it

the abutting property, but by the public. Special local benefits accrue to properties abutting on a street only at the time of the original paving and assessments for such benefits, if exercised at all, must be exercised at or near the time the benefits accrue. *Harrisburg v. Segelbaum*, 151 Pa. St. 172, 20 L. R. A. 834, 24 Atl. 1070.

Where a strip in the middle of a street has been macadamized under the authority of a city ordinance and paid for by the owners of the premises at the time, a subsequent owner cannot be compelled to pay the cost of a vulcanite pavement laid upon the same strip. *Philadelphia v. Ehret*, 153 Pa. St. 1, 25 Atl. 888.

<sup>26</sup> *State v. District Court*, 20

*Minn.* 293, 83 N. W. 183; *Sheley v. Detroit*, 45 Mich. 431; 8 N. W. 52; *Municipality No. Two v. Dunn*, 10 La. Ann. 57.

Improving a roadway 200 feet wide, of which forty feet in the center was originally paved, by leaving 100 feet in the center for park purposes, and paving with asphalt a strip 25 feet wide on each side, constitutes a repavement, in the absence of a showing that the original improvement was inadequate, within the meaning of a charter provision requiring the cost of such work to be paid from the "repaving" fund instead of by an assessment on abutting owners. *Dickinson v. Detroit*, 111 Mich. 480, 69 N. W. 728.



has been paved or macadamized.<sup>27</sup> But in Wisconsin, charter provisions authorizing street commissioners to require lot owners to clean and repair streets and alleys, to the center thereof, opposite their respective lots, and to make contracts for doing such work at the expense of the respective lots in case of the owner's neglect, are valid.<sup>27a</sup> Other states uphold the repair and maintenance of streets to be a proper subject for special assessment,<sup>28</sup> but custom and the weight of authority are to the contrary.<sup>29</sup> But a municipality cannot collect a fund in advance to be used at some indefinite time for the repair and maintenance of a pavement under the pretense of paying the cost of its construction.<sup>30</sup>

#### — d. Culverts.

**251.** Culverts, curbing and guttering, being essential parts of the roadway, are usually considered proper subjects for the exercise of the power of local assessment,<sup>31</sup> but are not a part of the sidewalk, and cannot be laid under an order to construct a sidewalk.<sup>32</sup>

#### Sidewalks.

**252.** Taxation for sidewalks is held by many courts to be more particularly referable to the police power, and the ques-

<sup>27</sup> *Alcorn v. Philadelphia*, 112 Pa. St. 494, 4 Atl. 185.

<sup>27a</sup> *Cramer v. Stone*, 38 Wis. 259.

<sup>28</sup> *Covington v. Boyle*, 6 Bush. 204; *Estes v. Owen*, 90 Mo. 113, 2 S. W. 133.

<sup>29</sup> *Philadelphia v. Lyon*, 35 Pa. St. 401; *McVicker v. Commissioners*, 25 Ohio St. 608.

It was early held in Colorado that the construction of curbstones and gutters not being within the police power of the state, a special assessment against abutting owners to pay therefor is void under the Colorado Constitution requiring uniformity in taxation.

*Wilson v. Chilcott*, 12 Colo. 600, 21 Pac. 901. But this was later overruled in *Denver v. Knowles*, 17 Colo. 204, 17 L. R. A. 135, 30 Pac. 104.

<sup>30</sup> *State v. District Court*, 80 Minn. 293, 83 N. W. 183.

<sup>31</sup> *Williams v. Bisnago* (Cal.), 34 Pac. 640; *In re Fifty-fourth Street*, 165 Pa. St. 8, 30 Atl. 503; *Wistar v. Philadelphia*, 111 Pa. St. 604, 4 Atl. 511. Extent of discretion given authorities. See *Shannon v. Hinsdale*, 180 Ill. 202, 54 N. E. 181.

<sup>32</sup> *Job v. People*, 193 Ill. 609, 61 N. E. 1079.



tion of benefits ignored,<sup>33</sup> but they are also ordered made and paid for by special assessment on the front foot basis,<sup>34</sup> or other principle of apportionment, and in practically the same manner as other street improvements.<sup>35</sup>

### Country roads and highways.

**253.** The minor political subdivisions of the state are usually chargeable with the duty of making and keeping in repair the necessary public roads, and clothed with authority to levy a special tax, designated as a road tax, to pay for the same, or to pay the cost out of the general levy; but the power to lay special assessments as such, for such purposes, has been sharply contested, and the law is by no means generally settled, depending largely on the construction of some constitutional provision, or the precedents established by previous decisions on somewhat analogous questions, and the matter may be considered as bounded by state lines.

**254.** If the power to impose special assessment be limited by the benefits received, then it is manifest that in many cases it is inapplicable to rural highways. Such a highway

<sup>33</sup> Cooley on Taxation, (3d ed.), pp. 1128-1130.

<sup>34</sup> *Speer v. Athens*, 85 Ga. 49, 9 L. R. A. 402, 11 S. E. 802.

<sup>35</sup> Where a charter requires lot owners to build sidewalks after due notice, and, failing so to do, the council are to cause them to be built, and the expense assessed the lots adjoining such walk, it becomes unnecessary for the council when directing the walks to be constructed, to specially direct that such construction shall be "at the expense of the" lots adjoining the walks. *Scott Co. v. Hinds*, 50 Minn. 204.

The const. of 1870, in Illinois, has authorized the legislature to vest corporate authorities with power to make local improve-

ments, and justifies an enactment whereby a city lot may be charged with the entire expense of a sidewalk in front of it, without limitation as to equality or uniformity. *White v. People*, 94 Ill. 604; *State v. Fuller*, 34 N. J. L. 227; *Flint v. Webb*, 25 Minn. 93; *Tourmer v. Municipality No. 1*, 5 La. Ann. 298; *Lufkin v. Galveston*, 58 Tex. 545; *Kemper v. King*, 11 Mo. App. 116.

An act authorizing a municipality to cause sidewalks to be constructed and to assess the cost upon abutting property in proportion to the accruing benefit, and making such assessment a lien on such property, is valid. *Mayor, &c., v. Klein*, 89 Ala. 461, 8 L. R. A. 369, 7 So. 386.



is not a "local improvement" within the meaning of a constitutional provision requiring taxes to be as nearly equal as may be, and the resulting benefits of the improvement accrue to the general public.<sup>36</sup> But it has been decided that a specific assessment an acre on all lands within a given distance of each side of a road, for the purpose of making it a free turnpike, may be authorized by statute, not being unconstitutional,<sup>37</sup> and in Indiana the constitutionality of similar acts for free turnpike and gravel roads has been repeatedly decided,<sup>38</sup> with the limitation that none but the legitimate expense of the construction may be assessed against the land owners,<sup>39</sup> but providing for an additional assessment when the original assessment proves insufficient.<sup>40</sup> The general principle of paying for a county road by means of special assessment, has likewise been upheld in Washington,<sup>41</sup> and in New Jersey, the power of a city to grade and pave a turnpike in the city limits has been sustained,<sup>42</sup> but as a general rule the method of assessment and taxation for

<sup>36</sup> In re Washington Ave., 69 Pa. St. 352, 8 Am. Rep. 255; *Graham v. Conger*, 85 Ky. 582, 4 S. W. 327; *Conger v. Bergman*, 10 Ky. L. Rep. 899, 11 S. W. 84.

"Taxation according to benefits as applied to improvements in the streets of a city is very different when applied to a country highway. In the city the improvement will benefit and improve the property adjacent to and abutting upon, the improved street, but will not benefit property remote therefrom, while in the country districts the highway is an advantage to the public at large, and the benefit thereof is not confined to farms through which it may pass. It is therefore reasonable to require the benefited city property to pay the expense of the improvement, while it would not be rea-

sonable or just or fair to require the farms along the line of a country road to pay the entire cost and expense of opening and laying the same out. *Sperry v. Flygare*, 80 Minn. 327, 49 L. R. A. 757, 81 Am. St. Rep. 261, 83 N. W. 177.

<sup>37</sup> *Foster v. Commissioners*, 9 Ohio St. 540; *McGonnigle v. Arthur*, 27 Ohio St. 251.

<sup>38</sup> *Goodrich v. Winchester etc. Co.*, 26 Ind. 119; *Turpin v. Eagle Creek Co.*, 48 Ind. 45; *Stoddard v. Johnson*, 75 Ind. 20; *Ricketts v. Spraker*, 77 Ind. 371.

<sup>39</sup> *Commissioners v. Fallen*, 118 Ind. 158, 20 N. E. 771.

<sup>40</sup> *Kline v. Commissioners*, 152 Ind. 321, 51 N. E. 476.

<sup>41</sup> *Seanor v. County Commissioners*, 13 Wash. 48, 42 Pac. 552.

<sup>42</sup> *State v. New Brunswick*, 30 N. J. L. 395.



street improvements cannot be applied to the improvement of highways in the country.<sup>43</sup>

### **Bridges and viaducts.**

**255.** Where the construction of bridges and viaducts in a municipality manifestly results in an enhancement in the value of abutting or adjacent property, there is no reason why the expense, to the amount of the benefit, should not be paid for by special assessments. Such improvements are both local and general. A viaduct in a public street,<sup>44</sup> with the approaches thereto, including retaining walls, filling and paving,<sup>45</sup> are proper subjects of assessment to abutting owners, but a railroad bridge in a public street crossing over a railroad crossing, is not.<sup>46</sup> And while the legislature may impose the cost of a bridge over a river upon the city or county through which it passes,<sup>47</sup> this is in the nature of a local or special tax for a local purpose; and even under a city charter making the "grading, gravelling, paving, planking or macadamizing" of any street chargeable to the lots abutting thereon, the expense of raising a street to the established grade by the construction of a pile bridge over a ravine is not so chargeable, especially where the charter fur-

<sup>43</sup> "Many of our public improvements are local in their character, and confer special benefits on those in their immediate vicinity. By a long line of decisions of this court, these benefits may be set off against damages sustained by the appropriation of private property for public use, in the construction of such works. In the case in judgment, the legislature has determined, and this matter is within its power, that this is a proper subject for taxation, and that the burden imposed is the just share of each person embraced in the provisions of the

act. This the legislature has the right to do, unless restrained by some provision of the constitution." Gregory, C. J. in *Goodrich v. Winchester, etc., Turnpike Co.*, 26 Ind. 119.

<sup>44</sup> *L. & N. R. Co. v. E. St. Louis*, 134 Ill. 656, 25 N. E. 962; *Denver v. Kennedy*, 33 Colo. 80, 80 Pac. 122, 467.

<sup>45</sup> *McFarlane v. Chicago*, 185 Ill. 242, 57 N. E. 12.

<sup>46</sup> *Bloomington v. C. & A. R. Co.*, 134 Ill. 451, 26 N. E. 366.

<sup>47</sup> *Philadelphia v. Field*, 58 Pa. St. 320.



ther provides for paying the expense of building bridges by levying a special tax.<sup>48</sup>

### Public parks.

**256.** The establishment of public parks, squares and boulevards has long been considered a public purpose, and many states, either by general statutes or charter provision, authorize the acquisition of land for such purpose, and for its maintenance and improvement as such, and to provide for the payment by a general tax.<sup>49</sup> And it is not uncommon to take lands in several different municipalities, for park purposes, and vest their government in the hands of specially created corporate authorities, having the power to levy taxes for their proper maintenance, but to be expended in the municipalities in which the tax is laid.<sup>50</sup> But lands outside a city cannot be assessed for a part of the expense of acquiring title to lands for a city park, or constructing the same, and a special assessment for park purposes had been adjudged void, as authorizing a special tax for a general public purpose.<sup>51</sup>

<sup>48</sup> *State v. Ashland*, 71 Wis. 502, 37 N. W. 809.

<sup>49</sup> *In re Lands in Flatbush*, 60 N. Y. 398; *In re Central Park*, 50 N. Y. 493; *People v. Salomon*, 51 Ill. 37.

<sup>50</sup> *People v. Breslin*, 80 Ill. 423; *Halsey v. People*, 84 Ill. 89; *Wright v. People*, 87 Ill. 582.

<sup>51</sup> *In re Lands in Flatbush*, 60 N. Y. 398.

"Private property cannot be taken for public use without just compensation. Special benefits cannot form any part of such compensation, unless they attach to and become a part of the taxed property. The phrase 'special benefits' is a misnomer as applied here. A lot holder has a property

interest or easement in the adjoining street independent of the general public, and the improvement of the street may be a special benefit or an absolute injury to his lot. If it be a benefit, he must pay for it, and a special tax may be levied on his lot for that purpose. But adjacent property holders can have no easement or property right whatever in a park. Their interest is precisely the same as all other citizens, and a tax upon them, because of their locality, is only a thin guise for confiscating their property without any just compensation." *State v. Leffingwell*, 54 Mo. 458.

"Private property is taken for public use when it is appropriated



257. The cases holding the latter doctrine have been squarely overruled, and the same court now holds that acquiring and improving land for park purposes is both a public use and a local improvement. It is now the generally accepted rule that a public park is a special benefit to the locality or part of the city in which it is established; and its cost, to the extent of such special benefits, may be assessed against the property specially benefited.<sup>52</sup> A city that is authorized to take land for park purposes may acquire the fee to the land,<sup>54</sup> and a street may be so constructed as part of a park system that the property fronting thereon may be locally assessed if specially benefited.<sup>55</sup> The propriety of apportioning the tax according to the special bene-

for the common use of the public at large. A stronger instance cannot be given than that of property converted into a public park. A public park becomes the property of the public at large, and is under the control of the public authorities; it may well be paid for by the public, as it is intended for public use." *County Court v. Griswold*, 58 Mo. 175.

But the dictum of Judge Adams, in *State v. Leffingwell*, 54 Mo. 477, was later criticized and in effect overruled. The court say: "The right to tax the owners' property is not because he has a property interest in the improvement, or in the land appropriated therefor, but because his property is benefited by the improvement, to pay for which it is taxed, and for that reason only does the right exist and the power to exercise it; and it applies to property benefited by a public park just as well as to his property benefited by a public street; as well to his property benefited by a public street in

which he has no property interest, as by one on which his property abuts — and so it has been universally applied." *Kansas City v. Ward*, 134 Mo. 172, 35 S. W. 600.

<sup>52</sup> *Kansas City v. Bacon*, 147 Mo. 259, 48 S. W. 860.

<sup>53</sup> *State v. Dist. Court*, 75 Minn. 292, 77 N. W. 968; *Owners of Ground v. Albany*, 15 Wend. 374; *In re Central Park Comr's*, 63 Barb. 282; *Commissioners v. Armstrong*, 45 N. Y. 234, 6 Am. Rep. 70; *Holt v. Somerville*, 127 Mass. 408; *Foster v. Commissioners*, 131 Mass. 225; S. C. 133 Mass. 321; *Cook v. South Park Commissioners*, 61 Ill. 115; *Kerr v. S. Park Commissioners*, 117 U. S. 379, 29 L. ed. 924, 6 Sup. Ct. Rep. 801; *Shoemaker v. United States*, 147 U. S. 282, 37 L. ed. 170, 13 Am. St. Rep. 361; *Swinton v. Ashbury*, 41 Cal. 525.

<sup>54</sup> *Holt v. Somerville*, 127 Mass. 408.

<sup>55</sup> *In re Beechwood Ave.* 194 Pa. St. 86, 45 Atl. 1093.



fits received is unquestionable,<sup>56</sup> and an assessment laid under such apportionment is not invalidated because of incidental sanitary improvement resulting from the creation of the park.<sup>57</sup> But when a strip of land in the middle of a very wide street has been converted into and maintained as a park, the expense of paving the roadway on either side can be assessed only to the middle of such roadway, under a charter provision authorizing the expense of paving to the middle of a street opposite public grounds to be paid from the ward fund.<sup>58</sup>

### Levees, dykes and breakwaters.

**258.** The construction of levees such as line the banks of the Mississippi near its mouth, or dykes like those which protect Holland from the encroachments of the sea, are works national in their importance, and so enormously expensive as to be beyond the reach of payment from the proceeds of local taxation. But within narrower limits, and where as a result of the protection afforded by works of this nature, the property of the individual is benefited by such protection, the courts are virtually unanimous in sustaining the power of the legislature to authorize special assessments for the payment of the necessary expenses. But such power must be expressly given,<sup>59</sup> and for a public pur-

<sup>56</sup> See note 5, supra, and *People v. Breslin*, 80 Ill. 423; *Dunham v. People*, 96 Ill. 331; *Bass v. South Park Commissioners*, 171 Ill. 370, 49 N. E. 549; *Briggs v. Whitney*, 159 Mass. 97; *Wilson v. Lambert*, 168 U. S. 611, 42 L. ed. 599, 18 Sup. Ct. Rep. 217.

<sup>57</sup> *Briggs v. Whitney*, 159 Mass. 97, 34 N. E. 179.

<sup>58</sup> *Boyd v. Milwaukee*, 92 Wis. 456, 66 N. W. 603; and see *Bennett v. Seibert*, 10 Ind. App. 369, 35 N. E. 35, 37 N. E. 1071.

*Arkansas.*

<sup>59</sup> *Davis v. Gaines*, 48 Ark. 370, 3 S. W. 184.

*Louisiana.*

*Yeatman v. Crandall*, 11 La. Ann. 220; *Selby v. Levee Com'rs*, 14 La. Ann. 437; *Wallace v. Shelton*, 14 La. Ann. 498; *Bishop v. Marks*, 15 La. Ann. 147; *State v. Maginnis*, 26 La. Ann. 558; *State v. Clinton*, 26 La. Ann. 561; *Munson v. Com'rs*, 43 La. Ann. 33, 8 So. 914.

*Mississippi.*

*Williams v. Cammack*, 27 Miss. 209, 61 Am. Dec. 508; *Alcorn v. Hamer*, 38 Miss. 652; *Daily v. Swope*, 47 Miss. 367.

*Missouri.*

*Egyptian Levee Co. v. Hardin*,



pose.<sup>60</sup> It may be exercised for making piers and breakwaters for securing the lake shore within the city limits,<sup>61</sup> and for building embankments, sluices, ditches and gates, where land was formerly open to the overflowing of the tides, but now reclaimed.<sup>62</sup> Indirect benefits received from the work justify the levy of the assessment for the cost of the work,<sup>63</sup> although it has been held it must be only when auxiliary to the drainage of lands.<sup>64</sup> In Tennessee, the legislature may, by direct legislation, create a levee district, and provide for special assessment of the property therein for the benefit of its property and inhabitants, but cannot delegate that power to municipalities.<sup>56</sup>

### Waterworks, pipes and mains.

**259.** The construction of a general system of waterworks, for fire protection and general use, is not a local improve-

27 Mo. 495, 72 Am. Dec. 276; Reelfoot etc. Dist. v. Dawson, 97 Tenn. 151, 34 L. R. A. 725, 36 S. W. 1041.

<sup>60</sup> The appropriation of land for the construction of local dykes within the territory of dyking districts authorized by law to be formed, is a taking for a public purpose. Hansen v. Hammer, 15 Wash. 315, 46 Pac. 332.

<sup>61</sup> Soens v. Racine, 10 Wis. 271; Teegarden v. Racine, 56 Wis. 545, 14 N. W. 614.

Although under its general powers as a municipal corporation, a city may contract for building a breakwater, yet it has no power to charge the expense thereof to adjoining lots unless expressly authorized by its charter. Miller v. Milwaukee, 14 Wis. 699.

<sup>62</sup> Rutherford v. Maynes, 97 Pa. St. 78.

<sup>63</sup> Chambliss v. Johnson, 77 Iowa 611, 42 N. W. 427; George v.

Young, 45 La. Ann. 1232, 14 So. 137.

<sup>64</sup> The object of a drainage law is for agricultural and sanitary purposes, and an assessment for a levee can only be authorized as auxiliary to the drainage of lands. Updike v. Wright, 81 Ill. 49.

The legislature may provide for the establishment of diking districts, although the constitution seems to restrict the power of local assessment to the corporate authorities of cities, towns and villages, where the same section further provides that "for all corporate purposes, all municipal corporations may be vested with authority to assess and collect taxes, and such taxes shall be uniform in respect to persons and property within the jurisdiction of the body levying the same." Hansen v. Hammer, 15 Wash. 315, 46 Pac. 332.

<sup>65</sup> Reelfoot etc. District v. Daw-



ment which may be paid for by a special assessment,<sup>66</sup> and an ordinance for such a system provides for but one local improvement, and is not invalid as embracing separate and local improvements.<sup>67</sup> But the extension of water pipes, mains and service pipe is a proper subject for special assessment,<sup>68</sup> as well as are the connections of water pipes with the mains of a private company,<sup>69</sup> and even after payment of the mains out of the general funds of a city, the proper authorities may provide for a change of method, and levy a special assessment for its reimbursement.<sup>70</sup>

**260.** While it may be unconstitutional to grant to a private corporation the right to lay reasonable assessments in

son, 97 Tenn. 151, 34 L. R. A. 725, 36 S. W. 1041.

<sup>66</sup> *Hewes v. Glos*, 170 Ill. 436, 48 N. E. 922; *Morgan Park v. Wiswall*, 155 Ill. 262, 40 N. E. 611; *Blue Island v. Eames*, 155 Ill. 398, 40 N. E. 615; *Hughes v. Momence*, 164 Ill. 18, 45 N. E. 302.

<sup>67</sup> *People v. Sherman*, 83 Ill. 165, but distinguished in *Morgan Park v. Wiswall*, *supra*.

<sup>68</sup> "All of the several water and sewer connections must be considered together as one entire work or improvement, and when taken in connection with the use of the mains which had already been provided, a local improvement especially useful and beneficial to the residents on the contiguous property, and generally useful and beneficial to the city, was provided for. At least the city council must have so regarded it in passing the ordinance, and we do not think there was any lack or abuse of power in the respect mentioned." *Palmer v. Danville*, 154 Ill. 156, 38 N. E. 1067; *State v.*

*R. P. Lewis Co.*, 72 Minn. 87, 42 L. R. A. 639, 75 N. W. 108; *Batterman v. New York*, 65 App. Div. 576, 73 N. Y. Supp. 44; *Parsons v. Dist. of Col.*, 170 U. S. 45, 42 L. ed 943, 18 Sup. Ct. Rep. 521; *Northern Liberties v. Swain*, 13 Pa. St. 113; *Smith v. Seattle*, 25 Wash. 300, 65 Pac. 612; *Allen v. Drew*, 44 Vt. 174.

A regulation that citizens may be compelled to pay for service pipes to connect with water mains is just and reasonable, and in accordance with the principle of special benefits on which special assessments are founded. *Prindiville v. Jackson*, 79 Ill. 337.

<sup>69</sup> *Palmer v. Danville*, 154 Ill. 156, 38 N. E. 1067. The laying of pipes for the conveyance of water along a particular street is local to that street, and of particular benefit, and is a local improvement, and may be paid for by special taxation or special assessment. *Hughes v. Momence*, 163 Ill. 535, 45 N. E. 300.

<sup>70</sup> *McChesney v. Chicago*, 152 Ill. 543, 38 N. E. 767.



the nature of water rents on every dwelling in any street in the city, this power may be exercised by the municipality upon the transfer to it of the rights and privileges of the company.<sup>71</sup>

**261.** Water rates, paid by water consumers, are in no sense taxes, although enforceable in the same manner as a lien for taxes. They are but the price paid for the use of water as a commodity, and its use is not compulsory. But an annual tax of three cents per lineal foot upon all lots which do not pay water rates, making it a lien upon the property, and not devoting the money so raised to any specific purpose, is not a specific tax or a local assessment, but is to be regarded as a general tax, and void, as not being levied by the constitutional rule of uniformity.<sup>72</sup>

**262.** A vacant, unoccupied tract of land embracing sixty-five acres, abutting on streets on three sides, cannot escape an annual tax of ten cents per lineal foot imposed on all city property, on the ground that the water pipe is a conduit placed in the street for the purpose of conducting water to the city, nor upon the sole ground that the city authorities have denied the owner the privilege of having it tapped for the purpose of supplying the land with water.<sup>73</sup>

### Drains and sewers.

**263.** The construction of drains and sewers has been frequently held to be authorized under the police power, as being clearly promotive of public health; it has also been recognized as a proper object of assessment for benefits in some of the earlier English cases. The principle of a proper

<sup>71</sup> Allentown v. Henry, 73 Pa. St. 404.

<sup>72</sup> Jones v. Water Commissioners, 34 Mich. 273.

<sup>73</sup> State v. Robert P. Lewis Co., 72 Minn. 87, 42 L. R. A. 639, 75 N. W. 108.

*Note.*—Since the text was writ-

ten, the court reconsidered this case, and on the authority of Norwood v. Baker held the act invalid as being a taking without compensation, under the Fourteenth Amendment. State v. Robert P. Lewis Co., 82 Minn. 390, 85 N. W. 207, 86 N. W. 611.



apportionment was fully recognized,<sup>74</sup> as well as that of special benefit.<sup>75</sup> Sewer assessments are a kind of tax, and as such have been held to be subject to revision by the court, and not by the jury.<sup>76</sup> And the construction of a sewage pumping station, covering a small area, although of benefit to a much larger area, may constitute a local improvement for which a special assessment may be levied.<sup>77</sup>

**264.** While drains are more particularly for the purpose of carrying off the surplus water from low and marshy places in the country, and sewers, or covered conduits, for carrying the effluent of cities, substantially the same principles of law are applicable to both subjects, and both rest for their authority upon the principle of equivalents, or special benefit concurred. The tax for sewers is more frequently laid by the front foot at a price fixed by legislative enactment, and that for drains upon the amount of land benefited by the drainage, at either a specific or ad valorem rate. And drainage districts are apt to include land in various municipal or political subdivisions, as the utility of the subject matter frequently requires, and the legislature has the undoubted power to authorize the organization of a municipal assessments be made by commissioners appointed by the corporation for one purpose embracing territory situated wholly or partly within the boundaries of another municipal corporation already organized for another purpose.<sup>78</sup>

**265.** Laws governing the creation of drainage districts,

<sup>74</sup> *Rooke's Case*, 5 Co. 203; *Case of Chester Mills*, 10 Co. 499; *Emmerson v. Saltmarshe*, 7 Ad. & El. 156; *Hetley v. Boyer*, 2 Cro. Jac. 336.

<sup>75</sup> *Masters v. Scroggs*, 3 M. & Sel. 447; *Bow v. Smith*, 9 Mod. 94. Sewer rates should be laid according to benefits, "as under the previous law of sewers," said Lord Campbell, but under the statute a party could not object that the property derived no benefit. *Metropolitan Board of Works v. Vaux-*

*hall Bridge Co.*, 7 El. & B. 964.

Where in one district, there were sewers at six levels, no one level deriving benefit from the others, a separate rate should be assessed upon each level or division. *Rex v. Commissioners of Tower Hamlets*, 9 B. & Cr. 517.

<sup>76</sup> *Bishop v. Tripp*, 15 R. I. 466, 8 Atl. 692.

<sup>77</sup> *Fisher v. Chicago*, 213 Ill. 268, 72 N. E. 680.

<sup>78</sup> *People v. Nibbe*, 150 Ill. 269, 37 N. E. 217.



when constitutional, are closely akin to sewer laws, benefits resulting may be assessed, and the districts so organized are public corporations.<sup>79</sup> They cannot be attacked for impolicy, or overthrown by a showing that in particular instances they operate harshly or unjustly,<sup>80</sup> but a judgment confirming the assessment may be collaterally attacked for want of jurisdiction in organizing the district,<sup>81</sup> and special assessments made by commissioners appointed by the county court under the Illinois statute, are not authorized.<sup>82</sup> The provisions of the Drainage act of 1885, authorizing the construction of drains, ditches, levees and dykes, are broad enough to include the construction of sewers also,<sup>83</sup> and in Indiana provision made by the statute of 1883 for laying an assessment to pay for the repair of public drains, was held constitutional,<sup>84</sup> while in Illinois, a city or village has no power to pay for operating a drainage system and pumping works connected therewith, by special assessment.<sup>85</sup>

**266.** It is essential, in order to sustain the power of special assessment, that the purpose be a public one, and the drainage of farms to render them more productive is not such an object, and a corporation organized for that purpose could not levy and collect a tax.<sup>86</sup>

**267.** Under general authority to make and maintain

<sup>79</sup> Mound City etc. Co. v. Miller, 170 Mo. 240, 60 L. R. A. 190, 94 Am. St. Rep. 727, 70 S. W. 721.

<sup>80</sup> De Gravelle v. Drainage Dist. 104 La. 703, 29 So. 302.

<sup>81</sup> Dempster v. Chicago, 175 Ill. 278, 51 N. E. 710.

<sup>82</sup> Updike v. Wright, 81 Ill. 49.

<sup>83</sup> Charleston v. Johnston, 170 Ill. 336, 48 N. E. 985.

<sup>84</sup> Weaver v. Templin, 113 Ind. 298, 14 N. E. 600; Roudebush v. Mitchell, 154 Ind. 616, 57 N. E. 570.

<sup>85</sup> McChesney v. Hyde Park, 151 Ill. 634, 37 N. E. 858

<sup>86</sup> Anderson v. Kerns Drainage

Co., 14 Ind. 199, 77 Am. Dec. 63.

The legislature may provide for the drainage of lands to be paid for by special assessment, the purpose being sufficiently public to justify the exercise of both the power of eminent domain and that of taxation. In re application for Drainage, 35 N. J. L. 497.

See Cooley on Taxation (3d ed.) p. 1168 et seq. Hagar v. Reclamation Dist., 111 U. S. 701, 28 L. ed. 569, 4 Sup. Ct. Rep. 663; Head v. Amoskeag Co., 113 U. S. 9, 28 L. ed. 889, 5 Sup. Ct. Rep. 441; Wurtz v. Hoagland, 114 U. S. 606, 29 L. ed. 229, 5 Sup. Ct. Rep. 1086.



streets and highways, common councils of cities have the power to construct sewers,<sup>87</sup> and one who dedicates a street to public use waives all claims for damages he might otherwise have had for the construction of a sewer thereunder.<sup>88</sup>

**268.** A general grant of power to build sewers carries with it, by implication, the right to determine the method of construction and operation, and will be construed with reference to the requirements of the district. So under a charter authorizing a scheme to drain a city, thereby benefiting the property and protecting the health of the inhabitants, the council has the power to extend the outlet for drainage beyond the city limits;<sup>89</sup> and where an ordinary sewerage system cannot be successfully operated for want of sufficient fall in the pipes, the corporate authorities will, under a general grant of power to construct sewers, have a right to build and operate pumping works in connection therewith, and to levy special assessments upon the property benefited, when so authorized by charter.<sup>90</sup>

**269.** In Illinois the amount of a special assessment upon contiguous property for the cost of constructing a sewer is limited to the amount of benefits received,<sup>91</sup> and in Pennsyl-

<sup>87</sup> *Cone v. Hartford*, 28 Conn. 363; *Johnson v. Milwaukee*, 88 Wis. 383, 60 N. W. 270; *Kirkland v. Indianapolis*, 142 Ind. 123, 41 N. E. 374.

<sup>88</sup> *Kelsey v. King*, 32 Barb. 410; *West v. Bancroft*, 32 Vt. 367.

"The dedication of land to the purposes of a village or city street must be understood as made and accepted with the expectation that it may be required for other purposes than those of passage and travel merely, and that under the direction and control of the public authorities it is subject to be appropriated to all the uses to which village and city streets are usually devoted, as the wants or convenience of the people may render nec-

essary or important. One of these uses is the construction of sewers, which are usually laid under the public streets; and the custom to lay them there must be assumed to be had in view when a way is dedicated, and the act of dedication is a waiver of any claim to compensation the owners might otherwise have made, had a sewer been laid across their premises." *Cooley, J. in Warren v. Grand Haven*, 30 Mich. 28.

<sup>89</sup> *M. & M. Land etc. Co. v. Billings*, 50 C. C. A. 70, 111 Fed. 972.

<sup>90</sup> *Drexel v. Lake*, 127 Ill. 54, 20 N. E. 38.

<sup>91</sup> *Springfield v. Sale*, 127 Ill. 359, 20 N. E. 86.



vania no properties can be assessed for such cost except those that abut on the line of it. And even though a public sewer be built by special assessment upon the property benefited, the legislature may require persons using it to pay a reasonable sum for that privilege.<sup>92</sup>

**270.** If farm lands in a village will be enhanced in value by constructing a sewer, they may be specially assessed, and if agricultural lands, worth \$100 an acre, will bring \$400 to \$1,000 an acre for suburban residence purposes, after construction of proper sewers, such lands are benefited.<sup>93</sup>

### **Irrigating arid lands.**

**271.** Upon the same principle of benefit resulting to the owner from a local improvement which authorizes the reclamation of swamp and overflowed lands,<sup>94</sup> the reclamation of arid lands by irrigation is now unquestionably settled in favor of the exercise of the power of special assessment for the payment of the expenses of such improvement, when duly authorized by legislative authority.<sup>95</sup> In view of the recent acts of congress looking to the reclamation of enormous tracts of now practically valueless land, the subject will probably become one of vast importance, and be the occasion for many opinions by the courts of last resort.

### **Sweeping, sprinkling and lighting streets — Removing snow.**

**272.** Although the flushing of paved streets, or laying the dust on urban thoroughfares might be justified as an exercise of the police power, it is difficult to reconcile it with

<sup>92</sup> *Witman v. Reading*, 169 Pa. St. 375, 32 Atl. 576; *Park Ave. Sewers*, 169 Pa. St. 433, 32 Atl. 574.

<sup>93</sup> *Leitch v. La Grange*, 138 Ill. 291, 27 N. E. 917.

<sup>94</sup> *Petition of New Orleans Draining Co.*, 11 La. Ann. 338.

<sup>95</sup> *Fallbrook Ir. Dist. v. Bradley*, 164 U. S. 112, 41 L. ed. 369, 17 Sup. Ct. Rep. 56; *Regents v. Williams*, 9 Gill. & J. 365, 31 Am. Dec. 72; *Hagar v. Supervisors*, 47 Cal.

222; *Turlock Ir. Dist. v. Williams*, 76 Cal. 360, 18 Pac. 379; *Central Ir. Dist. v. De Lappe*, 79 Cal. 351, 21 Pac. 823; *Irr. Dist. v. Collins*, 46 Neb. 411, 64 N. W. 1086; *In re Madera Irr. Dist.* 92 Cal. 296, 14 L. R. A. 755, 27 Am. St. Rep. 106, 28 Pac. 272, 675. In this latter case, the power of the legislature to impose the tax without any regard to benefits is strongly asserted.



the well recognized principles upon which special assessments are imposed, although some courts of excellent and recognized authority have sustained such exercise of the taxing power.<sup>96</sup> But if it be true that special benefits cannot form any part of the compensation provided for taking private property for public use, unless they attach to and become a part of the taxed property,<sup>97</sup> or that the idea of permanence enters into the foundation theory of special assessment for benefits, then the better reason, as well, perhaps, as the weight of authority would point to the opposite conclusion, that it is not a local improvement within the meaning of the statute authorizing municipalities to make such improvement by special assessment proceedings.<sup>98</sup>

<sup>96</sup> *Reinken v. Fuehring*, 130 Ind. 382, 15 L. R. A. 624, 30 Am. St. Rep. 247, 30 N. E. 414; *Kansas City v. O'Connor*, 82 Mo. App. 655. A statute authorizing a city to pay for watering certain streets at the public expense, and to determine that certain other streets shall be watered at the expense of abutters, and the expense thereof assessed upon the abutting estates according to their lineal feet of frontage upon the street, is constitutional, as applied to occupied estates in the center of a large city. *Sears v. Boston*, 173 Mass. 71, 43 L. R. A. 834, 53 N. E. 138; *Phillips Academy v. Andover*, 175 Mass. 118, 48 L. R. A. 550, 55 N. E. 841; *Tift v. Buffalo*, 7 N. Y. supp. 633; *State v. Reis*, 38 Minn. 371, 38 N. W. 97. In the latter case, the opinion goes upon the principle that it is a local improvement, and that it is only a matter of degree which distinguishes it theoretically from paving, which lasts only a few years. The court evidently overlooked the fact that it is the policy of most states to provide that the expense of repairing

or renewing pavements shall be a general charge. The most philosophical source of authority to order the cost of sprinkling to be charged against abutting property would be under the police power.

In *Hawes v. Fliegler*, 87 Minn. 319, 92 N. W. 223, an assessment for street sprinkling was set aside for insufficiency of notice, but the court declined to review the *Reis* case.

<sup>97</sup> *State v. Leffingwell*, 54 Mo. 477.

<sup>98</sup> *Chicago v. Blair*, 149 Ill. 310, 24 L. R. A. 412, 36 N. E. 829; *Pettit v. Duke*, 10 Utah, 311, 37 Pac. 568; *Macon v. Patty*, 57 Miss. 378, 34 Am. Rep. 451.

"Under such ordinances (authorizing a special assessment for street sprinkling), streets are sprinkled in front of vacant lots on which are neither house nor any 'living creature.' It could hardly be said, with reason, that running a sprinkling cart now and then in front of such a lot adds to its market value. Nor is there, in such occasional 'laying of the dust,' any semblance of permanen-



**273.** The lighting of streets is usually paid for out of the general fund, but has been held a proper subject for local assessment on the property specially benefited.<sup>99</sup> But a sidewalk, being free to all travelers, it has been held that a citizen or lot owner cannot be compelled to keep it free from snow at his own expense, even under the police power, or by fine and penalty imposed by ordinance.<sup>1</sup>

cy. It is as evanescent as the early and the later dew, and, in my judgment, it is no more within the power of a municipality thus to create liens on the citizen's property, than to hire a 'rain-maker' to vex the skies for refreshing showers, and charge the lots adjacent to the rain drops with the cost thereof. As the sprinkling of the public highways of a city, like the cleaning thereof, contributes much to the comfort and enjoyment of the public, its cost should be made a general, and not a special burden." Phillips, D. J. in *N. Y. Life Ins. Co. v. Prest*, 71 Fed. 815.

"It is, however, insisted that the sprinkling of the streets during the summer months renders the occupation of adjacent property more enjoyable and comfortable, and that, therefore, the property is enhanced in value. Doubtless the same result would follow by placing vases at convenient points on the street, to be filled every morning with fresh-cut flowers, or by open air concerts, in which music should be selected with reference to the taste of the adjacent dwellers. So the employment of an efficient police force, whereby greater safety was felt, would add to the enjoyment and comfort of persons residing upon the street.

The proper watering and clipping of the grass upon the lawn and terrace, the removal of garbage from the premises, besides saving expense to the occupant, would add to the enjoyment, and possibly the healthfulness of the locality. These all might be improvements, and increase, while they continued, the desirability of property in their locality. But they are not improvements, either of the property or the street, within the legislative contemplation when granting power to make local improvements by special assessment." *Chicago v. Blair, supra*.

"In an attenuated sense, sprinkling may be a protection to the school building, if dust blowing against it is an injury, but it is no more of a protection than the police regulation which guards the property from vandals, and gives the alarm in case of fire, nor is it any more of a protection than the department that responds to the call of fire and saves the property from destruction. *Butte v. School Dist. No. 1*, 29 Mont. 336, 341.

<sup>99</sup> *Jonas v. Cincinnati*, 18 Ohio 318; *Ewart v. Western Springs*, 180 Ill. 318, 54 N. E. 478.

<sup>1</sup> *Gridley v. Bloomington*, 88 Ill. 554, 30 Am. Rep. 566. But see *Pick*.



**Improving water courses.**

**274.** Under a charter authorizing a city to levy special assessments for improving streets and alleys, laying sidewalks, building sewers, and other like improvements, these powers do not confer authority to widen a navigable river of the United States which is under the control of the general government, and to levy assessments to pay for such widening. Such an improvement has none of the elements of a local improvement, which cities have been accustomed to make by special assessment.<sup>2</sup> But the direct contrary has been held,<sup>3</sup> and it is difficult to see why there should be any difference in principle between a highway by water and one by land, if the other essentials for a proper special assessment are present, for unless benefits result, an assessment will be void.<sup>4</sup> In any event, express charter authority is necessary.<sup>5</sup>

**Personal property.**

**275.** It has been laid down as one of the cardinal rules for special assessments that they could be levied only on real estate,<sup>6</sup> but in Louisiana they are levied on oysters<sup>7</sup> in the waters protected by the levees. This is upon the theory that the oyster beds are benefited by the levees, as they would be killed by the fresh water in case of crevasses, and the court upheld the special assessment laid by statute, of one-half cent on every bushel of oysters produced from the beds protected by the levees, to be expended in the maintenance of the levee

<sup>2</sup> Chicago v. Law, 144 Ill. 569, 33 N. E. 855.

<sup>3</sup> Cook v. Portland, 20 Or. 580, 13 L. R. A. 533, 27 Pac. 263; Johnson v. Milwaukee, 40 Wis. 315; Holton v. Milwaukee, 31 Wis. 27; People v. Buffalo, 147 N. Y. 675, 42 N. E. 344.

<sup>4</sup> An assessment of the expense of constructing a bridge or cover over a mill-race running through

the center of a street, upon owners of lots adjoining said street, who were not benefited by the race, or authorized to take water therefrom, is void. People v. Common Council, 54 N. Y. 507.

<sup>5</sup> Wright v. Chicago, 20 Ill. 252.

<sup>6</sup> Macon v. Patty, 57 Miss. 378, 34 Am. Rep. 451.

<sup>7</sup> Commissioners v. Mialegrvich, 52 La. Ann. 1292, 27 So. 790.



system, as well as a similar assessment on sugar, syrup, molasses, rice and oranges raised on lands protected from inundation by the same system. And a statute levying upon the owners of ore-beds an assessment of one and a half cents a ton on every ton of ore mined and carried away with teams over the roads in a certain township, has been declared constitutional.<sup>8</sup> Although the underlying principle in both cases is that of benefits, it would seem more accurate to call the imposition a special tax rather than a special assessment.

### Miscellaneous.

**276.** Court houses and public buildings are customarily paid for from the proceeds of general taxation, or by a special tax levied on all the property within the municipality. In 1860, the Supreme Court of Indiana held that a city could not pay for a school house from the general fund, but only by a tax assessed, levied and collected for that specific purpose.<sup>9</sup> And in Pennsylvania, the old court house having been destroyed by fire, a statute authorized the county commissioners to add \$500 yearly for a term of years to the taxes of the borough of Tonawanda "for the purpose of defraying the expenses of erecting the court house and jail" then being erected there. The court held the act constitutional, and because the erection of a court house in the borough tended to produce an increase of business and an appreciation of property therein, its inhabitants were morally bound to contribute in the proportion which the legislature might fix.<sup>10</sup>

**277.** Assessments have been sustained for filling land,<sup>11</sup> sinking an artesian well,<sup>12</sup> wells, cisterns, and pumps,<sup>13</sup> for

<sup>8</sup> Weber v. Reinhard, 73 Pa. St. 370, 13 Am. Rep. 747.

<sup>9</sup> Nill v. Jenkinson, 15 Ind. 425.

<sup>10</sup> Kirby v. Shaw, 19 Pa. St. 258.

<sup>11</sup> Lawrence v. Webster, 167 Mass. 513, 46 N. E. 123.

<sup>12</sup> Ruppert v. Mayor etc., 23 Md. 184.

<sup>13</sup> Sharp v. Speir, 4 Hill, 76; Steam Forge Co. v. Anderson, 22 Ky. L. Rep. 397, 57 S. W. 617; Abraham v. Louisville, 23 Ky. L. Rep. 375, 62 S. W. 1041



erecting fences around a township,<sup>14</sup> and for planting, maintaining and protecting shade trees.<sup>15</sup> But the legislature may not impose upon a municipality a tax for furnishing its citizens with free water without its consent,<sup>16</sup> nor specially assess a citizen for the abatement of a nuisance created by the city,<sup>17</sup> and the city council is without jurisdiction to improve property owned by the city, held and used for market purposes, at the expense of the owners to adjoining lots.<sup>18</sup>

**278.** Many other cases will doubtless arise in the future, where the principles of special assessment, under legislative sanction, will be applied to help pay the ever increasing expense of modern municipal management and methods. But the courts can undoubtedly be relied upon to see that gross injustice is not permitted, and prevent a local assessment from so far transcending "the limits of equality and reason that its exaction would cease to be a tax, or contribution to a common burden, and become extortion and confiscation."<sup>19</sup>

<sup>14</sup> *Simpson v. Commissioners*, 84 N. C. 158; *Cairn v. Commissioners*, 86 N. C. 8; *Shuford v. Commissioners*, 86 N. C. 552; *Green Co. Commissioners v. Lenoir*, 92 N. C. 180.

<sup>15</sup> *Heller v. Garden City*, 58 Kan. 263, 48 Pac. 841.

<sup>16</sup> *Blades v. Water Commissioners*, 122 Mich. 366, 81 N. W. 271.

<sup>17</sup> *Weeks v. Milwaukee*, 10 Wis.

242. See, also, *Smith v. Milwaukee*, 18 Wis. 69.

<sup>18</sup> *Ft. Wayne v. Shoaff*, 106 Ind. 66, 5 N. E. 403.

<sup>19</sup> *Redfield, J.*, in *Allen v. Drew*, 44 Vt. 188, *op.* The legislature have power to enact that a town may raise money for an agricultural college to be established therein by the state. *Merrick v. Amherst*, 12 Allen 500.



## CHAPTER V.

### WHAT PROPERTY SUBJECT TO SPECIAL ASSESSMENT — EXEMPTIONS.

In general, 279-280.	"Local" or "vicinity" property, 308.
Public property, 281-283.	"Fronting" property, 309.
Street railway property, 284-288.	What is a "square," 310.
Railroad property, 289-293.	What is a "block," 311.
Agricultural lands, 294.	EXEMPTIONS — In general, 312-316.
Personal property, 295.	Cemeteries, 317.
Realty benefited, 296.	Property of educational, religious and charitable institutions, 318-319.
Realty dedicated, 297.	Homesteads, 320.
Ownership, 298.	Railroad property, 321.
Street intersections, etc., 299-301.	Conveyances to avoid assessment, 322.
Location of property assessable, 302.	
"Abutting" property, 303-304.	
"Adjacent" property, 305.	
"Adjoining" property, 306.	
"Contiguous" property, 307.	

#### In general.

279. As we have seen in previous chapters, it is within the discretion of the legislature to say what property shall be liable to special assessment, subject to the limitation that it be real property, and benefited by the improvement. Like all general rules, this is subject to exceptions, but the legislative authority, within the limitations mentioned, is more nearly supreme in this division of the general subject than in any other. It may declare conclusively that only the property within the taxing district shall be especially assessed on account of a local improvement within that district,<sup>1</sup> and the costs and expenses of such local improvement must be confined to the locality in which the improvement is made.<sup>2</sup>

<sup>1</sup> Adams v. Shelbyville, 154 Ind. 467, 49 L. R. A. 797, 77 Am. St. Rep. 484, 57 N. E. 114.

<sup>2</sup> In re Lands in Flatbush, 60 N. Y. 398.



**280.** If a general tax be levied in a city to raise money to pay for the street improvement under a law which provides that lands specially benefited by the improvement shall be assessed therefor, the fact that part of that tax was levied on land, will not relieve the land from assessment for special benefits.<sup>3</sup> The question in every case is, will the property assessed be specially benefited by the proposed improvement. If it is, it makes no difference that it is private property, unoccupied, unimproved, and non-abutting.<sup>4</sup>

### Public property.

**281.** Property of the general government, such as may be used for a custom house, post-office, or other public building, is not liable for a special assessment.<sup>5</sup> With this exception, all other public property is assessable if so provided by legislation, for it is unquestionably competent for the law-making power to authorize the lands of the state, or public property belonging either to municipal corporations or political subdivisions to be subject to special assessment, but it will not be deemed included unless by special enactment or necessary implication.<sup>6</sup> The mere transfer, however, by legislative enactment, to a city of a county road within its boundaries, does not thereby make it a street, and subject to assessment.<sup>7</sup> The question is one of legislative expediency, except where there is a constitutional prohibition on the subject. Public property in Louisiana is liable to assessment for public improvements,<sup>8</sup> while in Arkansas and Iowa, the con-

<sup>3</sup> *State v. Newark*, 48 N. J. L. 101, 2 Atl. 627.

<sup>4</sup> *Guild, Jr. v. Chicago*, 82 Ill. 472; *L. & N. R. Co. v. E. St. Louis*, 134 Ill. 656, 25 N. E. 962; *Wright v. Boston*, 9 Cush. 233; *Bishop v. Tripp*, 15 R. I. 466, 8 Atl. 692.

<sup>5</sup> *Fagan v. Chicago*, 84 Ill. 227, and see note to *New Orleans v. Warner*, 175 U. S. 120, 44 L. ed. 96, 20 Sup. Ct. Rep. 44.

<sup>6</sup> *Hassan v. Rochester*, 67 N. Y. 528; *St. Louis v. Brown*, 155 Mo. 545, 56 S. W. 298; *State v. Hartford*, 50 Conn. 89, 47 Am. Rep. 622.

<sup>7</sup> *Heiple v. E. Portland*, 13 Or. 97, 8 Pac. 907.

<sup>8</sup> *New Orleans v. Warner*, 175 U. S. 120, 44 L. ed. 96, 20 S. Ct. Rep. 44.



trary rule prevails, and such property should be excluded in determining the value of property within an improvement district where the assessment is based on valuation.<sup>9</sup> Property belonging to the board of public schools may be assessed for street improvements in Missouri and Illinois,<sup>10</sup> but not in Kentucky<sup>11</sup> or Ohio.<sup>12</sup>

**282.** The term "municipal corporations," as used in the constitutional amendment in Minnesota, authorizing local assessments without regard to a cash valuation of the property assessed, includes counties,<sup>13</sup> and a city may levy a special assessment for improving the street in front of a court house square within the city, and if the board of county commissioners do not consent to and pay the same, the court may adjust the matter.<sup>14</sup> A public park or square is subject to assessment.<sup>15</sup>

<sup>9</sup> *Ahern v. Board of Improvement*, 69 Ark. 68, 61 S. W. 575; *Polk Co. etc. Bank v. State*, 69 Iowa, 24, 28 N. W. 416.

<sup>10</sup> *St. Louis Public Schools v. St. Louis*, 26 Mo. 468; *Chicago, to use etc. v. Chicago*, 207 Ill. 37, 69 N. E. 580.

<sup>11</sup> *Louisville v. Leatherman*, 99 Ky. 213, 35 S. W. 625.

<sup>12</sup> *Toledo v. Board of Education*, 48 Ohio St. 83, 26 N. E. 403; *Board of Education v. Toledo*, 48 Ohio St. 87, 26 N. E. 404.

<sup>13</sup> *Dowlan v. Sibley Co.*, 36 Minn. 430, 31 N. W. 517.

The exemption of municipal property from taxation relates to general county and state taxes, and has no reference to assessments for improvements made under special laws and of a local character. *San Diego v. Linda Vista Irrigation District*, 108 Cal. 189, 35 L. R. A. 33, 41 Pac. 291; *Hassan v. Rochester*, 67 N. Y. 528.

The constitutional provision that

the property of counties may be exempted from taxation by general law implies that in the absence of any law exempting it, such property would be liable to taxation. There being no law exempting it, a city may assess a water tax against county property. *Cook County v. Chicago*, 103 Ill. 646.

Exemption from taxation does not exempt from special assessments. Where there is no statute exempting county property from special assessment, by necessary implication it is liable thereto. *McLean Co. v. Bloomington*, 106 Ill. 209; *Cook Co. v. Chicago*, 103 Ill. 646. (So held above as to a court house square.)

<sup>14</sup> *Commissioners etc. v. Ottawa*, 49 Kan. 747, 33 Am. St. Rep. 396, 31 Pac. 788; *Adams Co. v. Quincy*, 130 Ill. 566, 6 L. R. A. 155, 22 N. E. 624.

<sup>15</sup> *Scammon v. Chicago*, 42 Ill. 192.



**283.** As a general rule, property owned by a municipal corporation and used for public purposes is not subject to assessment for benefits for such improvements in the absence of language in the statute indicating an intention to tax it,<sup>16</sup> and public streets are not assessable. They are not property in the sense that a city hall, school houses and other public property are, and are not liable to taxation for public improvement,<sup>17</sup> unless by force of a statute which clearly authorizes it. And where a strip in the middle of a wide street has been by the city converted into a park, with a paved roadway on either side, the property of the abutting owner is liable for the cost of a street improvement only to the center of the paved roadway, under a charter provision that street improvements opposite public grounds shall be paid from the ward fund.<sup>18</sup>

**Street railway property.**

**284.** There is a material diversity of opinion as to whether the track, rails, ties and right of way of street railways are subject to assessment for local improvement. A street railway operated on the trolley system receives no apparent benefit from the paving of a street, where one operated by animal power, or cable, might receive very material benefit, while all systems would receive a benefit by the proper grading of the streets upon which they are operated. And the questions before the courts turn largely upon the terms of the legislative grant or local franchise.

**285.** In Connecticut, the property of such a railway, laid in and attached to the soil of the street, is liable to assessment for the expense of paving the streets in which it is laid, as real estate;<sup>19</sup> and in Illinois, there are numerous decisions sustaining the right of special assessment for the bet-

<sup>16</sup> *State v. Hotaling*, 44 N. J. L. 347.

<sup>17</sup> *Smith v. Buffalo*, 90 Hun, 118, 159 N. Y. 427, 54 N. E. 62.

<sup>18</sup> *Boyd v. Milwaukee*, 92 Wis. 456, 66 N. W. 603, and see Ben-

*nett v. Seibert*, 10 Ind. App. 369, 35 N. E. 35, 37 N. E. 1071; *Murphy v. Peoria*, 119 Ill. 509, 9 N. E. 895.

<sup>19</sup> *New Haven v. Fair Haven & N. R. Co.*, 38 Conn. 422, 9 Am.



terment of the street, and the right of way and occupancy, franchise and interest of a street railway having a track in a street under due charter authority, is property which renders it liable to such burdens,<sup>20</sup> and is not relieved therefrom by the fact that a statute requires its track to be assessed as personal property,<sup>21</sup> and the franchise and right of user of an elevated railway, is liable to special assessment for the improvement of the street over which the structure is erected,<sup>22</sup> which decision marks the extreme limit.

**286.** In New Jersey, the rule is to the contrary, and the court held, in a case where the title to a strip of land in the center of the street was held by a horse railroad company, and its tracks were laid thereon, that such company acquired no benefit from the grading of the street sufficient to justify an assessment for a portion of the cost, saying, "The benefit conferred consists only in the increased facility in running the cars of the company by reason of diminished grades. But such a benefit, if it may be called such, is conferred upon the franchise and not upon the strip of land upon which the cars run. The land burdened with the public easement would in no respect be increased in value thereby."<sup>23</sup> But the roadbed of a street railway is subject to assessment for the benefits resulting from the building of a sewer in the street,<sup>24</sup> and on general principles, its real estate is liable for assessment for all municipal purposes.

Rep. 399. But see, *State v. Anderson*, 90 Wis. 550, 63 N. W. 746; *Farmer's L. & T. Co. v. Ansonia*, 61 Conn. 76, 23 Atl. 705.

<sup>20</sup> *Chicago City R. Co. v. Chicago*, 90 Ill. 573, 32 Am. Rep. 54; *Page v. Chicago*, 60 Ill. 441; *Kuehner v. Freeport*, 143 Ill. 92, 17 L. R. A. 774, 32 N. E. 372; *Rich v. Chicago*, 152 Ill. 18, 38 N. E. 255.

<sup>21</sup> *Cicero & P. St. R. Co. v. Chicago*, 68 Notes Ochsenfeld Sep 26 No 6 cago, 176 Ill. 501, 52 N. E. 866; *Lake Street El. R. Co. v. Chicago*,

183 Ill. 75, 47 L. R. A. 624, 55 N. E. 721; *W. Chi. St. R. Co. v. Chicago*, 178 Ill. 339, 53 N. E. 112.

<sup>23</sup> *Davis v. Newark*, 54 N. J. L. 144, 23 Atl. 276; citing *State v. Newark*, 27 N. J. L. 185, 191; *N. J. S. R. Co. v. Jersey City*, 68 N. J. L. 140, 52 Atl. 300.

<sup>24</sup> *State v. Passaic*, 54 N. J. L. 340, 23 Atl. 945. See, also, *Shreveport v. Prescott*, 51 La. Ann. 1895, 46 L. R. A. 193, 26 So. 664; *Shreveport v. Shreveport etc. Co.*, 104 La. 260; 29 So. 129.



**287.** The only rational view to take of this subject as to what property is subject to special assessment is the one from the standpoint of enhancement in the market value of the real property affected. If it is, or may be, enhanced in value by the improvement, it should be subject to assessment; but if it is not so favorably affected, or it is impossible that it should be so benefited, it should not be assessed.

**288.** The construction of statutory and municipal ordinance provisions naturally gives rise to further difference in the courts, much of the apparent discrepancy arising from the variance in the canons of statutory construction theretofore adopted by them. As each case depends upon its own peculiar facts, as well as the construction to be given the franchise provisions, no general rule can be given, but the subject is illustrated by the cases given in the notes.<sup>25</sup>

<sup>25</sup> Where permission is granted to a street railway company to lay its tracks on a paved street, expressly stipulating that no charge for paving should be made against the company, the council cannot thereafter enforce a claim against the company for any part of the cost of the original pavement. *Atlanta etc. Ry. Co. v. Atlanta*, 111 Ga. 255, 36 S. E. 667.

Property belonging to a railroad company used partly for depot grounds and part being leased to private parties is subject to assessment for paving the street upon which it abuts, in proportion to the benefits received. *Chi. T. Tr. Co. v. Chicago*, 178 Ill. 429, 53 N. E. 361.

Under an ordinance authorizing a street railway company to construct, maintain, and operate a street railway on certain streets, and that if the city should thereafter pave any street in which such railway "may run," the railway

shall pave and keep in repair the space between the tracks, the city is without authority to compel the railway company to pay the expense of paving its portion of a street upon which it is authorized to run, but where the tracks have not actually been laid. *Harris v. Macomb*, 213 Ill. 47, 72 N. E. 762.

Where a contract between a street railway company and a city leaves to the judgment of the common council as to whether the cost of pavement between the rails shall be assessed against the railway company or against the abutting property, the assessment for such work cannot be adjudged to the abutting property, when the ordinance directs that it shall be levied against the property of the company, and the contractor is sent to it for his pay. *State v. Michigan City*, 138 Ind. 455, 37 N. E. 1041.

An assessment against a railroad company for paving a street crossing their tracks, is invalid



**Railroad property.**

**289.** That the property of a railroad company, except its right of way, may be benefited by local improvements, and therefore subject to special assessment, is an almost univer-

where the company derives no benefit therefrom in the improvement of their lands for the uses to which they are appropriated. *State v. Elizabeth*, 37 N. J. L. 330.

Lands necessary for railroad tracks and buildings used for railroad purposes solely is not "specially benefited" by the paving of a street in front of it, so as to render it subject to special assessment therefor, under the Connecticut statute. *Naugatuck R. Co. v. Waterbury* (Conn.), 61 Atl. 474; *First Eccl. Soc. v. Hartford*, 35 Conn. 66; *Bridgeport v. R. R. Co.*, 36 Conn. 255, 4 Am. Rep. 63; *R. R. Co. v. New Haven*, 42 Conn. 279, 19 Am. Rep. 534; *Hartford v. W. Middle Dist.*, 45 Conn. 462, 29 Am. Rep. 687; *R. R. Co. v. New Britain*, 49 Conn. 40.

An ordinance of the city requiring a street railway company to pave the space within its tracks and two feet outside the same, gives no authority in support of the assessment against the roadbed or real estate occupied by it for benefits from street paving. *N. J. S. R. v. Jersey City*, 68 N. J. L. 140, 52 Atl. 300.

The fact that a street railway company has agreed to keep a portion of a street in a city in repair, as one of the conditions on which it was permitted to lay its tracks, does not deprive the proper city authorities of the power or absolve them from the duty to keep such streets in a safe and proper repair,

and even if the city fails to require the company to perform its contract, this is not an objection to an assessment upon owners of lots upon the streets for necessary repairs. *People v. Brooklyn*, 65 N. Y. 349.

No part of the expense of paving a street is chargeable to a street railway having simply a track in the street under a charter which provides no part of such expense shall be assessed on lands "not bordering on or touching the street," as the land occupied by the railway did not border on or touch the street within the meaning of the charter, it being simply a part thereof. *O'Reilly v. Kingston*, 114 N. Y. 439, 21 N. E. 1004.

The provisions of a charter authorizing the common council "to require all railroad companies operating street railroads in any of the streets of the city to repave between their tracks, and at least two feet in width on each side thereof, whenever the common council shall deem such repavement necessary," is not mandatory, but confers a discretionary authority. The private owners of property fronting such street have no vested right, or claim *de jure*, that a railroad company lawfully operating its road in the street shall repave or bear the expense of repaving any portion of it. *Gilmore v. Utica*, 121 N. Y. 561, 24 N. E. 1009.

When a street railway is permit-



ted by a common council to lay its tracks in the city streets upon condition that it should "replace and keep in good repair the pavement between and at least two feet in width on each outer side of the tracks," etc., this is a contract with the city (not with abutting owners), and not a statutory obligation, and the city can enforce same by action, in case of refusal to perform it; and if the city does not see fit to enforce it, the expense of paving the street, up to the proportion fixed by statute, can be legally assessed on the abutting property. *Gilmore v. Utica*, 121 N. Y. 561, 24 N. E. 1009.

The fact that the rails, ties and tracks of a street surface railroad are property and subject to taxation generally, affords no sufficient reason for taxing them for street improvements, when the law has not made them specially assessable for such purposes. *People v. Gilon*, 126 N. Y. 147, 27 N. E. 282.

A charter power to make an assessment for a street improvement "upon the property benefited in the manner authorized by law," limits the power to assess to the houses and lots benefited, and gives no authority to assess the track, ties, etc., of a street railway. *People v. Gilon*, 126 N. Y. 147, 27 N. E. 282.

When the city consents to the use of a portion of a street by a street railway company, on condition that it pave its right of way and keep it in good repair, or, pave its right of way in a specified manner superior to the then construction of the streets and keep said paving in good repair, the city may, after notice to the company

of the adoption of an improved pavement for the rest of the street, with which the original pavement is incompatible, require the company, its right of way being then out of repair, to replace the same with a pavement reasonably corresponding with the street pavement adopted. *Reading v. United Traction Co.*, 202 Pa. St. 571, 52 Atl. 106. See *Shamokin v. Shamokin E. R. Co.*, 206 Pa. St. 625, 56 Atl. 64.

An ordinance requiring a street railway company to completely improve a street occupied by its tracks, and between them, and at such times as city shall select, which is accepted by the company in consideration of a twenty year extension of franchise, constitutes a contract fixing an equivalent for special assessments for improving the street and precluding further assessment for that purpose. *W. Chi. St. R'y Co. v. Chicago*, 178 Ill. 339, 53 N. E. 112.

A lot abutting upon an alley intersecting a street improved between the latter and the next parallel street is assessable under a statute providing that half the cost of street and alley intersections shall be apportioned upon the lots abutting upon the intersecting streets or alley to the first street parallel to the street or alley improved, although between it and the street improved the alley is intersected by an alley wide enough to make a street in some cities. *Praigg v. Western P. & S. Co.*, 143 Ind. 358, 42 N. E. 750.

A charter provision that the aldermen shall have power to pave any street "and charge the cost and expense thereof to the center



sal rule, well grounded in justice and in reason.<sup>26</sup> In some states, assessments against the right of way for paving and other street improvements have been sustained, but the weight of authority is to the contrary, as well as the better reason. While the easement in the street may be rendered more easily used and the running of trains thereon made more economical, it can hardly be claimed that the fee is enhanced in value, which is the only correct standard. But upon the proposition that such an easement is "property," and "contiguous property" at that, the Illinois court holds that a railroad right of way is always subject to special taxation, and usually subject to special assessment as well, and in that court the question must be considered as definitely settled by a long line of decisions,<sup>27</sup> although a later case

of the street . . . to any lot or lots fronting or abutting on such street," and that the word lot or lots "shall be deemed to include . . . parcels or strips of land," does not authorize a special assessment upon the right of way of a street railway company, lying wholly within the street. *Oshkosh City R. Co. v. Winnebago Co.*, 89 Wis. 435, 61 N. W. 1107. When paving not required, see *Marshalltown L. H. & R. Co. v. Marshalltown*, 127 Iowa, 637, 103 N. W. 1005.

<sup>26</sup> *L. & N. R. Co. v. Barber Asphalt Pav. Co.*, 197 U. S. 430, 49 L. ed. 819, 25 Sup. Ct. Rep. 466; *In re North Beach & M. R. Co.*, 32 Cal. 499; *C. R. I. & P. R. Co. v. Chicago (Ill.)*, 27 N. E. 926; *C. & N. W. R. Co. v. People*, 120 Ill. 104, 11 N. E. 418; *N. J. M. R. Co. v. Jersey City*, 42 N. J. L. 97; *People v. Gilon*, 126 N. Y. 147, 27 N. E. 282; *N. Y. & N. H. R. Co. v. New Haven*, 42 Conn. 279, 19 Am. Rep. 534; *N. Y. N. H. & H. R. Co.*

*v. New Britain*, 49 Conn. 40; *C. R. I. & P. R. Co. v. Chicago*, 139 Ill. 573, 28 N. E. 1108; *B. & M. R. R. Co. v. Spearman*, 12 Iowa, 112; *State v. District Court*, 68 Minn. 242, 71 N. W. 27; *Nevada v. Eddy*, 123 Mo. 546, 27 S. W. 471; *N. J. R. & T. Co. v. Elizabeth*, 37 N. J. L. 330; *K. C. P. & G. R. Co. v. Waterworks Dist.*, 68 Ark. 376, 59 S. W. 248; *Ahearn v. Board of Improvement*, 69 Ark. 68, 61 S. W. 575; *Mt. Pleasant v. B. & O. R. Co.*, 138 Pa. St. 365, 11 L. R. A. 520, 20 Atl. 1052; *C. M. & St. P. R. Co. v. Milwaukee*, 89 Wis. 506, 28 L. R. A. 249, 62 N. W. 417; *Ludlow v. Trustees, etc.*, 78 Ky. 357.

<sup>27</sup> *New Whatcom v. Bellingham, etc.*, R. Co., 16 Wash. 137, 47 Pac. 237; *K. C. P. & G. R. Co. v. Waterworks Dist.*, 68 Ark. 376, 59 S. W. 248; *Ahearn v. Board of Improvement*, 69 Ark. 68, 61 S. W. 575; *I. C. R. Co. v. Kankakee*, 164 Ill. 608, 45 N. E. 971; *Kuehner v. Freeport*, 143 Ill. 92, 17 L. R. A. 774,



seems to question the authority of the former decisions of the court, not upon the ground that the right of way may not be assessed, if it be benefited, but that as a general rule it cannot be.<sup>28</sup>

**290.** In a much earlier case, the court held that nothing but tangible property can be said to abut upon a street, and that mere intangible rights or privileges cannot abut on anything, are not subject to a special assessment under a statute authorizing the same upon abutting property, and that under such a statute, a railroad "right of way, occupancy, franchise, etc., is not assessable."<sup>29</sup> A later case holds that such portions of the right of way as are included between cross-streets may be specially taxed for the cost of building sidewalks thereon across such right of way,<sup>30</sup> while another case is to the effect that a mere license to a railroad company to run its trains over the track and right of way of another company is not such a property right as may be subjected to a special assessment.<sup>31</sup> But for drainage purposes, such assessment may be laid, as the right of way may be benefited thereby, but not the track.<sup>32</sup>

32 N. E. 372; *Rich v. Chicago*, 152 Ill. 18, 38 N. E. 255; *C. & N. W. R. Co. v. Elmhurst*, 165 Ill. 148, 46 N. E. 437; *C. & A. R. Co. v. Joliet*, 153 Ill. 649, 39 N. E. 1077; *Railway Co. v. Jacksonville*, 114 Ill. 562, 2 N. E. 478; *C. & N. W. R. Co. v. People*, 120 Ill. 104, 11 N. E. 418; *I. C. R. Co. v. Decatur*, 126 Ill. 92, 1 L. R. A. 613, 18 N. E. 315; *Lightner v. Peoria*, 150 Ill. 80, 37 N. E. 69; *I. C. R. Co. v. Mattoon*, 141 Ill. 32, 30 N. E. 773; *I. C. R. Co. v. Commissioners*, 129 Ill. 417, 21 N. E. 925; *Drainage Commissioners v. I. C. R. Co.*, 158 Ill. 353, 41 N. E. 1073; *I. C. R. Co. v. Decatur*, 154 Ill. 173, 38 N. E. 626; *I. C. R. Co. v. Decatur*, 147 U. S. 191, 37 L. ed. 133, 13

Sup. Ct. Rep. 293; *C. B. & Q. R. Co. v. Quincy*, 136 Ill. 563, 29 Am. St. Rep. 334, 27 N. E. 192; *Muscatine v. C. R. I. & P. R. Co.*, 79 Iowa, 645, 44 N. W. 909; *N. Ind. R. R. Co. v. Connelly*, 10 Ohio St. 159; *Ludlow v. Cincinnati S. R. Co.*, 78 Ky. 358; *Appeal of North Beach & M. R. Co.*, 32 Cal. 500; *Philadelphia v. P. W. & B. R. Co.*, 33 Pa. St. 41.

<sup>28</sup> *River Forest v. C. & N. W. R. Co.*, 197 Ill. 344, 64 N. E. 364.

<sup>29</sup> *South Park Commissioners v. C. B. Q. R. Co.*, 107 Ill. 105.

<sup>30</sup> *I. C. R. Co. v. People*, 170 Ill. 224, 48 N. E. 215.

<sup>31</sup> *L. & N. R. Co. v. E. St. Louis*, 134 Ill. 656, 25 N. E. 962.

<sup>32</sup> *Drainage Commissioners v. I.*



**291.** The use of the term "right of way" in an ordinance providing for special taxation of railroad property for street improvement, is not ambiguous, but imposes a tax upon the tracks and road beds lying in the street to be improved.<sup>33</sup>

**292.** In Connecticut, Iowa, New York, Pennsylvania, and Wisconsin, it is laid down as axiomatic, that a mere right of way is not enhanced in value by the paving of a street, and cannot be specially assessed to pay for it.<sup>34</sup> The

C. R. Co., 158 Ill. 353, 41 N. E. 1073; I. C. R. Co. v. Commissioners, 129 Ill. 417, 21 N. E. 925; L. N. A. & C. R. Co. v. State, 122 Ind. 443, 24 N. E. 350; Commissioners, etc. v. Commissioners, 127 Ill. 581, 21 N. E. 206.

<sup>33</sup> C. R. I. & P. R. Co. v. Moline, 158 Ill. 64, 41 N. E. 877.

This is in the same volume of reports as the first case cited in the preceding note, and, in connection with what has preceded, would indicate the decisions of the court are not quite so consistent as to be ideal.

<sup>34</sup> The easement of a railroad company in a limited portion of land adjoining a new highway is not assessable for benefits for laying out such new highway. Such benefits may be assessed upon the franchise of the company where they are direct, immediate, appreciable and certain, but not where they are contingent, remote, unappreciable or uncertain. *Bridgeport v. N. Y. & N. H. R. R. Co.*, 36 Conn. 255, 4 Am. Rep. 63; *N. Y. & N. H. R. Co. v. New Haven*, 42 Conn. 279, 19 Am. Rep. 534.

"It would be strange legislation that would authorize the soil of one public road to be taxed in order to raise funds to make or im-

prove a neighboring one." *Philadelphia v. P. W. & B. R. Co.*, 33 Pa. St. 43.

"A railroad from its very nature cannot derive any benefit from the paving, while all the rest of the neighborhood may, and it is not to be presumed that the compulsion was intended to be applied to such companies." *Junction R. Co. v. Philadelphia*, 88 Pa. St. 424. "In a case where we can declare as a matter of law that no such benefit can arise, the legislature is powerless to impose such a burden. It would not be a tax in any proper sense of the term; it would be a forced loan and would practically amount to confiscation." *Allegheny City v. West Pa. R. Co.*, 138 Pa. St. 375, 21 Atl. 763 (a striking commentary on the theory of legislative omnipotence).

A special assessment for street paving cannot be levied against a railroad right of way secured by condemnation proceedings, for the expense of paving a street on which it abuts, since such right of way is a mere easement in the land. *C. R. I. & P. R. Co. v. Ottumwa*, 112 Iowa, 300, 51 L. R. A. 763, 83 N. W. 1074.

No special benefits such as will sustain an assessment accrue to the tracks and necessary right of



Supreme Court of the last named state say, "It is universally conceded that all such assessments have their foundation, rest upon, and cannot lawfully exceed, the special benefits of the improvement to the property against which the cost of its construction, to that extent, is charged," and being of the opinion that the property could not be benefited as a matter of law, the assessment was held invalid.<sup>35</sup>

**293.** There is yet another reason for the claim that such a burden is not chargeable upon a mere right of way, and that is, that the enforcement of such an assessment by the ordinary process of sale and conveyance of the property assessed would necessarily dismember and break up the entirety and utility of the road as a line of travel and commercial intercourse, and interfere with and impair the paramount interest which the public have in it for these purposes; that the road and its franchises are an entirety, and that public policy forbids a severance and segregation of its several parts, which would disable it from performing the duties it owes to the public, and the courts have sustained the justice of this claim, in the absence of any statutory authority for enforcing the assessment.<sup>36</sup>

### **Agricultural lands.**

**294.** Agricultural lands, lying within or without the limits of a city, may be assessed under certain conditions,<sup>37</sup> and for drainage and sewerage purposes a wider latitude

way of a railroad from the improvement of the adjoining street. *C. M. & St. P. R. Co. v. Milwaukee*, 89 Wis. 506, 28 L. R. A. 249, 62 N. W. 417.

<sup>35</sup> *C. M. & St. P. R. Co. v. Milwaukee*, 89 Wis. 506, 28 L. R. A. 249, 62 N. W. 417.

<sup>36</sup> *Gue v. Tide Water Canal Co.*, 24 How. 263, 16 L. ed. 636; *People v. Gilon*, 126 N. Y. 147, 27 N. E. 282; *Plymouth R. Co. v. Colwell*,

39 Pa. St. 337, 80 Am. Dec. 322; *C. M. & St. P. R. Co. v. Milwaukee*, 89 Wis. 506, 28 L. R. A. 249, 62 N. W. 417; *Yellow River I. Co. v. Wood Co.*, 81 Wis. 562, 17 L. R. A. 92, 51 N. W. 1004; *Fond du Lac Water Co. v. Fond du Lac*, 82 Wis. 322, 16 L. R. A. 581, 52 N. W. 439.

<sup>37</sup> *Taber v. Grafmiller*, 109 Ind. 206, 9 N. E. 721; *Allen v. Davenport*, 107 Iowa, 907, 77 N. W. 532.



seems to exist than for any other purpose, but subject only to the limitations that the property assessed must be capable of being connected directly with the sewerage system, and be benefited by the work.<sup>38</sup> Under the Wisconsin statute for the reclamation of swamp and overflowed lands, a special assessment may be made against a town.<sup>39</sup> The cost of repairing a ditch may be assessed against the lands benefited thereby, although such land may have been originally assessed for the construction of the ditch.<sup>40</sup> So lands in the bed of a river, and lands above obstructions in a river which

<sup>38</sup> No person whose lots are not so placed as to permit of a present connection with the sewer, can be assessed for benefits. *State v. Hoboken*, 45 N. J. L., 482.

Where a new sewer becomes necessary to furnish a proper outlet for an existing sewer, land assessed for the old sewer may be further assessed for a new one, and if in levying such further assessment, the assessors regard both sewers as a unit, estimate the value of the benefit afforded by this unit, make due allowance for what difference charged for the old sewer in excess for the benefit derived from it, and levy only the residue, justice will be done. *Bayonne v. Morris*, 61 N. J. L. 127, 38 Atl. 819.

Property not on the line of a main sewer may be assessed in proportion to benefits received, if within the limits of a district having the right to drain into the sewer, or where some provision for securing such right is made. *Mason v. Chicago*, 178 Ill. 499, 53 N. E. 354.

An act granting the privilege of using as public sewers, former highway drains, constitutes a license fee or excise duty rather

than a tax, and does not require a previous estimate of cost of construction. *Hunter's Appeal*, 71 Conn. 189, 41 Atl. 557.

The diverting of a natural stream from its natural course, and carrying it into a sewer of sufficient capacity, may justify a local assessment to pay for the same, under a charter authority to construct sewers; and if the property relieved by the sewer of the waters of the stream would thereby receive greater benefits than adjacent property, which was relieved only of ordinary surface water, the assessment against it may be correspondingly greater. *Sherwood v. Duluth*, 40 Minn. 22, 41 N. W. 234. See *State v. Passaic*, 54 N. J. L. 340, 23 Atl. 945.

<sup>39</sup> And a finding by the commissioners that such town would "derive a benefit by the improvement of the highways therein to the amount of \$300," when confirmed by the court, is a sufficient adjudication that the town was benefited in that sum. *Muskego v. Drainage Com'rs*, 78 Wis. 40, 47 N. W. 11.

<sup>40</sup> *Park Co. Coal Co. v. Campbell*, 140 Ind. 28, 39 N. E. 149, 558.



have been removed, are liable for an assessment for benefits conferred.<sup>41</sup>

### Personal property.

295. Although it is a well-recognized rule that only real estate is liable to special assessment,<sup>42</sup> one court of eminent ability upholds a statute levying a special assessment upon certain specific personal property, and the court say, "Local assessments are, as a general rule, levied on land alone; but this is only because land is the kind of property which is usually benefited; but there exists no constitutional or other restriction on the legislative power; and when particular personal property has enjoyed a benefit from the works to which it owes its existence and preservation, nothing prevents the legislature from assessing it."<sup>43</sup> Accordingly a special assessment, so-called, is levied against each bale of cotton, bushel of oranges, hogshead of sugar and bushel of oysters raised within a certain district. If it were denominated a special tax, as it is in Illinois, where it has been held that the

<sup>41</sup> Powers v. Grand Rapids, 98 Mich. 393, 57 N. W. 250; People v. Buffalo, 147 N. Y. 676, 42 N. E. 344.

#### *Road Through Agricultural Land — Public Purpose.*

An act to make an artificial road seven miles long, mainly through agricultural land near Pittsburgh, to be paid by assessment on land at different distances, whether abutting or not, some of the owners of taxed lands not traveling on the road, is unconstitutional, although the master found that all the taxed lands, and many outside the limit, would be benefited; that those within the limit would receive the most benefit; and that it would be a general public benefit,

Washington Ave., 69 Pa. St. 352, 8 Am. Rep. 255.

The court say, "To charge the cost of this avenue upon the farms lying within one mile on each side at a fixed sum per acre, is so obviously onerous and unreasonable, and leads to such destruction of private right, and such unfairness of imposition, for the advantage of the public at large, and of individuals who pay nothing, it cannot, on any fair principle of reasoning, be said to be a valuation according to benefits." P. 362.

<sup>42</sup> Commissioners, etc. v. Abbott, 52 Kan. 148, 34 Pac. 416; Ahern v. Board of Improvement, 69 Ark. 68, 61 S. W. 575.

<sup>43</sup> Excelsior, etc., Co. v. Green, 39 La. Ann. 455, 1 So. 873.



poles, wires and lamps of an electric lighting plant are subjects of special taxation,<sup>44</sup> it would seem more accurate.

### **Realty benefited.**

**296.** An assessment for street improvement should be laid upon all property substantially and directly benefited, whether it be in fee, for life, or a term of years, if it be increased in value by the improvement, and must be directed only against the specific property designated in the ordinance therefor.<sup>45</sup>

### **Realty dedicated.**

**297.** Land dedicated by the owner as a park, to the trustees of a town, "for the benefit of the owners of lots fronting on the same," "to be ornamented and improved in such manner as a majority of such owners shall desire," is neither a public park nor the property of the town. It remains private, and is subject to taxation and special assessment under general laws. A municipal corporation cannot hold private property in trust for private persons, so as to exempt it from the imposition of taxes or special assessments under general laws.<sup>46</sup>

### **Ownership.**

**298.** If land be owned by a married woman, her husband has an estate therein as tenant by the curtesy, which is assessable. If assessed too high, his remedy is by appeal, as also a claim for irregularity in assessing it all to him. If he do not choose to have his wife made a party, he will be presumed to have waived the objection, and consented to take the whole burden on himself.<sup>47</sup>

Under the charter of Louisville, the relative location of

<sup>44</sup> Ewart v. Western Springs, 180 Ill. 318, 54 N. E. 478.

<sup>46</sup> McChesney v. People, 99 Ill. 216.

<sup>45</sup> Chicago v. Baer, 41 Ill. 306; State v. Michigan City, 138 Ind. 435, 37 N. E. 1041.

<sup>47</sup> Dann v. Woodruff, 51 Conn. 203.



the fourths of squares, and not of lots, determines what property is liable; and no lot is liable unless the fourth of a square in which it lies is contiguous to the improved way.<sup>48</sup>

### Street intersections, etc.

**299.** The cost of improving street intersections may be assessed against all the property in the assessment district,<sup>49</sup> but there is no authority for assessing benefits upon the part intended for street purposes.<sup>50</sup> “The fact that the street to be improved is the most public thoroughfare in the city does not prevent the improvement from being local; but the local character of the improvement depends upon the special benefit which will result to the real property adjoining or near the locality in which the improvement is made;<sup>51</sup> and because the state may compel a corporation to sell real estate owned by it and not used for corporate purpose does not preclude its assessment, if benefited, same as if owned by an individual;<sup>52</sup> and when a sidewalk is built in front of only part of a city lot owned by one person, the cost must be charged against the entire lot; while in determining what property fronts on a sidewalk, officials must be guided by the records and plats. Practical frontage is not the test.<sup>53</sup>

**300.** Where a street terminating in a *cul de sac* is opened and extended, no assessment for benefits resulting from the opening of the street can be assessed upon the properties abutting upon such portion of the street as formerly terminated in such *cul de sac*;<sup>54</sup> but the owner of the fee of two public

<sup>48</sup> Wahle v. Nehan, 97 Ky. 351, 41 S. W. 1040. For opinion and diagram illustrative of this peculiar method of assessment, see Schmelz v. Giles, 12 Bush. 491. See, also, Dumesnil v. Shanks, 97 Ky. 354, 30 S. W. 654, 31 S. W. 864.

<sup>49</sup> Jones v. Seattle, 19 Wash. 669, 53 Pac. 1105.

<sup>50</sup> Leman v. Lake View, 131 Ill. 388, 23 N. E. 346.

<sup>51</sup> State v. District Court, 23 Minn. 295, 33 N. W. 222.

<sup>52</sup> Chicago U. T. Co. v. Chicago, 202 Ill. 576, 67 N. E. 383.

<sup>53</sup> Scott Co. v. Hinds, 50 Minn. 204.

<sup>54</sup> In re Orkney Street, 194 Pa. St. 425, 48 L. R. A. 274, 45 Atl. 314.



streets, which run into U. street, is not the owner of a "lot," and an assessment for the paving of U. street opposite the ends of these two streets as upon "lots" cannot be maintained.<sup>55</sup>

**301.** As an assessment should be just, and the benefits flow directly therefrom, property is not rendered non-assessable where it lies at one end of the street proposed to be opened, but contiguous thereto.<sup>56</sup> But where an ordinance establishes an alley in continuation of one already existing through part of a block, all the property owners in said block are subject to an assessment for benefits under a charter provision "that in the opening of an alley the benefits shall be paid by the owners of property in said block, abutting on the proposed alley."<sup>57</sup>

#### **Location of property assessable.**

**302.** Subject to the limitation as to enhancement in value, any real estate is subject to special assessment in the discretion of the legislature, and such authority may by it be delegated to the municipality. In the grading, paving, or other ordinary improvement of a street, it is usually the property fronting or abutting the street that is assessed for the work, but contiguous, adjacent, and adjoining property, and property in the neighborhood or vicinity of the local improvement are frequently assessed.

#### **— "Abutting" property.**

**303.** "Abutting property" is synonymous with "contiguous property,"<sup>58</sup> and denotes property between which and the local improvement there is no property intervening.<sup>59</sup> But where a strip of ground from one side of a

<sup>55</sup> *Schenectady v. Trustees*, 144 N. Y. 241, 26 L. R. A. 614, 39 N. E. 67.      254, 19 S. W. 533; *Springfield v. Green*, 120 Ill. 269, 11 N. E. 261.

<sup>56</sup> *Brooks v. Chicago*, 168 Ill. 60, 48 N. E. 136.      <sup>58</sup> *Green v. Springfield*, 130 Ill. 515, 22 N. E. 602.

<sup>59</sup> *Perine v. Erzbacher*, 102 Cal. 234, 36 Pac. 585; *Holt v. Somer-*



street is appropriated for the purpose of widening such street, the lots and lands fronting on the opposite side of the street at the part widened, will be held to abut on the improvement, although the street may intervene between the abutting lands and the strip of ground appropriated;<sup>60</sup> and property which is separated from the street by a narrow parking, over which the property owner enjoys an easement of unobstructed access, is abutting property within the meaning of assessment statutes,<sup>61</sup> and so is property from which a strip one foot wide along the side of the lot abutting the street has been conveyed, without consideration, in anticipation of a street improvement, and for the purpose of relieving the balance of the lot from the assessment therefor.<sup>62</sup>

**304.** Under a city ordinance for paving streets which directs that the special tax to defray the costs thereof should be levied, assessed and collected upon the real estate abutting upon the line of the streets ordered to be paved in proportion to their frontage thereon, it was held that a lot the side of which was bounded by a street so ordered to be paved, was to be regarded as abutting on the same, as well as one the end of which was so bounded;<sup>63</sup> and officers whose duty it is to assess the cost of improving a street upon abutting lands, are not authorized to extend their assessment to an adjoining lot of the same owner, but which does not abut upon the street.<sup>64</sup> But the tracks of a street railway lying entirely within the limits of the street are not assessable as abutting property,<sup>65</sup> nor are cross-street inter-

ville, 127 Mass. 408; *In re Morewood Ave.*, 159 Pa. St. 20, 28 Atl. 123, 132.

<sup>60</sup> *Cincinnati v. Batsche*, 52 Ohio St. 324, 27 L. R. A. 536, 40 N. E. 21.

<sup>61</sup> *Allman v. Dist. of Col.*, 3 App. D. C. 8.

<sup>62</sup> *Fass v. Seehawer*, 60 Wis. 525, 19 N. W. 533; *Woodruff Place v. Raschig*, 147 Ind. 517, 46 N. E.

990; *Ottumwa Brick, etc., Co. v. Ainley*, 109 Iowa, 386, 80 N. W. 510; *Ransom v. Burlington*, 111 Iowa, 77, 82 N. W. 427.

<sup>63</sup> *Springfield v. Green*, 120 Ill. 269, 11 N. E. 261.

<sup>64</sup> *Springfield v. Green*, 120 Ill. 269, 11 N. E. 261.

<sup>65</sup> *South Park Commissioners v. Chicago*, 107 Ill. 105; *Indianapolis, etc., R. Co. v. Capitol Paving Co.*,



sections.<sup>66</sup> It is not necessary that a lot should abut upon the street to be paved and curbed in order to make it subject to taxation for such improvement,<sup>67</sup> but the statutes fixing the property upon which the tax is to be laid govern with absolute rigidity.<sup>68</sup>

— “Adjacent” property.

**305.** In respect to lots to be assessed for street improvements, the term “adjacent” means “lying near, close to, or contiguous, but not actually touching,” while the term “adjoining” indicates that they are “so joined or united that no third body intervenes.”<sup>69</sup>

— “Adjoining” property.

**306.** The word “adjoining” means such property as is in immediate contact with the street improved. If there

24 Ind. App. 114, 54 N. E. 1076; Oshkosh City R. Co. v. Winnebago Co., 89 Wis. 435, 61 N. W. 1107.

<sup>66</sup> Holt v. East St. Louis, 150 Ill. 530, 37 N. E. 927.

<sup>67</sup> Olsson v. Topeka, 42 Kan. 709, 21 Pac. 219.

<sup>68</sup> A statute is not unconstitutional because it authorizes the assessment of lands not bordering the street to be improved, but being within fifty feet thereof. “The legislature has the right to place the streets of a city under the control of the common council, and to authorize their improvement by the common council, and to declare in what manner the owners of lots receiving the benefit of such improvements shall contribute to the costs thereof. There is no violation of any constitutional provision or of natural justice in requiring that all lands within fifty feet of a street improvement shall be as-

sessed therefor. Such a provision is more equitable than the former law, under which a lot-owner could enjoy the benefit of a street improvement without paying for it, by simply conveying away a strip of his lot along the border of the street.” Ray v. Jeffersonville, 90 Ind. 567.

The improvement of an alley is a special benefit to the lots abutting thereon, and if the lot be subdivided, the cost is still to be borne by such lot, the mode of apportionment to be based on some rule that will do justice to the several owners of the subdivided lot. Lansing v. Lincoln, 32 Neb. 457, 49 N. W. 650.

<sup>69</sup> Hennessy v. Douglas Co., 99 Wis. 129, 74 N. W. 983; Muscatine v. Chicago, etc., R. Co., 88 Iowa, 291, 55 N. W. 100.

Where the charter provides that a street improvement assessment may be levied on adjoining prop-



be an intervening public space, such property may be “adjacent,” but is not “adjoining.” It means touching, or contiguous, as distinguished from lying near, or adjacent.<sup>70</sup>

— “Contiguous” property.

**307.** The words “contiguous property” as used in the Illinois statute relating to special taxation for local improvements are to be understood in their popular sense; the word “contiguous” meaning “any actual or close contact,” “touching,” or “near.” If the improvement is of a street or sidewalk, contiguous property is such as abuts upon the street or sidewalk, or is bounded by the street.<sup>71</sup> And where a street is to be improved between the sidewalks and on both sides, all land extending to the sidewalk is property contiguous to the street, and subject to special taxation.<sup>72</sup> Property not contiguous may be assessed if it be specially benefited.<sup>73</sup>

— “Local” or “vicinity” property.

**308.** The terms “local” or “vicinity,” as used in connection with special assessment proceedings, indicate no defi-

erty to the distance of one hundred and fifty feet, a tract of land bordering the improvement and running back sixty feet is assessable as an entirety, when its owner has used it as such, although the tract is formed in two lots according to the plat of the original survey. *Wolfert v. St. Louis*, 115 Mo. 139, 21 S. W. 912.

<sup>70</sup> *Johnson v. Dist. of Col.*, 6 Mackey, 21; *In re Ward*, 52 N. Y. 395.

<sup>71</sup> *Adams Co. v. Quincy*, 130 Ill. 566, 6 L. R. A. 155, 22 N. E. 624.

<sup>72</sup> *C. B. & Q. R. Co. v. Quincy*, 136 Ill. 563, 29 Am. St. Rep. 334, 27 N. E. 192.

<sup>73</sup> *Rich v. Chicago*, 152 Ill. 18, 38 N. E. 255.

The words “special assessment,”

as used in Sec. 9, Art. 9, Ill. Const. of 1870, mean an assessment upon property specially benefited, without regard to whether it is contiguous or not, and the words “contiguous property,” as used in that section, apply to special taxation only, and not special assessments. *Guild v. Chicago*, 82 Ill. 472.

The words “power and authority to levy, assess and collect special assessments and special taxes on contiguous property,” in an act to enable park authorities to make local improvements, do not confine the taxing power to contiguous property, but contemplate as well the special assessment of property benefited. *Farr v. W. Chi. Park Com’rs*, 167 Ill. 355, 46 N. E. 893.



nite limits, but are understood to extend to real property sufficiently near and so related to the improvement as to be found specially benefited, in addition to the general benefits accruing to other property.<sup>74</sup> But in Pennsylvania, property in the "neighborhood" of a street cannot be assessed for the improvement of such street, even if benefited thereby. Even an abutting owner may not be assessed twice where the improvement is directly in front of his property, and certainly not when the improvement is not in front of his property.<sup>75</sup>

— "Fronting" property.

**309.** Under a statute providing that when the city council shall have contracted for the improvement of any street "the cost and expense of such improvement shall be assessed upon the lots and land *fronting* thereon," property which has once been liable for an improvement on part of the street cannot be subjected to an additional liability for a continuation of the improvement on another part of the street, made under another contract, although such property has received benefits under the second contract.<sup>76</sup> And under authority to assess expense of street improvement against lots *fronting* such street, a lot which is separated therefrom by a railway running side by side therewith, is exempt from such assessment,<sup>77</sup> while a corner lot, having a double frontage, may be properly assessed for the cost of improving the streets the entire extent thereof,<sup>78</sup> and although less than the whole width of the street be so improved.

<sup>74</sup> State v. District Court, 33 Minn. 295, 23 N. W. 222; Extension of Hancock St., 18 Pa. St. 26; Mock v. Muncie (Ind.), 32 N. E. 718; Moran v. Lindell, 52 Mo. 229.

<sup>75</sup> In re Morewood Avenue, 159 Pa. St. 20, 28 Atl. 123, 132; In re Fifty-fourth Street, 165 Pa. St. 8, 30 Atl. 503.

<sup>76</sup> Vancouver v. Winter, 8 Wash. 378, 36 Pac. 278, 685.

<sup>77</sup> Philadelphia v. Eastwick, 35 Pa. St. 75; In re Ward, 52 N. Y. 395.

<sup>78</sup> Morrison v. Hershire, 32 Iowa, 271; Meyer v. Covington, 103 Ky. 546, 45 S. W. 769.



— What is a “Square.”

**310.** Each subdivision of territory bounded on all sides by principal streets is deemed a “square” within the meaning of a charter provision for making street improvements “at the exclusive cost of the owners of lots in each fourth of a square.” <sup>79</sup>

— What is a block.”

**311.** A “block” is a portion of a city enclosed by streets or avenues, and where such block or square is subdivided by alleys or lanes, it still remains one block, and the parts thereof, those surrounded by public ways, are not made blocks thereby but remain subdivisions of the block enclosed by streets or avenues.<sup>80</sup> The two terms are synonymous and practically interchangeable.

## EXEMPTIONS.

### In general.

**312.** Statutes exempting property from taxation do not apply to special assessments. “Taxation is an act of sovereignty, to be performed, so far as conveniently can be, with justice and equality to all. Exemptions, no matter how meritorious, are of grace, and must be strictly construed.” <sup>81</sup> The distinctions between taxes and assessments have been recognized and stated by the courts of almost every state in the Union, and a rule of very general acceptance has been based upon these distinctions — that an exemption from taxation is to be taken simply from the burden of ordinary taxes, taxes proper, and in no manner relieves the property owner from the obligation of paying a special assessment.<sup>82</sup>

<sup>79</sup> *Caldwell v. Rupert*, 10 Bush. 179.

<sup>80</sup> *Olsson v. Topeka*, 42 Kan. 709, 21 Pac. 219. And see, *McGrew v. Kansas City*, 64 Kan. 61, 67 Pac. 438.

<sup>81</sup> *Crawford v. Burrell*, 53 Pa. St. 219.

<sup>82</sup> *Illinois C. R. Co. v. Decatur*, 147 U. S. 190, 37 L. ed. 132, 13 Sup. Ct. Rep. 293; *Burroughs on Taxation*, 461; *Zable v. Louisville Orphan Home*, 92 Ky. 89, 13 L. R. A. 668, 17 S. W. 212; *Yates v. Milwaukee*, 92 Wis. 352, 66 N. W. 248; *Daily v. Swope*, 47 Miss. 367.



**313.** The states are without power to levy special assessments upon the property of the general government, as this would be an invasion of a distinct sovereignty, but no such reason exists as to the various agencies of a state gov-

Special assessments for curbing are not taxes or assessments within the meaning of a statute which exempts land used for agricultural purposes from taxation "for any city purpose." *Farwell v. Des Moines, etc., Co.*, 97 Iowa, 286, 35 L. R. A. 63, 66 N. W. 176.

A special assessment for street paving is not a "tax for city purposes," within the meaning of the Iowa statute exempting lands in a city used for agricultural purposes from such tax. *Allen v. Davenport*, 107 Iowa, 90, 77 N. W. 532.

Although property may not be liable for taxation generally, yet it is liable for benefit assessments for street paving, sewers, etc., even under a constitutional provision exempting it from "taxation of every kind." *Exposition Park v. Kansas City*, 174 Mo. 425, 74 S. W. 979.

A provision in a charter exempting property "from all taxation by State or local laws for any purpose whatever" does not exempt it from local assessments for street improvements. *Zable v. Louisville Orphan Home*, 92 Ky. 89, 13 L. R. A. 668, 17 S. W. 212.

The proper construction of statutes exempting property from taxation, depends on the fair meaning of the language used, and not upon the fact that the legislature had in former years been very liberal with the beneficiaries. And a subsequent amendatory act providing in addition that such land should be

"exempt from any and all special taxes and assessments for the year 1891," does not have a retrospective operation on an assessment ordered and improvement contracted for prior to that time. The contractor had acquired a vested right to enforce the payment of the assessment against the land, the certificate having been issued before the passage of the act. *Yates v. Milwaukee*, 92 Wis. 352, 66 N. W. 248.

As the burden of taxation ought to fall equally upon all, statutes exempting persons or property are construed with strictness, and the exemption should be denied, unless so clearly granted as to be free from fair doubt. Such statutes will be construed most strongly against those claiming the exemption. Although a special assessment is in the nature of a tax, and is a branch of the taxing power, yet a general statute exempting certain property does not exempt it from liability for special assessments levied for improving a street upon which the property abuts or is contiguous. *Adams Co. v. Quincy*, 130 Ill. 566, 6 L. R. A. 155, 22 N. E. 624; *In re Swigert*, 123 Ill. 267, 14 N. E. 32; *Canal Trustees v. Chicago*, 12 Ill. 403.

A municipal corporation insisting upon the right to impose an assessment, should be prepared to show that such power has been clearly granted by statute; but, au-



ernment,<sup>83</sup> although the property of the state is not subject to special assessment or special taxation in the absence of express statutory authority conferring such right, and the

thority for such purpose being shown, in general terms, whoever insists that his property is exempt from the burden, will be required to support his claim by a provision equally clear. *Lima v. Cemetery Association*, 42 Ohio St. 128, 51 Am. Rep. 809.

The rule applicable to the interpretation of statutes exempting religious and charitable properties from taxation, construing the word "taxation" to include "assessments," is because a general purpose to relieve from all burdens may well be inferred in such enactments upon many grounds of a public character or of general policy. But such a rule is inapplicable to the reading of a private contract. A covenant in a coal lease providing "that the said lessee shall pay all and every the United States, state and local taxes, duties and imposts on the coal mined, the mining improvements of every kind and the surface and coal land itself," does not include a local assessment for the cost of grading a street and constructing a sewer. *Pettibone v. Smith*, 150 Pa. St. 118, 17 L. R. A. 423, 24 Atl. 693.

"While these assessments, resting, for their final reason, upon special local benefits, are referable to the taxing power, and therefore not improperly recognized as a species of taxation, they are not general burdens, or taxes proper, within the true intent and meaning of the law exempting property

from taxation." *Sterrett*, Ch. J., in re *Broad Street*, 165 Pa. St. 478; 30 Atl. 1007.

A constitutional provision that general laws may be enacted for exempting from taxation "public property used for public purposes, actual places of religious worship, places of burial not used or held for private or corporate profit, and institutions of purely public character, does not extend to or include a local assessment against a church for paving a street. *Broad Street*, In re, 165 Pa. St. 475, 30 Atl. 1007.

Such provision cannot be contravened by an act authorizing an abatement of general taxes equivalent to a portion of the assessment on abutting property. *Erie v. Griswold*, 184 Pa. St. 435, 39 Atl. 231.

Although a lessee covenants that he will pay all taxes and assessments against the demised premises, yet such covenant does not extend to an assessment for a street improvement against the lessor's reversionary interest (and for which the tenant's interest was also assessed), the assessment being made under an act passed after the lease was executed, which was novel and extraordinary in character, and could not have been in contemplation of the parties when the covenant was made. *Love v. Howard*, 6 R. I. 116.

<sup>83</sup> *Fagan v. Chicago*, 84 Ill. 227; *McLean Co. v. Bloomington*, 106 Ill. 209.



§§ 314, 315 THE LAW OF SPECIAL ASSESSMENTS.

rule that exemptions from taxation in a general law apply only to the kind of property mentioned therein does not apply to public property.<sup>84</sup>

**314.** An attempt to exempt by ordinance certain property in the district which is not benefited, is valid, unless it be shown as a fact that such property is benefited, in which case the ordinance is void.<sup>85</sup> An attempt to exempt by ordinance the improvements on real estate, is likewise void.<sup>86</sup> Under the Illinois Constitution of 1848, the principles of equality and uniformity enjoined by it apply to special assessments for local improvements, as well as to general taxation; and acts of the legislature, or city ordinances pursuant thereto, which attempt to create exemptions not authorized by that instrument, are void.<sup>87</sup>

**315.** A city is without power to accept a deed of land for street purposes, and to agree that the same and other lands of the grantor shall thereafter be exempt from all assessments for street opening or extension, although park commissioners may contract for the conveyance of land for

<sup>84</sup> *Higgins v. Chicago*, 18 Ill. 276; *In re Mt. Vernon*, 147 Ill. 359, 23 L. R. A. 807, 35 N. E. 533; *Big Rapids v. Mecosta Co.*, 99 Mich. 351, 58 N. W. 358.

The constitutional provision which exempts from execution the property of the state, counties and other municipal corporations, and the statute exempting property belonging to any city, county or other municipal corporations in the state, do not refer to or include special assessments for local improvements. 115 Mo. 557, 37 Am. St. Rep. 415, 22 S. W. 494.

The statutory provision exempting from taxation lands belonging to the state relates to general state and county taxes, but has no reference to assessments for improve-

ments made under special laws and of a local character. *Hassan v. Rochester*, 67 N. Y. 528.

<sup>85</sup> *Alexander v. Mayor, etc.*, 5 Gill, 383, 46 Am. Dec. 630; *Chicago v. Baer*, 41 Ill. 306.

<sup>86</sup> *Primm v. Belleville*, 59 Ill. 142.

<sup>87</sup> *Chicago v. Baptist Theological Union*, 115 Ill. 245, 2 N. E. 254; *University of Chicago v. People*, 118 Ill. 565, 9 N. E. 189.

Note.—Accordingly the exemption attempted to be granted defendant by Sec. 7 of its charter, providing that its "property, real and personal, at any and all times hereafter shall be free and exempt from all taxation and assessments, special or general, for any and all purposes whatever, was void." *Id.*



park purposes in consideration of the exemption of contiguous lands of the owner from assessments for park purposes, to the amount agreed upon, if authorized thereto by statute. Such exemptions are not limited to a single act of assessment, but include all assessments, present and future, upon the contiguous lands embraced in the contract,<sup>88</sup> and it is competent for the legislature to exempt from taxation the property owned and used for park purposes in a special park district created by the legislature, while a city has no power to levy a special assessment for street improvement against a public park under control of a board of park commissioners.<sup>89</sup>

**316.** The charter of a private corporation exempting from the imposition of any tax or assessment all its property and effects, exempts it from assessments for benefits for local improvements. A general act providing that assessments for the cost of a public improvement shall be made upon all land and real estate benefited thereby, will not repeal an exemption from assessments contained in the charter of such corporation.<sup>90</sup>

<sup>88</sup> *Leggett v. Detroit*, 137 Mich. 247, 100 N. W. 566; *State v. District Court*, 83 Minn. 170, 86 N. W. 15. But see, *Omaha v. Megeath*, 46 Neb. 502, 64 N. W. 1091.

<sup>89</sup> *People v. Salomon*, 51 Ill. 37; *Billings v. Chicago*, 167 Ill. 337, 47 N. E. 731; *W. Chicago Park Commissioners v. Chicago*, 152 Ill. 392, 38 N. E. 697.

<sup>90</sup> *Hudson, etc., Protective v. Kearney*, 56 N. J. L. 385, 28 Atl. 1043; *Protestant, etc., Home v. Newark*, 36 N. J. L. 478, 13 Am. Rep. 464.

*Notes on Miscellaneous Questions.*

A legislative provision for reimbursement to citizens who had previously contributed for a local benefit, allowing them a credit

upon their future taxes for sums so contributed, is in the nature of an exemption, and a tax levied to compensate them for past liberality is for a private and not a public use. *Davis v. Gaines*, 48 Ark. 370, 383, 3 S. W. 184.

The constitutional provision that every person and corporation shall pay a tax in proportion to the value of his property, does not include municipal corporations. *People v. Salomon*, 51 Ill. 37.

A mere temporary occupancy and use of land for agricultural purposes, when purchased for speculation, with intent to lay it out into lots and sell them, is not a good faith occupancy and use of land for agricultural purposes, within



## Cemeteries.

**317.** In many of the states there are statutes which, in various terms, exempt cemeteries and burial places, from "taxation and execution," "tax or public imposition," "all public taxes and assessments," "all public taxes, rates and assessments." Some of the cases hold that special assessments may not be laid upon such property, but the weight and number of cases, and the better reason, seem to be on the other side. Cemetery property is frequently greatly enhanced in market value by reason of street improvement, and it should bear its proportion of the cost of such improvement. The cases cited in the appended note will illustrate the conclusions at which different courts have arrived.<sup>91</sup>

the meaning of an exemption from taxation for city purposes. *Farwell v. Des Moines, etc., Co.*, 97 Iowa, 286, 35 L. R. A. 63, 66 N. W. 176.

It was not the intention of the legislature in prohibiting an assessment of property for local improvements exceeding half of its value as valued by the general tax-assessing officers, to relieve from such assessments property that is exempt from taxation. *In re St. Joseph's Orphan Asylum*, 69 N. Y. 353.

Where a property which the legislature might originally have exempted from taxation has been omitted from an assessment, it has power to ratify and confirm the tax as imposed. *Van Derverter v. Long Island City*, 139 N. Y. 133, 34 N. E. 774.

The provisions of the charter of Lynchburg empowering the council, when water mains are laid in the street, to levy an annual special assessment on the real estate on both sides of such street to meet the ex-

penses of the waterworks, and further authorizing it to exempt from such assessment any property to which water is supplied and water rates charged, are valid. *R. & A. R. R. Co. v. Lynchburg*, 81 Va. 473.

<sup>91</sup> A clause in the charter of a cemetery association exempting the grounds held as a burial place "from taxation and execution," does not exempt it from special assessment or special taxation. *Bloomington Cemetery Ass'n v. People*, 139 Ill. 16, 28 N. E. 1076; *Louisville v. Nevin*, 10 Bush. 549, 19 Am. Rep. 78.

The charter of a cemetery company within the limits of the city of Baltimore provided that the land set apart for a cemetery "shall not be liable to any tax or public imposition whatever" so long as it was used as a cemetery, did not exempt it from a paving tax for paving a street in front of the property. *Mayor, etc. v. Green Mount Cemetery*, 7 Md. 517.

A sewer assessment cannot, un-



**Property of educational, religious and charitable institutions.**

**318.** The same rule is applicable in the case of property belonging to any of the above mentioned institutions as to cemeteries. Exemptions made by general laws in favor of such property apply only to the general purposes of government, state, county and municipal, even where the statute exempts the specific property "from taxation of every

der Pub. Stats. Mass., c. 50, §§ 4, 7, be laid upon land belonging to a cemetery association, which by its charter is perpetually set apart as a burial place for the dead, and can neither be sold, used for profit, nor appropriated to any other purpose. *Mount Auburn v. Cambridge*, 150 Mass. 12, 4 L. R. A. 836, 22 N. E. 66.

The property of cemetery associations being exempt from "all public taxes and assessments" is exempt from an assessment for a local improvement, such as a sidewalk. *State v. St. Paul*, 36 Minn. 529, 32 N. W. 781.

But an assessment is invalid where the association has no beneficial interest in the land, but merely the right of entry, and to keep the property in repair. *Mt. Pleasant Cemetery Co. v. Newark*, 50 N. J. L. 66, 11 Atl. 147.

Statutes conferring exemptions are strictly construed, and one which exempts the land and property of cemetery associations from "all public taxes, rates and assessments" does not apply to a special assessment for a local improvement. *Buffalo City Cemetery v. Buffalo*, 46 N. Y. 506.

A cemetery association is not relieved from assessment for a street improvement by a statutory exemption of its lands from taxation, the

exemption being confined to taxes as distinguished from special assessments for local improvements. *Lima v. Cemetery Association*, 42 Ohio St. 128, 51 Am. Rep. 809.

Under a cemetery charter providing "that no street, lane or road shall hereafter be opened through the said tract occupied as a cemetery without the consent of a majority of the lot-holders; and the same, when used as a place of sepulchre, shall be exempt from taxation, except for state purposes," the lot-holders were not liable for a sewer constructed in a street along the line of which were a number of these burial lots. *Olive Cemetery Co. v. Philadelphia*, 93 Pa. St. 129, 39 Am. Rep. 732.

But such exemption from liability does not extend to an assessment for street paving. *Newcastle v. Stone Church Graveyard*, 172 Pa. St. 86, 33 Atl. 236; *Beltzhoover v. Beltzhoover's Heirs*, 173 Pa. St. 213, 33 Atl. 1047.

Land acquired by a cemetery association under a charter exempting its real estate from "taxes and assessments" is exemption from special assessment for sewerage purposes, although such assessments were unknown at the time of the granting of the charter. *Swan Point Cemetery v. Tripp*, 14 R. I. 199.



kind," or from being "taxed by any law of the state," and do not apply to the system of special assessments for local improvements.<sup>92</sup> The reasoning given in the leading case upon this subject is strong. The language of the statute was to the effect that no place of public worship "should be taxed by any law of this state," and the court say: "The word *taxes* means burdens, charges or impositions put or set upon persons or property for public uses, and this is the definition which Lord Coke gives of the word *talliage* (2 Inst. 232); and Lord Holt (Carth. 438) gives the same definition, in substance, of the word *tax*. The legislature intended by that exemption to relieve religious and literary institutions from these public burdens, and the same exemption was extended to the real estate of any minister not exceeding in value \$1,500. But to pay for the opening of a street in the ratio of the benefit or advantage derived from it is no burden. It is no talliage or tax within the meaning of the exemption, and has no claim upon the public benevolence. Why should not the real estate of a minister as well as of other persons pay for such an improvement in proportion as it is benefited?"<sup>93</sup>

**319.** As in the case of cemeteries, there is a difference of judicial opinion upon the question, largely due to the peculiar language of the statute under review. But the weight both of reason and authority preponderate largely in favor of strict construction, and of confining the exemption to general taxes.<sup>94</sup>

<sup>92</sup> *Broadway, etc., Church v. McAttee*, 8 Bush. 508, 8 Am. Rep. 480; *Ottawa v. Trustees, etc.*, 20 Ill. 423; *Sheehan v. Good Samaritan Hospital*, 50 Mo. 155, 11 Am. Rep. 412; *Matter of the Mayor, etc.*, 11 Johns. 77; *Second Universalist Society v. Providence*, 6 R. I. 235; *Lefevre v. Detroit*, 2 Mich. 586.

<sup>93</sup> *People v. Brooklyn*, 4 N. Y. 419, 55 Am. Dec. 266.

<sup>94</sup> Although the Arkansas Const. does not expressly exempt school buildings from assessment for local improvements, a statute providing for the assessment of all real property within a certain district for a local improvement, does not contemplate that school property should be assessed. *Board of Improvement v. School District*, 56



**Homesteads.**

**320.** Although exemptions of homesteads from execution are favored in the law, they are not exempt from special assessment because of their use, nor is such use a defense to a lien for such an assessment. The contrary rule obtains in

Ark. 354, 16 L. R. A. 418, 35 Am. St. Rep. 108, 19 S. W. 969.

But land belonging to a school district, which is not used for school purposes, is not exempt from a tax for local improvement. *School District v. Board of Improvement*, 65 Ark. 343, 46 S. W. 418.

Though exempt from general taxation, and therefore not appearing as valued on the assessor's list, church property is liable to assessment for local improvements, and extraneous proof of its value is admissible. *Ahearn v. Board of Improvement*, 69 Ark. 68, 72, 61 S. W. 575.

When an assessment is levied to pay expenses of opening a street, upon property benefited and in proportion to the benefits accruing, the exemption from assessment of lots belonging to the general, state or city government does not render the assessment illegal. *Doyle v. Austin*, 47 Cal. 353.

An assessment by an irrigation district upon unoccupied and uncultivated lands belonging to a city in the district, but susceptible of cultivation by irrigation, and which would be benefited thereby, is not a tax within the meaning of the constitutional provision exempting property of municipal corporations from taxation, and such lands may be sold to pay unpaid special assessments. *San Diego v. Linda*

*Vista Irrigation District*, 108 Cal. 189, 35 L. R. A. 33, 41 Pac. 291.

Land on which was situated a school house owned by a school district, and devoted exclusively to school purposes, is not benefited by laying out a street to an amount sufficient to warrant an assessment for benefits. *Hartford v. West Middle Dist.*, 45 Conn. 462, 29 Am. Rep. 687.

It was not the intention of the legislature in passing an act giving a city the power of special assessment to make either public or private property held exclusively for purposes of religious worship subject to the provisions of the act. *Trustees M. E. Church v. Atlanta*, 76 Ga. 181. But above was reversed in *Atlanta v. First Presb. Church*, 86 Ga. 730, 12 L. R. A. 852, 13 S. E. 252.

School property or school lands held in trust for school purposes are exempt from special assessments as well as their general taxation. *People v. Trustees of Schools*, 118 Ill. 52, 7 N. E. 262.

A church and the ground upon which it is situated is not liable to assessment for a sewer. *First Presbyterian Church v. Fort Wayne*, 36 Ind. 338, 10 Am. Rep. 35.

Note.—This decision went upon the ground that by the statutes of Indiana such property, being exempt from general taxation, had no



assessed value; and that the assessment for the payment for sewers must be based on the assessed valuation of the property.

The exemption from taxation of school provided for by the Iowa statute, extends only to taxation for the purposes authorized thereby, and a city may levy and collect a special tax upon the property of a school district situated within its limits, for the purpose of building a sidewalk in front of such property. *Sioux City v. School Dist.*, 55 Iowa, 150, 7 N. W. 488.

An orphan asylum renders such a public service as authorizes the legislature to exempt its property from taxation. *Zable v. Louisville Orphan Home*, 92 Ky. 89, 13 L. R. A. 668, 17 S. W. 212. And see, *Kilgus v. Trustees, etc.*, 94 Ky. 439, 22 S. W. 750; *Kilgus v. Trustees Church Home, etc.*, Id.

The occupancy intended by statute exempting from taxation real estate belonging to literary institutions "occupied by them or their officers for the purposes for which they were incorporated means something more than that which results from ownership and possession on the part of the institution, or the use of the property for investment purposes. It must have, or be supposed to have, direct reference to the purposes for which the institution was incorporated, and must tend, or be supposed to tend, directly to promote them. *Phillips Academy v. Andover*, 175 Mass. 118, 48 L. R. A. 550, 55 N. E. 841; *Harvard College v. Boston*, 104 Mass. 470.

Where part of the consideration by which land was deeded to a city for sewerage purposes was an agree-

ment that such land should be forever exempt from assessments for the construction and maintenance of such sewer, and *ultra vires*, the council ignored the agreement, and assessed plaintiff's lands for benefits. *Held*, in an action to recover the assessments, that the city having received the benefits of the agreement was estopped to deny the authority of the council to make the contract. *Coit v. Grand Rapids*, 115 Mich. 493, 73 N. W. 811.

Church property is taxable for sewerage purposes, and exemption from special assessments will not be implied. *Lockwood v. St. Louis*, 24 Mo. 20.

Exemption "from taxation of every kind" in the charter of a hospital does not exempt its property from special assessment for street paving. *Sheehan v. Good Samaritan Hospital*, 50 Mo. 155, 11 Am. Rep. 412.

Buildings rented for a Young Men's Christian Association are not used exclusively for charitable purposes within the meaning of an act exempting buildings so used from taxation, it appearing that the Association is maintained by annual fees from members, and that the building contains an auditorium which is occasionally rented for lectures, concerts and other entertainments. *Trustees Y. M. C. A. v. Patterson*, 61 N. J. L. 420, 39 Atl. 655.

Exemption from "all taxes" does not exempt a college from special assessment. *State v. Robertson*, 24 N. J. L. 504.

A provision in the act incorporating a charitable institution exempting its real estate from tax-



Texas.<sup>94a</sup> They are certainly as capable of receiving benefits by means of the improvement of the streets adjacent as any other class of property.<sup>95</sup>

### Railroad property.

**321.** If railroad property be benefited by a local improvement, there seems no valid reason why it should not be subject to local assessment. But by reason of the facts that

ation, does not exempt it from assessment for a local improvement, the assessment not being taxation within the meaning of the act. *Roosevelt Hospital v. Mayor, etc.*, 84 N. Y. 108; *People v. Syracuse*, 2 Hun, 433; *In re St. Joseph's Asylum*, 69 N. Y. 353; *In re Second Ave. Church*, 66 N. Y. 395; *Gerke v. Purcell*, 25 Ohio St. 229.

A church is not exempt by reason of a statute exempting churches and burial grounds from taxes. "Taxes are a public imposition, levied by authority of the government, for the purpose of carrying on the government in all its machinery and operations; that they are imposed for a public purpose; whereas municipal charges are often for the benefit of lot-holders on a particular street." *Northern Liberties v. St. John's Church*, 13 Pa. St. 104.

Where the statute so provides, churches, meeting houses, or other regular places of stated worship, and burial grounds not used or held for private or corporate profit, are exempt from assessment for laying a water pipe in the street in front thereof. *Philadelphia v. St. James Church*, 134 Pa. St. 207, 19 Atl. 497. *In re Broad Street, etc.*, 165 Pa. St. 475, 30 Atl. 1007.

But church property which is

exempted by statute "from all and every county and city tax," is not liable for a sewer assessment. *Erie v. First Universalist Church*, 105 Pa. St. 278. But an ordinance requiring all footwalks to be kept in repair is valid as a police regulation. *Borough of Wilkinsburg v. Home for Women*, 131 Pa. St. 109, 6 L. R. A. 531, 18 Atl. 937; *Philadelphia v. Pennsylvania Hospital*, 143 Pa. St. 367, 22 Atl. 744.

No exemption from special assessment, either under a general law exempting property used for religious or educational purposes, or a college charter exempting same from "all taxes." *Second Universalist Soc. v. Providence*, 6 R. I. 235; *In re College St.* 8 R. I. 474.

<sup>94a</sup>*Higgins v. Bordages*, 88 Tex. 458, 53 Am. St. Rep. 770, 31 S. W. 52, 803, overruling *Lufkin v. Galveston*, 58 Tex. 545.

<sup>95</sup>*Ahearn v. Board of Improvement*, 69 Ark. 68, 61 S. W. 575; *Perine v. Forbush*, 97 Cal. 305, 32 Pac. 226; *Nevin v. Allen*, 15 Ky. L. Rep. 836, 26 S. W. 180; *Lufkin v. Galveston*, 58 Tex. 545; *Higgins v. Bordages*, 88 Tex. 458, 53 Am. St. Rep. 770, 31 S. W. 52, 803.

A right of way and franchise of a street railway are exempt. *Mayor, etc. v. Royal St. R. Co.*, 45 Ala. 322.



it is impressed with a public use, and is frequently taxed either as an entirety or by a license fee in the nature of a fixed percentage of its gross earnings, many of the states have enacted statutes exempting such property from taxation, and such statutes have frequently required construction. No extended discussion of the principles involved is deemed to be required, and the reader can readily gather the trend of judicial interpretation from the cases cited.<sup>96</sup>

<sup>96</sup> In the absence of express constitutional or statutory exemption of railway property, it may be assessed for park or boulevard purposes, if specially benefited. *C. & N. W. Ry. Co. v. People*, 120 Ill. 104, 11 N. E. 418.

A provision in a railroad charter exempting it from all taxation except as therein provided, has no application to special assessments or special taxation of contiguous property. *I. C. R. Co. v. Decatur*, 126 Ill. 92, 1 L. R. A. 613, 18 N. E. 315.

A street railway company occupying a portion of a street under its franchise has property of a character to be substantially benefited by opening of such street, and should contribute its share to the cost of such improvement in common with the other property upon said street. *Chicago v. Baer*, 41 Ill. 306.

Horse railway property is not exempt from special assessment for widening a street because of an agreement that, in consideration of keeping in repair the portion of the street occupied by its tracks, it should be exempted from special assessments for grading, paving, macadamizing, filling or planking the parts of streets on which the

railway is constructed. *Parmelee v. Chicago*, 60 Ill. 267.

Where the ordinance granting a franchise to the street railway company requires it to pave the portion of the street occupied, upon the subsequent paving of the street by the city under an ordinance, excepts from its operation that portion of the street occupied by the railway, the company need not be assessed for such improvement. *Billings v. Chicago*, 67 Ill. 337, 47 N. E. 731.

The depot and depot grounds of a railroad company are not exempt from assessment for street improvements merely because the right of way, with tracks thereon, runs into such depot. *C. R. I. & P. R. Co. v. Chicago*, 139 Ill. 573, 28 N. E. 1108, and see, generally, *I. C. R. Co. v. Mattoon*, 141 Ill. 32, 30 N. E. 773; *I. C. R. Co. v. Decatur*, 154 Ill. 173, 38 N. E. 626; *Ludlow v. Trustees of C. S. R. Co.*, 78 Ky. 357.

The roadbed of a railroad corporation is not liable for the payment of assessments for sidewalks or sewers, under stats. of Mass. *Boston v. Boston & A. R. Co.*, 170 Mass. 95, 49 N. E. 95.

*Note.* The court holds that railway property is within the terms



**Conveyances to avoid assessment.**

**322.** Because of the fact that abutting property is almost universally liable for the cost of a street improvement schemes to avoid such liability have been tried, but with-

of the statute as "land appropriated to public use in much the same way as is a highway, or the land under a court house, or school-house, or jail."

A part of the right of way of a railroad, occupied by a main track and one side track, and nothing else, cannot be assessed for a local street improvement.

*Note.* McGrath, C. J., and Hooker, J., dissent upon the ground that the determination by the local authorities upon the questions of benefits, should be final. If this be the law, it would have a very unfortunate effect upon the property owner, who would thus be left to the tender mercies of the local officials, without remedy. The author has known of too much injustice thus worked to be able to assent.

A statute providing that an annual tax upon the gross receipts of railroad companies "shall be in lieu of all other taxes upon the properties of such companies" does not exempt them from liability for special assessment. *L. S. & M. S. R. Co. v. Grand Rapids*, 102 Mich. 374, 29 L. R. A. 195, 60 N. W. 767.

The exemption of railroad property from all taxes and assessments by the territory, the state that should succeed it, or by any county, city, town, village or any other municipal authority, includes exemption from local assessments for street grading. *St. Paul & P. R. Co. v. St. Paul*, 21 Minn. 526.

The payment of a certain percentage of gross earnings of a railroad "in lieu of all taxes whatsoever," is an exemption from special assessments. *St. Paul v. St. P. & S. C. R. Co.*, 23 Minn. 469.

A constitutional provision declaring railroads to be highways and railroad corporations common carriers, does not exempt land used by a railroad for depot and yard purposes from special taxes for street improvements. *Nevada v. Eddy*, 123 Mo. 546, 27 S. W. 471.

An assessment for a street improvement on houses and lots owned by a railroad company is not a tax within the meaning of a section of the charter of such company exempting it from taxation. But an assessment for a street improvement on the track of a railroad company, which does not enhance its value, cannot be sustained where the charter of the company exempts it from taxation. *State v. Newark*, 27 N. J. L. 185.

Where the charter of a railroad company provides for the payment of a state tax, and contains a proviso "that no other tax shall be levied or assessed upon said company," the word "assessed" is used merely to describe the act of levying the tax, and the proviso does not exempt the company from assessments for local improvements. *State v. Jersey City*, 42 N. J. L. 97.

But benefits which it is antici-



out success. They have been more ingenious than ingenuous, and when the facts are properly shown, the courts may be relied upon to see that success does not attend the wrongful attempt. In one case the conveyance of a strip of land

pated will flow to a railroad by reason of the probable increase in its business because of increased facilities of access to its station and grounds cannot be the basis of an assessment where its charter exempts it from taxation for benefits from local improvements. *Morris & E. R. Co. v. Jersey City*, 36 N. J. L. 56.

A provision in a railroad company grant exempting the property of such company from "all taxation" is not to be construed as an exemption from assessment for municipal improvements. *Winona & St. P. R. Co. v. Watertown*, 1 S. D. 46, 44 N. W. 1072.

Sec. 22, ch. 10, charter of Milwaukee, provided that real estate exempted from taxation by general laws, should remain subject to special taxes, while Sec. 23 provided that no general law of the state should be considered as repealing, modifying or amending any of the charter provisions, unless such purpose be expressly set forth in such law. A general law, passed two years after the charter enactment, provided for the payment by railroads of a percentage of earnings, "which amount of tax shall take the place and be in full of all the taxes of every name and kind upon said roads, or other property belonging to said companies, or the stock held by individuals therein, and it shall not be lawful to levy or assess thereupon

any other or further assessment or tax for any purpose whatsoever." Although the charter was not mentioned in the act, it was held to be a clear expression of the legislative intention "to exempt the property of railroad corporations from all assessments for local improvements as well as other taxes." *Brightman v. Kirner*, 22 Wis. 54.

The Wisconsin statute of exemption from taxation of railroad property containing the exception "that the same shall be subject to special assessment for local improvements in cities and villages," was intended merely to confine the exemption to the subject of general taxation, and has no independent affirmative force to make such property liable to assessment, where none previously existed, as was the case with its necessary tracks and right of way. It is at most a mere general declaration that such property shall be subject to local assessments for improvements in cases to be provided by law; but the real authority to make such assessment must be sought in some other exercise of legislative power. But a probability that land owned by a railway company will very soon be required for railway purposes does not exempt it from an assessment for street improvements. *C. & St. P. Ry. Co. v. Milwaukee*, 89 Wis. 506, 28 L. R. A. 249, 62 N. W. 417; *Oshkosh City R. Co. v.*



one foot wide along the side of a lot abutting on a street, made in anticipation of its improvement, and for the express purpose of relieving the balance of the lot from any assessment therefor, without consideration or change of possession or user, and upon an understanding for a re-conveyance upon request,— was held a fraud, and the whole lot remains assessable for benefits.<sup>97</sup> But in a later case in the same court, the conveyance of a strip five and 80-100 feet wide, unexplained,<sup>98</sup> was upheld, and the owner of the remainder of the property, nearly 50 feet wide, not entitled to the remedy pertaining to an abutting owner for an illegal assessment.

Winnebago Co., 89 Wis. 435, 61 N. W. 1107.

Sec. 1836, R. S., of Wis., requiring every corporation owning or operating a railroad in a street to restore the street to its former condition and "thereafter maintain the same in such condition against any effects in any manner produced by such railroad," gives no power to make a local assessment on such railroad corporation to improve the street. Oshkosh City R. Co. v. Winnebago Co., 89 Wis. 435, 61 N. W. 1107.

<sup>97</sup> Fass v. Seehawer, 60 Wis. 525, 19 N. W. 533. See, also, St. Louis v. Meier, 77 Mo. 13.

<sup>98</sup> Damkoehler v. Milwaukee, 124 Wis. 144, 101 N. W. 706.

As to assessments against narrow strips of land, see Terry v. Hartford, 39 Conn. 286. Denver v. Londoner, 33 Colo. 104, 80 Pac. 117.

*Reserving narrow strip between street and property.*

*Recent decisions.*

A lot used for railroad purposes may be assessed for grading, curb-

ing and paying. Louisville & N. R. Co. v. Barber Asphalt Pav. Co., 197 U. S. 430, 49 L. ed. 819.

But not if used therefor exclusively and permanently. Naugatuck R. Co. v. Waterbury (Conn.), 61 Atl. 474.

Not necessary that property abut. Roberts v. Evansville, 218 Ill. 296, 75 N. E. 923.

It is a matter of legislation. Felt v. Ballard, 38 Wash. 300, 80 Pac. 532; San Francisco Pav. Co. v. Dubois (Cal. App.), 83 Pac. 72.

City cannot release owner from future liability. Pittsburgh, etc. R. Co. v. Oglesby (Ind.), 76 N. E. 165.

School property subject to assessment in certain cases. Board, etc. v. People, 219 Ill. 83, 76 N. E. 75.

Right to require street railways to pave cannot be contracted away, and statutory immunity will not pass to its successor. Rochester v. Rochester R. Co., 182 N. Y. 99, 74 N. E. 953.

Woodruff Pl. v. Raschig, 147 Ind. 517, 46 N. E. 990.



## CHAPTER VI.

### OF THE INITIATORY PROCEEDINGS.

In general, 323-326.

The petition — In general, 327-329.

Sufficiency of signature and authority for, 330-333.

Requisites of, 334.

Sufficiency of, 335-337.

Effect of signing — Estoppel, 338.

Dismissal of, 339.

Challenging jurisdiction, 340.

What steps are mandatory —

What directory, 341.

The resolution — In general, 342.

Resolutions sufficient or valid, 343-344.

Resolutions insufficient or invalid, 345.

Estimate of cost, 346.

Notice — Requisites of, 347-352.

Sufficiency of, 353-354.

Notices held sufficient, 355-358.

Notices held insufficient, 359.

What record must show, 360.

How given — actual and constructive, 361-367.

The official paper, 368-369.

Publication of, 370.

Proof of publication, 371-373.

Waiver of, 374-376.

Computation of time, 377.

Definitions, 378.

#### In general.

**323.** It being assumed, as we have endeavored to demonstrate in previous chapters, that the power of special assessments resides in the legislature and may by it be delegated to municipalities and subordinate political subdivisions; that such proceedings are *in invitum*, and strictly construed; and that the mode authorized by the statute is the measure of the power conferred, it follows that the statute must be carefully followed in all the proceedings which it authorizes. Conditions precedent to the right to make the assessment are jurisdictional, and the statutory provisions are generally mandatory. Only in rare instances, and in matters which cannot prejudice the rights of the taxpayer, do the courts hold any of the steps required by such a statute to be directory.



**324.** All special assessments must be for public improvements, but a large number of public improvements are paid for by general taxes, and not special. It is not the purpose of this work to treat of the steps necessary to make public improvements, except in such cases as are to be paid by special assessment, although the initiary proceedings are generally similar.

**325.** It is appropriate that the power to initiate proceedings should be a broad one; that the determination of the propriety or necessity of the improvement be fixed in certain local authorities; that the assessment be authorized by the proper authority, be made on property in a fixed district, according to fixed rules of law, and by the board or officers nominated by statute; that due notice be given to property holders of an opportunity to be heard at some stage of the proceedings; and that the assessment be confirmed by some competent tribunal provided by the statute.

**326.** If the author may be pardoned for stepping beyond the limits of legal decision, and drawing upon his own reading and practical experience as to the methods most generally in vogue, and the various steps to be taken in a special assessment proceeding, the following may be accepted as the result of his observation and judgment as to the ordinary course of procedure.

*First.* A petition to, or resolution by, the proper local authority, reciting the work to be done, and the limits of the district within which it is to be performed. The initiative may be taken by interested property owners, or some local board, officer, or other corporate authority.

*Second.* Action upon such petition or resolution by the common council, or other local legislative body, in such form as to make the same effective, if favorable. This action may always be by ordinance, but may be by resolution if the charter or statute permit.

*Third.* Although the propriety and necessity of the proposed improvement is usually committed to the exclusive dis-



cretion of the proper local authorities, sometimes notice is required to be given to property owners of the time and place of the session of such authorities to hear objections to the proposed improvement; and the provisions of law as to such notice must be complied with strictly.

*Fourth.* Making the assessment, with notice either of the making thereof, or that the same has been made, and fixing the time and place for an opportunity to parties interested to be heard thereon.

*Fifth.* The ratification or confirmation of the assessment.<sup>1</sup>

### The Petition — In general.

**327.** As the property owners within the district to be improved are the ones who are mostly interested, it is fitting that they should be entitled to set in motion the municipal machinery requisite for the purpose. And in nearly all jurisdictions there are statutes which provide they may petition for the doing of the work, and it is frequently required that such petition, properly signed by the requisite number or proportion of property owners, be first made, or jurisdiction is not acquired. Where such a requirement prevails, an assessment without it is absolutely unauthorized, and void;<sup>2</sup>

<sup>1</sup> It is in no manner claimed that this procedure is exact, or universal, or that the various necessary steps are taken in the order indicated, but it is believed that it covers all the essentials required by the general principles of law applicable to this technical subject. Not only do the statutes of the forty-five sovereign states exhibit extraordinary variances, but different cities in the same state have charter idiosyncrasies almost as fantastic.

*California.*

<sup>2</sup> Mulligan v. Smith, 59 Cal. 206;

Kahn v. Board, 79 Cal. 388, 21 Pac. 849, 25 Pac. 403.

*Colorado.*

Keese v. Denver, 10 Colo. 112, 15 Pac. 825.

*Illinois.*

Merritt v. Kewanee, 175 Ill. 537, 51 N. E. 867; Bloomington v. Reeves, 177 Ill. 161, 52 N. E. 278; Brookfield v. Sterling, 214 Ill. 100, 73 N. E. 302.

*Indiana.*

Covington v. Nelson, 35 Ind. 532; Case v. Johnson, 9 Ind. 477.



but such petition is unnecessary if the statute authorizes the local authorities to proceed without it.<sup>3</sup>

**328.** Where a petition is required, the statutory provisions must be strictly followed, or jurisdiction is not acquired, and this is especially true as to the requirements concerning the requisite number or proportion of property owners who must join in the petition. And it is essential that the signatures be those of the actual *owners*, or authorized by them.

*Kansas.*

Wahlgren v. Kansas City, 42 Kan. 243, 21 Pac. 1068.

*Maryland.*

Mayor v. Eschbach, 18 Md. 279.

*Minnesota.*

Hawkins v. Horton, 91 Minn. 285, 97 N. W. 1053; Hause v. St. Paul, 94 Minn. 115, 102 N. W. 221.

*Nebraska.*

Leavitt v. Bell, 55 Neb. 57, 75 N. W. 524; Grant v. Bartholomew, 58 Neb. 839, 80 N. W. 45.

*New Jersey.*

State v. Stockton, 61 N. J. L. 520, 39 Atl. 921.

*New York.*

Jex v. New York, 103 N. Y. 536, 9 N. E. 39; Miller v. Amsterdam, 149 N. Y. 288, 43 N. E. 632; Sharp v. Speir, 4 Hill, 76.

*Ohio.*

Burgett v. Norris, 25 Ohio St. 308.

*Wisconsin.*

Dieckmann v. Sheboygan Co., 89 Wis. 571, 62 N. W. 410.

<sup>3</sup> Denver v. Londoner, 33 Colo. 104, 80 Pac. 117; Spalding v. Denver, 33 Colo. 172, 80 Pac. 126; Dennison v. Kansas City, 95 Mo. 416, 8 S. W. 429; Spring Garden v. Wistar, 18 Pa. St. 195; Kerstens v. Milwaukee, 106 Wis. 200,

48 L. R. A. 851, 81 N. W. 948, 1103.

*When Petition unnecessary.*

Under a charter authorizing street improvements without petition in certain cases, a resolution of the Common Council declaring a street to be unsafe for public use and that it is necessary to proceed with the paving of it without petition of the property owners because such owners have failed to make said street in a safe and suitable condition for the public use, and have failed to present a petition therefor, states a sufficient reason for proceeding without petition. Boyd v. Milwaukee, 92 Wis. 456, 66 N. W. 603.

*Grading of Street — Jurisdiction.*

Where the statute requires a petition for grading a street to state therein all the work required to be done, such petition is valid although it does not contain a request for the grading and paving of the street intersections; and when duly spread upon the journal, the city has jurisdiction to make the improvement, and to assess and apportion the cost to the abutting property on such improved street. Wahlgren v. Kansas City, 42 Kan. 243, 21 Pac. 1068.



A tenant for life of property fronting a city street is not an *owner* within the requirements of such a statute,<sup>4</sup> and the signature to a street improvement petition of one tenant in common of a lot abutting on said street, represents merely his individual interest in such lot, unless he have authority to sign for his co-tenants.<sup>5</sup> One who has a life estate in an undivided one-half of a lot, and has the care and management of the other half during a child's minority, is the "owner" of the entire lot in the sense that she can sign for it in petitioning for a street improvement,<sup>6</sup> while resident tenants in common of undivided lands who hold otherwise than as heirs, are to be counted as if they were owners in severalty.<sup>7</sup> The signing of a street improvement petition by the owners of an undivided two-thirds of a lot is sufficient to warrant the counting of such lot in estimating the aggregate of property petitioning for the improvement.<sup>8</sup>

**329.** The requirements of a petition that it shall represent one-half of the frontage is positive, and cannot be evaded by arbitrary or irregular measurements,<sup>9</sup> but signatures thereto which do not bind the owners of the property affected thereby, should not be counted in passing upon the validity of such petition.<sup>10</sup> And a petition which has been

<sup>4</sup> Mayor, &c., v. Boyd, 64 Md. 10, 20 Atl. 1028.

<sup>5</sup> Merritt v. Kewanee, 175 Ill. 537, 51 N. E. 867.

<sup>6</sup> Allen v. Portland, 35 Or. 420, 58 Pac. 509.

<sup>7</sup> Makemson v. Kaufman, 35 Ohio St. 444.

<sup>8</sup> Allen v. Portland, 35 Or. 420, 58 Pac. 509.

<sup>9</sup> Taylor v. Bloomington, 186 Ill. 497, 58 N. E. 216.

<sup>10</sup> Batty v. Hastings, 63 Neb. 26, 88 N. W. 139.

When an improvement petition has been signed, accepted by the board, and an ordinance for paving the street has been passed,

the city cannot thereafter change the grade and rely upon the same petition as authorizing another ordinance for paving at a new grade. Whaples v. Waukegan, 179 Ill. 310, 53 N. E. 618.

If the ordinance based upon a petition of property owners is held invalid, the same petition cannot again be used as a basis for recommending another ordinance. Vennum v. Milford, 202 Ill. 423, 66 N. E. 1040.

In determining whether the requisite number have signed a petition, the names of those who signed a former petition for a similar improvement over the same



once used becomes *functus officio*, and cannot be used again.<sup>11</sup> Under a charter requiring the written application of the owners of at least one third in quantity of the real estate located on each side of the street or streets which is to be improved, the owners of property on one side, as well as the other, to the extent of one third in quantity of the real estate, must join in such application.<sup>12</sup> And where a charter permits a street improvement only on a petition by the owners of two thirds of the property, it requires the petition to be signed only by the owners of two thirds of the property, and not by two thirds of the whole number of owners.<sup>13</sup>

— Sufficiency of signature and authority for.

**330.** A seal is not necessary to the validity of the signature of a corporation to a street improvement petition, unless there is a requirement that all petitioners shall sign under seal, and a signature to a street improvement petition in the name of a corporation by its secretary is sufficient to bind the property signed for.<sup>14</sup> It is a general, but not universal rule, that the authority of the general manager, or other principal officer of a corporation, to sign a petition on its behalf will be presumed, and such authority need not be proved unless expressly challenged in the appropriate proceeding.<sup>15</sup>

line, but abandoned, cannot be counted. *Makemson v. Kauffman*, 35 Ohio St. 444.

<sup>12</sup> *Mayor, &c., v. Dargan*, 45 Ala. 310.

<sup>13</sup> *Barkley v. Oregon City*, 24 Or. 515, 33 Pac. 978.

<sup>14</sup> *Allen v. Portland*, 35 Or. 420, 58 Pac. 509.

<sup>15</sup> The authority of the general manager of a railroad to sign an improvement petition need not accompany it, when the statute presumes it, there being no proof to the contrary. *McVey v. Danville*, 188 Ill. 428, 58 N. E. 955.

The president of a corporation is the proper party to sign a petition for repaving on behalf of the corporation. His signature will not be held invalid as unauthorized, although the board of directors took no action thereon, if it appears from the evidence that it had for some time prior to such signing been customary for the president to sign such petitions on behalf of the corporation without express authority from the directors, and that the directors knew of this custom, and consented thereto, and had reason to believe



**331.** Undoubtedly a signature which was not originally authorized may be afterwards ratified, in certain contingencies, but there is some conflict in the authorities as to whether such a ratification can refer back so far as to confer jurisdiction which did not exist without it. This seeming conflict apparently arises more from a difference in the state of facts presented to the court than from a difference as to the legal principles. It would seem to be the proper rule that such ratification will be effective if given before any steps are taken by the authorities in the assessment proceedings, but

that the president had signed the petition in question, and made no objection thereto until the improvement had been entered upon relying upon the validity of such signature to bind the corporation. *Eddy v. Omaha* (Neb.), 103 N. W. 692.

The general manager of a town site company is presumed to have authority to sign the name of the company to a street improvement petition. *Kansas City v. Cullinan*, 65 Kan. 68, 68 Pac. 1099.

The signing of a street improvement petition as "Wardens and Vestry of Trinity Parish, by James Laidlaw, Clerk," is a sufficient signing of the name of a corporation whose true name is "Rector, Wardens and Vestrymen of Trinity Parish, Portland," where it appears that the clerk was duly authorized to sign the petition. *Allen v. Portland*, 35 Or. 420, 58 Pac. 509.

Under a charter requiring a petition by the owners of a certain percentage of property to be first presented to the council before any steps for the improvement are undertaken, and the signature of a

corporation appears upon such petition, it will be presumed to have been duly authorized, and if any third person assails the same, the burden will be upon the objector to establish the fact that such corporation did not assent, and that the fact of the signing of such petition was unauthorized. *State v. Fairview*, 62 N. J. L. 621, 43 Atl. 378.

*Contra.*

A general manager of a corporation has not the power merely as such officer, to bind the corporation by his signature to a petition for a street improvement. Such power belongs to the board of directors. *Trepbogen v. South Omaha* (Neb.), 96 N. W. 248.

Where the business of a corporation is to be transacted by a board of directors, the signature to a petition for street improvement by the president and secretary, either singly or jointly, cannot bind the corporation unless specially authorized so to do by the board of directors. *Mulligan v. Smith*, 59 Cal. 206; *Liebman v. San Francisco*, 24 Fed. 706; *Morse v. Omaha*, 67 Neb. 126, 93 N. W. 734.



ineffective if made thereafter. Jurisdiction cannot be conferred retroactively.<sup>16</sup>

**332.** A signature, followed by the words "Administrator Estate of, &c.," is merely the personal signature of the writer, such additional words being merely *descriptio personæ*, as is also the signature of one who signs "as trustee," when the added words should have been "as guardian," the signer being duly authorized to sign in such latter capacity.<sup>17</sup>

<sup>16</sup> Where two husbands were authorized to sign the names of their wives to a petition for improving a street in front of their homesteads, which stood in the names of the wives, but signed their own names instead, the fact that the wives are willing to ratify such signatures will not bind objecting property owners. *Von Steen v. Beatrice*, 36 Neb. 421, 54 N. W. 677.

Where a signature to a petition for street improvement was not originally authorized, it may be afterwards ratified, and such ratification relates back to the time of the original season and signature, and renders the petition as effectual as if the signature were duly authorized in the first instance. *State v. Fairview*, 62 N. J. L., 621, 43 Atl. 378.

A special assessment is not invalid because some of the names representing the requisite amount of frontage were signed to the petition by persons other than the owners, but assuming to act for them, where it further appeared there was no fraud in the matter, and that the agency was subsequently ratified by each owner, before the city directed the work to be done and issued its bonds for the cost of the improvement. *Co-*

*lumbus v. Sohl*, 44 Ohio St. 479, 8 N. E. 299.

Signature to a street improvement petition representing the signature as the owner of abutting property, which in fact belongs to his wife, cannot be included in estimating the amount of property representation, nor can the wife ratify such signature so as to cure the defect after the passage of the ordinance. *Merritt v. Kewanee*, 175 Ill. 537, 51 N. E. 867.

<sup>17</sup> *Allen v. Portland*, 35 Or. 420, 58 Pac. 509; *Mayor, &c., v. Boyd*, 64 Md. 10, 20 Atl. 1028.

Neither a guardian nor administrator can bind the estate where the statute requires the petition to be signed by resident property-holders; nor can a husband, holding under a contract running to himself and wife jointly, unless the latter join with him. *Aplin v. Fisher*, 84 Mich. 28, 48 N. W. 574.

The signatures to a petition for street improvements by the executors and trustees of the estate of a decedent who devised to them jointly his property, in trust, to be held and managed by them during the life of his wife, as in the will directed, and giving to them full discretion in the management and control of such property, with



A signature to a petition for a change of grade in the name of a landholder, "per H., attorney," does not authorize such signature to be counted, when it appears that the attorney had not seen his principal, but supposed he was acting under a written power of attorney which he received from a third person and was not proved, nor can one sign as the owner of a lot which is in fact owned by another.<sup>18</sup>

**333.** Neither the state, nor a political subdivision thereof, nor a municipality is authorized to join in such a petition, although the owner of property within the assessment district, unless the statute by direct enactment or necessary implication so directs.<sup>19</sup> It is no objection that the petition is signed by resident property owners only, nor will the assessment based thereon be invalid as to property owners who are not residents where they have the same opportunity for a hearing, and whose property is bound by the same

the view of increasing its value and deriving the best possible income therefrom, are in contemplation of law the signatures of the "owners" of the property, and are valid and sufficient. *Portsmouth Sav. Bank v. Omaha*, 67 Neb. 50, 93 N. W. 231.

Where the fee of abutting property is in a married woman, the signature of her name by her husband, not in her presence and without her knowledge or consent, is insufficient. *Morse v. Omaha*, 67 Neb. 426, 93 N. W. 734.

The signature of a wife who is the owner of abutting property, to a petition for street improvement, made by her husband, in full view, and with her consent, is a sufficient signature. *Portsmouth Sav. Bank v. Omaha*, 67 Neb. 50, 93 N. W. 231.

<sup>18</sup> *State v. Bayonne*, 54 N. J. L. 474, 24 Atl. 448.

The act of one who signs a street improvement petition as the owner of a lot which is in fact owned by another, is such a substantial variance between the requirements of the statute and the mode of signature, as may be shown to overcome the prima facie case made by the petition. *Merritt v. Kewanee*, 175 Ill. 537, 51 N. E. 867.

Where one signs a petition for a street improvement as the owner of a lot having 64 feet front, while in fact the lot is owned jointly by himself and another, such signature can count for only 32 feet. *Morse v. Omaha*, 67 Neb. 426, 93 N. W. 734.

<sup>19</sup> *State v. Trenton*, 40 N. J. L. 89; *Atlanta v. Smith*, 99 Ga. 462, 27 S. E. 696. And see, *Armstrong v. Ogden*, 12 Utah, 476, 43 Pac. 119.



rule.<sup>20</sup> The petition itself, as well as the signatures thereto, may be upon different papers.<sup>21</sup>

— Requisites of.

**334.** It must be unconditional. A long petition, in which two of the petitioners join "on condition that grade is satisfactory, and trees are not molested," is not binding upon them or their property.<sup>22</sup> Under the Illinois statute, a petition to the County Court for an assessment to pay the cost of a local improvement, containing a recital of the ordinance, is the foundation of the application, and if it fails to contain such recitals, the court is without authority to act.<sup>23</sup> And if the statute require the petition to be first presented to the mayor, or other officer, such presentation is necessary, although the certificate of such officer as to its sufficiency is not final and conclusive.<sup>24</sup> A petition and the ordinance authorizing must substantially agree, and where the petition for paving was for "Trinidad sheet asphalt," and the ordinance for the work directed the street to be paved with "asphaltum sheet pavement," the variance was fatal.<sup>25</sup> But the form of the petition is in general immaterial, and the substantial purpose of the statute is satisfied by a paper signed by the landowner clearly expressing his consent to the improvement in the mode and manner therein provided; and it may be in the form of a petition, its legal effect not being changed by the fact that it is not only a consent, but a request as well.<sup>26</sup>

<sup>20</sup> *Kirkland v. Board*, 142 Ind. 123, 41 N. E. 374; *Speer v. Pittsburg*, 166 Pa. St. 86, 30 Atl. 1013.

<sup>21</sup> *Campbell v. Park*, 32 Ohio St. 544, *Commissioners v. Young*, 36 Ohio St. 288.

<sup>22</sup> *Von Steen v. Beatrice*, 36 Neb. 421, 54 N. W. 677.

<sup>23</sup> *Ogden v. Lake View*, 121 Ill. 422, 13 N. E. 159.

<sup>24</sup> Nor the action of the county

court confirming the report of the board of public works, in the absence of any provision for notice to parties interested. The petition having been found insufficient, the assessment was void. *Mulligan v. Smith*, 59 Cal. 206.

<sup>25</sup> *Conde v. Schenectady*, 164 N. Y. 258, 58 N. E. 130.

<sup>26</sup> *Jones v. Tonawanda*, 158 N. Y. 438, 53 N. E. 280.



— Sufficiency of.

**335.** The sufficiency of the petition, from a legal standpoint, is a matter primarily for the determination of the corporate authorities, in which they act in a *quasi* judicial capacity. Such determination is merely *prima facie* evidence of the fact, but not conclusive evidence, except as to a collateral attack, and is subject to review in a direct attack for that purpose, and its insufficiency may ordinarily be interposed as a defense in an action to collect the assessment.<sup>27</sup> But where the statute provides that the determina-

<sup>27</sup> The action of the improvement board on the petition of the property-owners for an improvement, is *prima facie* evidence that the requirements of the statute have been met, but is not conclusive, and the objecting owner may show any willful or substantial departure therefrom. *Bloomington v. Reeves*, 177 Ill. 161, 52 N. E. 278.

The presentation of a petition for an improvement to the corporate authorities, the record showing they deemed it sufficient, is an adjudication upon a jurisdictional fact, and is conclusive against a collateral attack. *McEmery v. Sullivan*, 125 Ind. 407, 25 N. E. 540.

Where a petition of three-fourths of the owners of property fronting the streets to be improved is necessary, the offer in evidence of the petition, with the certificate of the city engineer that it was signed by three-fourths of the resident property owners abutting on the street to be improved; and of the ordinance which recites that more than three-fourths of the property-owners had petitioned for the improvement, is sufficient *prima facie*, to confer jurisdiction. *Ar-*

*gentine v. Simmons*, 54 Kan. 699, 39 Pac. 182.

Unless the charter provides otherwise, the fact as to whether the requisite number or proportion of property-holders have signed a petition for a street improvement may be inquired into in an action to collect an assessment, and the want of such number interposed as a defense. *Aplin v. Fisher*, 84 Mich. 128, 47 N. W. 574.

The finding by trustees of a special road district that the requisite proportion of land owners have signed the petition for the proposed improvement, is not conclusive of such fact, but it may be inquired into by the court in an action to collect the assessment. *Campbell v. Park*, 32 Ohio St. 544.

A council in determining the sufficiency of a street improvement petition, exercises a *quasi* judicial function, but the question of its jurisdiction in a given case is always open to inquiry. Thus, under a city charter which provided that certain improvements should not be made unless the owners of half the property affected should petition therefor, the decision of the council that the petition was



tion of the council in respect to all facts necessary to be ascertained for the purpose of commencing and carrying on a proposed improvement shall be final and conclusive, a court is without power to examine the question as to whether the petition was in fact signed by a sufficient number of owners.<sup>28</sup>

**336.** It is unnecessary that the petition for a local improvement should specify in detail the nature, character and locality of the improvement, but it will be deemed sufficient if its general terms clearly indicate the improvement that the petitioners desire to secure.<sup>29</sup> Where the statute does not require that the ordinance upon which the petition is founded shall be certified, the certificate is no part of the ordinance, and failure to properly certify does not affect the validity of the assessment.<sup>30</sup> It is not rendered invalid as failing to recite the ordinance under which the work is to be done because the certificate of the city clerk attached to the copy of the ordinance annexed to the petition does not affirmatively show the passage of such ordinance, especially if there be no requirement that such copy of the ordinance be certified; nor because superfluous papers or documents are unnecessarily attached.<sup>31</sup> Such petition is sufficiently recited in the report of the commissioners where it is averred that the commissioners appointed to estimate the cost of the improvement made a report estimating such cost at a

signed by half of such owners does not give it jurisdiction unless the petition was in fact so signed. *Allen v. Portland*, 35 Or. 420, 58 Pac. 509.

<sup>28</sup> *In re Kiernan*, 62 N. Y. 457.

<sup>29</sup> *Patterson v. Macomb*, 129 Ill. 163, 53 N. E. 617; *Whaples v. Waukegan*, 179 Ill. 310, 53 N. E. 618.

A petition for grading "to the established grade" need not recite a former ordinance by which such grade was established. *Parker v. La Grange*, 171 Ill. 344, 49 N. E. 550.

<sup>30</sup> *Adcock v. Chicago*, 160 Ill. 611, 43 N. E. 589. And see *Cabell v. Henderson (Ky.)*, 88 S. W. 1095.

<sup>31</sup> *Doremus v. People*, 161 Ill. 26, 43 N. E. 701; *Gage v. Chicago*, 162 Ill. 313, 44 N. E. 729; *McChesney v. People*, 171 Ill. 267, 49 N. E. 491.

Because a member of the council is a petitioner for an improvement his vote, or the proceedings thereunder are not void. *Steckert v. E. Saginaw*, 22 Mich. 104.



sum stated, which was approved by the council, and stating that a copy of such report was attached to and made part of the petition.<sup>32</sup> A petition which is defective will not avoid the assessment for want of jurisdiction where the council is authorized to order an assessment by a two-thirds vote without a petition, and there is no showing that the proceedings were founded on the petition.<sup>33</sup> So, too, where a charter requires a petition for laying out a street to be signed by the persons owning land on the line thereof, but does not require the fact of such ownership to be stated in the petition, the fact that the petition for opening the street in question did not show on its face that the persons signing it were such owners, did not tend to negative their ownership and in the absence of other proof, the invalidity of the proceedings in this respect was not established.<sup>34</sup> The reference in a petition for the improvement of a street to the grade "as now established by ordinance," is sufficiently definite.<sup>35</sup>

**337.** Quite frequently questions arise as to whether a sufficient number of owners of property fronting on the improvement have signed the petition. It is necessary that the provisions of the charter or statute be closely followed,

<sup>32</sup> *Gage v. Chicago*, 162 Ill. 313, 44 N. E. 729.

<sup>33</sup> *Emery v. Sullivan*, 125 Ind. 407, 25 N. E. 540.

<sup>34</sup> *Tingue v. Port Chester*, 101 N. Y. 294, 4 N. E. 625.

<sup>35</sup> *Haley v. Alton*, 152 Ill. 113, 38 N. E. 750.

*Objections to Sufficiency — When not Considered.*

No defense or objection shall be made or heard upon an application for sale of property for an unpaid assessment, which might have been interposed in the proceeding for the making of such assessment or the application for its confirma-

tion, and no errors in the proceedings to confirm, not affecting the jurisdiction, shall be deemed a defense in such application. This applies to an objection that the original petition was insufficient. *Goldstein v. Milford*, 214 Ill. 528, 73 N. E. 758; *Lyman v. Chicago*, 211 Ill. 209, 71 N. E. 832; *Gage v. People*, 207 Ill. 61, 69 N. E. 635; *Harman v. People*, 214 Ill. 454, 73 N. E. 760.

It would seem that in cases where the lack of jurisdiction appeared upon the face of the proceedings as though the rule should be otherwise,



and it then becomes a matter of the construction of the statute. But in all cases, where the right to improve is based upon the petition of a certain proportion of abutting property owners, it is jurisdictional, and the work must be in accordance with such petition.<sup>36</sup>

<sup>36</sup> *Mulligan v. Smith*, 59 Cal. 206; *Hutchinson v. Omaha*, 52 Neb. 345, 72 N. W. 218; *Grant v. Bartholomew*, 58 Neb. 839, 80 N. W. 45.

*What constitutes sufficient petition.*

Where one set of petitioners, the majority of the requisite three-fourths, asked that the street should be "paved with eight feet of stone on each side, and twenty-four feet of wood between the stone;" and another, the minority, asked that the street be "paved with not less than thirty-two feet of wood center, treated with the Thilmany process, and balance stone;" and the street was paved with stone and wood treated with the designated process, but not in the proportions asked by the minority, it was decided that the requisite three-fourths in interest had duly petitioned. *Wamelink v. Cleveland*, 40 Ohio St. 381.

Under a charter provision providing that no work chargeable to lots fronting thereon should be ordered without a petition signed by residents of the ward "owning a majority of the feet in front of all the lots fronting upon such improvement owned by residents of said ward;" but that, "in case the majority of feet in front of all the lots in any one block fronting upon such improvement is owned by non-residents of such ward, then such work may be ordered

upon the petition of the resident owners of a majority of the feet in front of any adjoining block, or the block opposite," etc.—such improvement in front of six blocks having a frontage of 1,800 feet, was properly ordered upon the petition of the resident owners of 300 feet, the non-resident ownership being 1,350 feet, and several of such blocks were owned entirely by non-residents, and there were no resident owners on adjoining or opposite blocks. *Fass v. Seahawer*, 60 Wis. 525, 19 N. W. 533.

As to how question of requisite number is ascertained, see *Burgett v. Norris*, 25 O. St. 308.

Where the petition of property owners for a local improvement consisting of the paving of two streets at right angles to each other, is not signed by a majority of the owners of a majority of property in every contiguous block, the ordinance therefor is entirely insufficient. *Bloomington v. Reeves*, 177 Ill. 161, 52 N. E. 278.

A petition signed by the requisite number of property owners, in substantial compliance with the statute requiring it, is a jurisdictional prerequisite to a valid special assessment. *Portsmouth Sav. Bank v. Omaha*, 67 Neb. 50, 93 N. W. 231.

Under a charter provision that "no repaving shall be ordered except upon the petition of the owners of the majority of the taxable



— Effect of signing — Estoppel.

**338.** One who signs a petition for a public improvement is justified in the presumption that the corporate au-

front feet in any improvement district," the requisite number of signers to such a petition is jurisdictional to the right of the council under an ordinance to repave a street. *Morse v. Omaha*, 67 Neb. 426, 93 N. W. 734; *South Omaha v. Tighe*, 67 Neb. 572, 93 N. W. 946.

Where a charter provides two methods of starting special assessment proceedings, one by petition of a majority of the owners, and one by independent resolution of the council declaring that public necessities require the work should be done, and proceedings were initiated by petition, a properly signed petition is a jurisdictional prerequisite to the authority of the council to act. *Hawkins v. Horton*, 91 Minn. 285, 97 N. W. 1053.

Where a petition for a street improvement is signed by the requisite number of property owners, its sufficiency is not affected by the fact that subsequently the council created a larger district for the purposes of assessment, the effect being to lighten the burden of the petitioners. *O'Dea v. Mitchell*, 144 Cal. 374, 77 Pac. 1020.

In Kansas, cities of the first class have the power to contract for grading streets and alleys, and to levy a special assessment on abutting property to pay the expense thereof, without first having been requested by petition signed by the resident owners of the abutting property. *Tarman v. Atchison*, 69 Kan. 483, 77 Pac. 111.

Evidence that a large number of signers to a petition for street improvements had no title of record, constitutes some evidence tending to sustain the findings of the trial court that the requisite number of owners did not sign the petition, the only evidence to the contrary being the bare recital in the petition. *South Omaha v. Tighe*, 67 Neb. 572, 93 N. W. 946.

The absence of a sufficient petition does not render the resolution for paving a street void, but merely requires the city to pay the cost itself, and not by special assessment upon abutting property. *Orr v. Omaha*, 2 Neb. (Unof.) 771, 90 N. W. 301; *Omaha v. Granter*, 4 Neb. (Unof.) 52, 93 N. W. 407.

"Where the power to pave or improve depends upon the assent or petition of a given number or proportion of the proprietors to be affected, this fact is jurisdictional, and the finding of the city authorities or council that the requisite number had assented or petitioned is not, in the absence of legislative provision to that effect, conclusive. The want of such assent makes the whole proceeding void, and the non-assent may be shown as a defense to an action to collect the assessment; or may, it has been held, be made the basis of a bill in equity to restrain a sale of the owner's property to pay it." 2 *Dillon*, Mun. Corp. sec. 800.

Evidence that a petition did not have the requisite number of petitioners will not be received on



thorities will proceed in accordance with law. He does not petition for an illegal assessment, and is not estopped by his signing of the petition from challenging the validity of the assessment upon which it is based, or the lack of jurisdic-

application for judgment of sale. *Perisho v. People*, 185 Ill. 334, 56 N. E. 1134.

Where a petition for street improvement signed by the owners of a certain specified proportion of the lot frontage on such street is required by the city charter before the council may improve the street at the expense of the adjoining lots, the presentation of such a petition, bearing the names as signers, of persons *actually owning* the required proportion of such lot frontage, and actually signed by such persons, or by their authority, is essential to give the council jurisdiction. And where the improvement has been made without such petition, the owner of a lot sold for non-payment of the assessment made thereon for such work, is entitled to a judgment in equity declaring the sale void and restraining the issue of a deed, where he has not estopped himself from demanding such relief. *Canfield v. Smith*, 34 Wis. 38.

#### **Miscellaneous cases illustrating foregoing principles.**

##### *Charter requirements.*—

A city charter providing that in the case of storm sewers alone, their construction shall not be subject to petition or remonstrance, is constitutional. In the absence of statutory provisions, the city authorities may initiate and complete public improvements without preliminary action on the

part of the owners whose property may be assessed for the expense of such improvement. A law to this effect does not deprive the owners of any fundamental right. *Denver v. Londoner*, 33 Colo. 104, 80 Pac. 117; *Spalding v. Denver*, 33 Colo. 172, 80 Pac. 126.

##### *Invalidity — Burden of Proof.*

Where the statute provides that a recommendation for an improvement shall accompany the ordinance for the same, and "shall be prima facie evidence that all of the preliminary requirements of the law have been complied with," the burden of proof upon an allegation that no petition was in fact presented is upon him who asserts it. *McVey v. Danville*, 188 Ill. 428, 58 N. E. 955; *Guyer v. Rock Island*, 215 Ill. 144, 74 N. E. 105.

##### *Jurisdiction to fix grade.*

A petition to the council to grade a street to an established grade authorizes the city to make any reasonable grade, and damages cannot be recovered unless a showing is made that the grade adopted was unreasonable. *Ball v. Tacoma*, 9 Wash. 592, 38 Pac. 133.

*Grade.*  
The grade at which a street shall be paved is clearly an element entering into and affecting the determination of a citizen as to the desirability and advisability of aiding to secure the street to be improved in that way. *Whaples v. Waukegan*, 179 Ill. 310, 53 N. E. 618.



tion.<sup>37</sup> He is, however, estopped thereby from denying the power of the city to grant his petition, or that he is not the owner of the number of feet of frontage which he has stated therein, or from complaining of mere irregularities.<sup>38</sup> At any time before an improvement is finally acted upon, even if it be under consideration by the council, a petitioner may withdraw his assent by remonstrance, or have his name stricken from the petition; and if a sufficient number of signers so act, the authorities are without jurisdiction to proceed.<sup>39</sup> The death of a petitioner for an improvement before the final order therefor is made, has no effect upon the authority to count his name, if it be not withdrawn by those succeeding to the title.<sup>40</sup> But after jurisdiction to make the

*Amendment of petition.*

The granting of leave to amend a petition for a special assessment is not an amendment of itself. After such leave is given, the party is not bound to make the proposed amendment, and after judgment and writ of error brought, the record cannot be so amended by showing an amendment of the petition. *Ogden v. Lake View*, 121 Ill. 422, 13 N. E. 159.

*What unnecessary to insert.*

*Richards v. Jerseyville*, 214 Ill. 67, 73 N. E. 370.

<sup>37</sup> *Lyon v. Tonawanda*, 98 Fed. 361; *Tone v. Columbus*, 39 Ohio St. 281, 48 Am. Rep. 438; *Aberdeen v. Lucas*, 37 Wash. 190, 79 Pac. 632; *In re Sharp*, 56 N. Y. 259, 15 Am. Rep. 415.

*Only portion of work necessary.*

Where a specific improvement is duly petitioned for and its public necessity found by the officers to allow the commissioners to make only a small fraction of the improvement, and to levy an assessment to pay for it, will in effect

deprive the land holder of the protection entitled by the statute, and no liability results to the abutters from an assessment so made. *Robinson v. Logan*, 31 Ohio St. 466.

<sup>38</sup> *Tone v. Columbus*, 39 Ohio St. 281, 48 Am. Rep. 438; *Cincinnati v. Manso*, 54 Ohio St. 257, 43 N. E. 687; *Aberdeen v. Lucas*, 37 Wash. 190, 79 Pac. 632.

A property owner who signs a petition for a street improvement under a charter which requires the cost to be apportioned among the owners according to frontage, necessarily asks that the work be done under the statutory rule, and thereby waives any right to object to it upon the ground that it constitutes a taking of property without due process of law. *Conde v. Schenectady*, 164 N. Y. 258, 58 N. E. 130.

<sup>39</sup> *Hays v. Jones*, 27 Ohio St. 218; *Dutton v. Hanover*, 42 Ohio St. 215.

<sup>40</sup> *Makemson v. Kauffman*, 35 Ohio St. 444.



improvement has attached by the filing of the petition, and taking other necessary steps, it cannot be defeated by any number of such petitioners subsequently remonstrating against the prayer of the petition being granted.<sup>41</sup>

— Dismissal of.

**339.** The unqualified dismissal by the city of a petition to confirm a special assessment proceeding, in effect abrogates the entire proceeding under the ordinance, and the city cannot pass a new and different ordinance for the same improvement without taking all the necessary preliminary steps required by statute.<sup>42</sup> But the fact that a city voluntarily dismisses a special assessment petition against particular lots, the owner of which appeared and filed objections to the confirmation, does not relieve the remaining lot owners who permitted the assessment to go by default, from liability for such assessment.<sup>43</sup> The fact that jurisdiction is conferred upon the proper authorities does not make it obligatory upon them to proceed with the improvement.

**Challenging jurisdiction.**

**340.** After a petition has been duly approved, it is *prima facie* evidence of the ownership and authority to sign, of those whose names are affixed, and the burden of proof of showing the insufficiency of such petition, and that jurisdiction is not thereby acquired, is upon him who attacks it.<sup>44</sup> The objection that a petition does not contain the requisite number of signers may be made on application to confirm the assessment, but comes too late on application for judgment of sale, if the confirmation be otherwise correct.<sup>45</sup>

<sup>41</sup> Grinnell v. Adams, 34 Ohio St. 44.

<sup>42</sup> Bass v. Chicago, 195 Ill. 109, 62 N. E. 913.

<sup>43</sup> Walker v. People, 170 Ill. 410, 48 N. E. 1010.

<sup>44</sup> Dashiell v. Mayor, &c., 45 Md. 615; Allen v. Portland, 35 Or. 420,

58 Pac. 509; McVey v. Danville, 188 Ill. 428, 58 N. E. 955; Guyer v. Rock Island, 215 Ill. 144, 174 N. E. 105.

<sup>45</sup> Pipher v. People, 183 Ill. 436, 56 N. E. 84; Leitsch v. People, 183 Ill. 569, 56 N. E. 127.



But if the signatures are procured by paying therefor, or other fraud upon the law, it is a proper ground for equitable relief.<sup>46</sup>

### What steps are mandatory — What directory.

**341.** It is difficult, if not impossible, to lay down any general definition or rule which will accurately separate the mandatory provisions of the statute from those which are merely directory. It is well settled that conditions precedent must be strictly complied with,<sup>47</sup> and that the record must affirmatively show such compliance.<sup>48</sup> The law is jealous in the protection of property rights, and frowns upon the omission of any step in procedure which may result in injury to or increased burden upon the property owner. But where the omission of some step, or the imperfect execution of some other can in no manner be injurious to the owner, and results in no unnecessary delay and in no injustice, it may be considered as a directory provision only. But the far safer way is to follow the statute implicitly; and where liberal reassessment statutes prevail, there is no excuse for not holding the local authorities to a practically literal compliance with all the statutory requirements.

<sup>46</sup> Howard v. Independent Church, 18 Md. 451.

When the signature of a certain proportion of frontage owners to a petition for the improvement of a street is necessary to give the council jurisdiction to order the work done, the plaintiff, under a complaint alleging that "no petition was ever presented by the owners of" such frontage, may show that some signatures were affixed without consent of owners, and that other signers did not own

frontage claimed by them. Canfield v. Smith, 34 Wis. 381.

<sup>47</sup> Moffitt v. Jordan, 127 Cal. 622, 60 Pac. 173; Moore v. Mattoon, 163 Ill. 622, 45 N. E. 567; Worthington v. Covington, 82 Ky. 265; Bowditch v. Superintendent, &c., 168 Mass. 239, 46 N. E. 1026; State v. Bayonne, 49 N. J. L. 311, 8 Atl. 295; Frosh v. Galveston, 73 Tex. 401, 11 S. W. 402.

<sup>48</sup> Medland v. Linton, 60 Neb. 249, 82 N. W. 866; Lieberman v. Milwaukee, 89 Wis. 336, 61 N. W. 1112.



**The resolution — In general.**

**342.** While nearly all special assessment proceedings in cities are founded upon a valid ordinance, yet a resolution is customary at some stage of the proceedings, and when required by statute the provisions applicable to its contents, adoption and publication must be rigidly followed. If a city attempts some method other than that provided by statute, or goes beyond the authority given, to that extent it is without jurisdiction, and its acts are void.<sup>48a</sup> The common council are usually made the judges of the necessity of the proposed work, and the adoption by them of the resolution is a sufficient declaration, so that an express finding in such resolution as to the necessity for the improvement is unnecessary,<sup>49</sup> unless the statute expressly require the resolution to contain such statement. As to whether such a requirement is mandatory, the authorities are at variance, but under the statement of the underlying principle in such matters contained in the last section it would seem as though no injury could be caused by its omission, except the somewhat serious one of encouraging the local authorities in the pernicious habit of omission to comply with all statutory requirements.<sup>50</sup>

<sup>48a</sup> *Bluffton v. Miller*, 33 Ind. App. 521, 70 N. E. 989.

The expression "lack of jurisdiction" in special assessment proceedings does not necessarily mean that there was no authority of law to levy the assessment under any circumstances. It covers as well a case where there was legal authority to make the assessment, but where there has occurred some material defect or omission in the proceedings at any stage. *Schintgen v. La Crosse*, 117 Wis. 158, 94 N. W. 84.

<sup>49</sup> *Commonwealth v. Abbott*, 160 Mass. 282, 35 N. E. 782; *Kansas City v. Baird*, 98 Mo. 215, 11 S.

W. 243, 562; *State v. Engelmann*, 106 Mo. 628, 17 S. W. 759; *Ral-eigh v. Peace*, 110 N. C. 32, 17 L. R. A. 330, 14 S. E. 521; *Connor v. Paris*, 87 Tex. 32, 27 S. W. 88.

<sup>50</sup> *Zottman v. San Francisco*, 20 Cal. 96, 81 Am. Dec. 96; *Creighton v. Manson*, 27 Cal. 613; *Taylor v. Palmer*, 31 Cal. 240.

"All the requirements of the statute must be complied with, or the tax cannot be collected." *Hewes v. Reis*, 40 Cal. 255; *Chambers v. Satterlee*, 40 Cal. 497; *Mayo v. Haynie*, 50 Cal. 70; *Turrill v. Grafton*, 52 Cal. 97; *City Improvement Co. v. Babcock*, 123 Cal. 205, 55 Pac. 762; *McLauren*



— Resolutions sufficient or valid.

**343.** A resolution is sufficient if it provides that the improvement shall be of a designated character and contains enough to constitute the basis for letting the contract without specifying with particularity of detail what such improvement shall be;<sup>51</sup> or which provides for both grading and macadamizing;<sup>52</sup> and it is not rendered uncertain by a provision for doing the work "except that portion required by law to be kept in order by the railroad company having its tracks thereon,"<sup>53</sup> nor is the validity of the resolution impaired by the fact that resolutions declaring it necessary to improve several streets are voted on together in the council;<sup>54</sup> laying the venue in the caption of a street assessment so as to show the state, county and city, sufficiently shows the property charged is within the jurisdiction of the authorities of such city;<sup>55</sup> under a resolution directing that cross-walks be laid at intersecting streets under the directions of a certain department, it is not required that such walk be laid at every street intersection but only such as the

v. Grand Forks, 6 Dak. 397, 43 N. W. 710; Hoyt v. E. Saginaw, 19 Mich. 39, 2 Am. Rep. 76; White v. Saginaw, 67 Mich. 33, 34 N. W. 255.

Where the statute requires the council to adopt a resolution of the necessity for a street improvement, and to publish same, and it shall *then* be lawful to provide by ordinance for the improvement, the adoption and publication of such resolution is a condition precedent to the exercise of the authority to pass a valid act, and not merely an irregularity provided for in the curative statute. Welker v. Potter, 18 Ohio St. 85; Smith v. Toledo, 24 Ohio St. 126; Cincinnati v. Sherike, 47 Ohio St. 217, 25 N. E. 169; Waco v. Chamberlain,

(Tex. Civ. App.) 45 S. W. 191; Mich. Cent. R. Co. v. Huehn, 59 Fed. 335.

*Contra.*

Quill v. Indianapolis, 124 Ind. 292, 7 L. R. A. 681, 23 N. E. 788; Barber Asphalt P. Co. v. Edgerton, 125 Ind. 455, 25 N. E. 436; Hughes v. Parker, 148 Ind. 692, 49 N. E. 243.

<sup>51</sup> Taber v. Grafmiller, 109 Ind. 206, 9 N. E. 721.

<sup>52</sup> Emery v. San Francisco Gas Co., 28 Cal. 345.

<sup>53</sup> Whiting v. Townsend, 57 Cal. 515.

<sup>54</sup> Cincinnati v. Anderson, 52 Ohio St. 600, 43 N. E. 1040.

<sup>55</sup> Whiting v. Quackenbush, 54 Cal. 306.



department should deem necessary; <sup>56</sup> a street improvement is not invalid because it includes "the necessary bridges, culverts," etc., without specifying what is necessary where it does not appear that anything is necessary beyond the improvement of the street, and there being no delegation of authority. <sup>57</sup>

**344.** Where the general provisions of a city charter provide that the city shall have power "by ordinance and not otherwise" to provide for making local improvements, such improvements may yet be ordered by resolution where the specific provisions of such charter on the subject of street improvements provide for that method. <sup>58</sup>

Where not rendered compulsory by statute, a resolution for a street improvement, passed by the proper board, need not state how such improvement shall be paid for. <sup>58a</sup>

Under a street improvement statute which provides that, when certain work is proposed, the council may except from its resolution of intention and order "any of the said work already done upon the street to the official grade," such exception may be made by language similar to that of the statute, as, where "not already laid," and "where not already so paved." <sup>58b</sup>

#### — Resolutions insufficient or invalid.

**345.** A resolution requiring abutting owners to grade and sod the space between the sidewalk and curb, is void; <sup>59</sup> one to macadamize a street does not authorize a contract for

<sup>56</sup> Matter of Eager, 46 N. Y. 100.

<sup>57</sup> Cuming v. Grand Rapids, 46 Mich. 150.

<sup>58</sup> Buckley v. Tacoma, 9 Wash. 253, 37 Pac. 441.

<sup>58a</sup> Zeigler v. Chicago, 213 Ill. 61, 72 N. E. 719.

<sup>58b</sup> Dowling v. Hibernia S. & L. Soc., 143 Cal. 425, 77 Pac. 141;

McDonald v. Connif, 99 Cal. 386, 34 Pac. 71; Williams v. Bergin, 116 Cal. 56, 47 Pac. 877; Edwards v. Berlin, 123 Cal. 544, 56 Pac. 432; Reid v. Clay, 134 Cal. 207, 66 Pac. 262.

<sup>59</sup> Adams v. Shelbyville, 154 Ind. 467, 49 L. R. A. 797, 77 Am. St. Rep. 484, 57 N. E. 114.



the construction of stone gutters; <sup>60</sup> nor curbing; <sup>61</sup> it must in general state specifically the work to be done, or the owners will be liable only for the cost of such improvements as are specifically designated in the resolution regularly adopted and published, and not then if the authorized and unauthorized portions can not be separated; <sup>62</sup> and a resolution which is defective by reason of the omission to specify materials, etc., which are required for the work, is not aided by subsequent detailed specifications prepared by the engineer; <sup>63</sup> a resolution of a city council "that a permanent grade be, and the same is, hereby established," on a certain street "except where already established," and authorizing a committee to employ an engineer to establish such grade, is not an establishment of the grade, but merely a provision for its future establishment; <sup>64</sup> and where a charter requires that a street improvement be *ordered* by resolution of the city council, a resolution declaring the intention of the council to improve the street is not sufficient; <sup>65</sup> one for street improvement works which provides for "suitable drains and inlets at intersecting crossings," without specifying the number of drains and inlets, or their size or material, is fatally defective, and no foundation for an assessment; <sup>66</sup> where a resolu-

<sup>60</sup> Partridge v. Lucas, 99 Cal. 519, 33 Pac. 1082.

<sup>61</sup> Mason v. Sioux Falls, 2 S. D. 640, 39 Am. St. Rep. 802, 51 N. W. 770.

In such case the contract was valid so far as it calls for macadamizing, and invalid only so far as it calls for curbing. The contractor can recover for the former if it can be separated from the latter and estimated. Beaudry v. Valdez, 32 Cal. 269.

<sup>62</sup> Mason v. Sioux Falls, 2 S. D. 640, 39 Am. St. Rep. 802, 51 N. W. 770; Schwiesau v. Mahon, 128 Cal. 114, 60 Pac. 683.

<sup>63</sup> Schwiesau v. Mahon, 128 Cal.

114, 60 Pac. 683, overruling Deady v. Townsend, 57 Cal. 298.

<sup>64</sup> Blanden v. Fort Dodge, 102 Iowa, 441, 71 N. W. 411.

<sup>65</sup> Kline v. Tacoma, 11 Wash. 193, 39 Pac. 453.

<sup>66</sup> Fay v. Reed, 128 Cal. 357, 60 Pac. 927.

A resolution of intention to construct sewers is insufficient where it fails to state the material or size of the sewers and manholes, nor the number of branch sewers to be constructed to the curb line. Williamson v. Joyce, 140 Cal. 669, 74 Pac. 290.

As to facts showing sufficiency of a resolution of intention to im-



tion for a specific improvement was passed without a three days' prior publication as required by charter, the resolution and the assessment based thereon is void, and it matters not that there was no paper in which the advertising could be legally done, because the mayor and comptroller failed to designate the papers, as they were required to do.<sup>67</sup>

### Estimate of cost.

**346.** It is usual to require a preliminary estimate of the cost of the contemplated improvement, so that interested persons may be advised of the probable amount of the tax. In the management of the practical business of a modern municipality, it is a matter of wisdom to ascertain the cost of an improvement before ordering it, but it is unnecessary from a legal point of view where not required by statute or municipal by-law. But when made by statute a condition precedent, a strict compliance must be observed, or no jurisdiction to proceed further is acquired.<sup>68</sup> In this respect, such estimates stand upon the same footing as the petition or resolu-

prove a street by reference to other records, see *Dowling v. Hibernia S. & L. Soc.*, 143 Cal. 425, 77 Pac. 141.

<sup>67</sup> In re *Smith*, 52 N. Y. 526.

*Insufficiency of description of work.*

Where the charter requires the council, in providing for a street pavement, to order it done by resolution stating the "kind" of paving to be done, a resolution for paving the roadway with either sheet asphalt or brick paving blocks, or bituminous macadam, is not a compliance with the charter requirement as to specifying the "kind" of the improvement. *Bluffton v. Miller*, 33 Ind. App. 521, 70 N. E. 989.

*Separate vote on each resolution unnecessary.*

Under a charter requiring that the vote on the passage of every such resolution shall be taken by yeas and nays and duly entered in the journal, etc., a separate vote on each resolution is not necessary. *Wright v. Forrestal*, 65 Wis. 341, 27 N. W. 52; *Pittelkow v. Milwaukee*, 94 Wis. 651, 69 N. W. 803; *Dougherty v. Porter*, 18 Kan. 206; *Reed v. Sexton*, 20 Kan. 195.

<sup>68</sup> *Hentig v. Gilmore*, 33 Kan. 156, 5 Pac. 781; *Corsicana v. Kerr*, 89 Tex. 461, 35 S. W. 794; *Davie's Executors v. Galveston*, 16 Tex. Civ. App. 13, 41 S. W. 145.



tion. The more recent decisions upon the validity of the estimates will be found in the appended note.<sup>69</sup>

### Notice — Requisites of.

**347.** In all cases where the assessment is not based upon a merely mathematical calculation, or the exact amount is

<sup>69</sup> When the statute requires as a condition precedent to the construction of sewers at the expense of abutting property, "a detailed estimate" of the cost by the city engineer, under oath, and that the taxes shall not exceed the estimated cost of the work, in cash, and the estimates are not fully in detail, are not under oath, and the taxes largely in excess of the real estimate of the cost of the work, the taxes are voidable. And where estimates are made for a stone pavement, and a different kind is constructed, special taxes cannot be levied to pay for the construction of such pavement. *Hentig v. Gilmore*, 33 Kan. 234, 6 Pac. 304.

A charter provision that the board shall estimate the cost of the improvement and report the same to the council before making an assessment therefor, is sufficiently complied with by the adoption, approval and report by the board of the estimate of the city surveyor. *Cuming v. Grand Rapids*, 46 Mich. 150, 9 N. W. 141.

The estimate of the cost should be considered in connection with the ordinance and the specifications on the question as to its being sufficiently specific. *McChesney v. Chicago*, 152 Ill. 543, 38 N. E. 767.

The commissioners of assessment may include in their estimate of cost of improvement matters not

specifically mentioned in the ordinance therefor, if recorded as a necessary part of the improvement. *Delamater v. Chicago*, 158 Ill. 575, 42 N. E. 444.

Where the estimating committee has reported the cost of a sewer at a certain sum, and their report has been approved, the levy of a larger sum is without authority and is illegal. *Payne v. S. Springfield*, 161 Ill. 285, 44 N. E. 105.

Where the statute requires an engineer's estimate to be made a part of the resolution presented at the public hearing, the assessment is not invalidated by such assessment having been made before the adoption of the first resolution. *Givins v. Chicago*, 186 Ill. 399, 57 N. E. 1045.

Where the statute requires the engineer's itemized estimate to accompany the first resolution, such requirement being for the information and protection of property owners, is mandatory. *Bickerdike v. Chicago*, 203 Ill. 636, 68 N. E. 161.

A resolution reciting that the engineer's estimate of cost was a certain sum does not comply with the statutory requirement that the engineer's itemized estimate of cost shall be made a part of the record of the first resolution. *Bickerdike v. Chicago*, 203 Ill. 636, 68 N. E. 161.

Where estimates are required be-



fixed directly by the legislature, and the taxing officers exercise no discretion as to the amount, notice to those whose property is to be charged, giving them an opportunity to be heard at some stage of the proceedings prior to final judgment, as to the question of benefits and damages, is necessary to constitute due process of law, is jurisdictional, and the jurisdiction is not dependent upon there being a requirement as to notice in the statute authorizing the assessment.<sup>70</sup> It is an absolute right, not to be evaded under any pretext whatever, and the fact that if the owner had appeared the tax would have been the same, does not make it legal.<sup>71</sup> The

fore letting contracts, the provisions of law with reference thereto are jurisdictional, and without compliance therewith there can be no basis for a special assessment against adjacent property. *Moss v. Fairburg*, 66 Neb. 671, 92 N. W. 721.

As to local procedure on, see *Auditor General v. Chase*, 132 Mich. 630, 94 N. W. 178.

Under a statute providing a variance shall not affect the validity of the proceedings unless in the opinion of the court it be wilful or substantial, the omission of the signature of the engineer to the estimate of cost does not invalidate the special tax, *Zeigler v. Chicago*, 213 Ill. 61, 72 N. E. 719.

When estimate sufficiently itemized, see *Herbert v. Chicago*, 213 Ill. 452, 72 N. E. 1097.

Where a charter provides that the street commissioner shall cause to be made an estimate of the whole expense of the contemplated improvement, and of the number of cubic yards of excavating or filling in front of each lot, and to file the same with the city clerk; and also, that notice to lot own-

ers to do the work themselves shall be given by advertisement for two weeks, the making and filing of such estimate is a condition precedent to the publication of the notice. *Myrick v. La-Crosse*, 17 Wis. 443.

<sup>70</sup> *Murdock v. Cincinnati*, 39 Fed. 891; *Cook v. Gage Co.*, 65 Neb. 611; 91 N. W. 559; *Davis v. L. S. & M. S. R. Co.*, 114 Ind. 364, 16 N. E. 639; *McEnery v. Sullivan*, 125 Ind. 407, 25 N. E. 540; *McDonald v. Littlefield*, 5 Mack. 574; *Sewall v. St. Paul*, 20 Minn. 511, Gil. 459; *Mayor, etc. v. Scharf*, 54 Md. 499; *Wilson v. Salem*, 24 Or. 504, 34 Pac. 9, 691; *Kings v. Portland*, 38 Or. 402, 55 L. R. A. 812, 63 Pac. 2; *Hutcheson v. Storrie*, 92 Tex. 685, 45 L. R. A. 289, 71 Am. St. Rep. 884, 51 S. W. 848; *Herschberger v. Pittsburgh*, 115 Pa. St. 78, 8 Atl. 581; *Com'rs v. Harper*, 38 Ill. 103; *Shannon v. Omaha (Neb.)*, 100 N. W. 298. And see Ch. ii, under *Notice*.

<sup>71</sup> "It has been suggested that the order appealed from should be affirmed because even had an opportunity been given to the appellant to appear and be heard before the



failure to provide for notice, in a statute, does not render the same void if notice in fact be given; and in such case the municipality has a broad discretion with reference to the kind of notice, and the manner of giving it.<sup>72</sup> But where the statute requires a notice, or prescribes its form and the mode in which it shall be given, the notice must be given in accordance with such requirements.<sup>73</sup> That it is competent for the legislature to prescribe the form of the notice, how given, and the tribunal before which the hearing may be had, is unquestioned.<sup>74</sup> But after notice has been once given in

tax was imposed, no different result could have been reached. To this we cannot agree. The constitutional guaranty belongs to the individual by right, and not by the mere favor of the legislature or the sufferance of judicial tribunals. It is the duty of the courts to see that this right is not invaded under any pretext whatever, when the subject is before them. Its value as a safeguard would speedily dwindle away, or, at least, become exceedingly precarious, if the privilege to assert it were made to depend upon the belief or opinion of a judge that it would, if asserted, be available. It is a right of which the citizen cannot be deprived, and he may appeal to it, whatever others may think as to the result of such an appeal." *Ulman v. Mayor*, 72 Md. 587, 11 L. R. A. 224, 20 Atl. 141, 21 Atl. 709.

<sup>72</sup> When the only notice to property owners of the levy of a sewer tax was by the passage of two ordinances levying the taxes, and the publication of such ordinances and a notice for two days in the official paper, the ordinances being indefinite as to the notice given by them, and the special notice gave

nothing more than a right to the property owners to contest the *valuation* of their lots, the notice given by the ordinances and special notice might be sufficient to render the tax valid, except for substantial reasons; and for such reasons the tax might be voidable. *Gilmore v. Hentig*, 33 Kan. 156, 5 Pac. 781; *Wilson v. Salem*, 24 Or. 504, 34 Pac. 9, 691.

<sup>73</sup> *McChesney v. People*, 145 Ill. 614, 34 N. E. 431; *Holland v. People*, 189 Ill. 348, 59 N. E. 753; *Sewall v. St. Paul*, 20 Minn. 511, Gil. 459; *State v. Otis*, 53 Minn. 318, 55 N. W. 143; *Overman v. St. Paul*, 39 Minn. 120, 39 N. W. 66; *State v. Jersey City*, 27 N. J. L. 536; *White v. Bayonne*, 49 N. J. L. 311, 8 Atl. 295.

<sup>74</sup> *Weaver v. Templin*, 113 Ind. 298, 14 N. E. 600; *Johnson v. Lewis*, 115 Ind. 490, 18 N. E. 7.

Under a charter requiring that a resolution of intention declaring the intention to improve shall be published before making any street improvement, a publication: "Notice is hereby given that the common council of the city of P. propose to improve" stated streets in a specified manner, is sufficient.



the statutory mode, notice of further proceedings is unnecessary, all interested persons being chargeable therewith.<sup>75</sup> A want of legal notice to claimants for damages is not available by one having no such claim.<sup>76</sup>

**348.** Failure to give notice of assessment, or notice of application for confirmation of the assessment is jurisdictional, and such omission is not cured by a statutory provision that no error or informality in the assessment proceedings, not affecting the substantial justice of the assessment itself, shall vitiate or in any way affect the assessment.<sup>77</sup> Where notice is given of application for the confirmation of an assessment for opening a street between two points, there is no authority for making an assessment for opening the streets beyond such points, and if made, it is void.<sup>78</sup> The consent of property owners to the improvement is unnecessary where the law authorizing the assessment gives them a hearing at some stage of the proceedings.<sup>79</sup>

**349.** The determination of a municipality to enter upon a work of local improvement is not invalid for the lack of prior notice of intention so to do to the owners of the property affected, there being no requirement to that effect in the gift of legislative power to the municipality;<sup>80</sup> but under a charter requiring the lot owner to do the work on the adjoining street before contracts for such work are let, such notice must be given, or the assessment made to pay for the work is void. Nor is such omission cured by a charter provision that all directions therein for the proceedings for levying, assessing and collecting the tax or assessment shall be deemed directory only.<sup>81</sup> A charter required that

*Bank of Columbia v. Portland*, 41 Or. 1, 67 Pac. 1112.

<sup>75</sup> *Chamberlain v. Cleveland*, 34 Ohio St. 551; *Voigt v. Detroit*, 184 U. S. 115, 46 L. ed. 459, 22 Sup. Ct. Rep. 337; *Affirming S. C.* 123 Mich. 547, 82 N. W. 253.

<sup>76</sup> *Scovill v. Cleveland*, 1 Ohio St. 126.

<sup>77</sup> *Sewall v. St. Paul*, 20 Minn. 511, Gil. 459.

<sup>78</sup> *Owen v. Chicago*, 53 Ill. 95.

<sup>79</sup> *Jones v. Tonawanda*, 158 N. Y. 438, 53 N. E. 280.

<sup>80</sup> *In re Zborowski*, 68 N. Y. 88.

<sup>81</sup> *Johnson v. Oshkosh*, 21 Wis. 186.

Nor can the property be made



all work for the city or either of the wards "shall be let by contract to the lowest bidder, and due notice shall be given of the time and place of letting such contract." Another section provided for the publication of notice to lot owners to do the work within a reasonable time, before the street commissioner should be authorized to let the contract for the work. This section was amended by adding, "and if said work be not done within the time limited in said contract, . . . the said commissioner may relet such work without further notice." This was construed to mean although "further notice" to the lot owner was dispensed with, the commissioner was still bound to give notice of a reletting of the contract.<sup>82</sup> Where a property owner is entitled by statute to notice of a nuisance on his property, and an opportunity to do the work himself, the city authorities are without authority to do the work until such notice and opportunity have been given.<sup>83</sup>

**350.** A notice may be a condition precedent to the passage of a valid ordinance for the improvement.<sup>84</sup> In case of an additional assessment to pay the cost of a public improvement, the commissioners cannot determine the amount of the assessment, but must again give notice, and refer the matter to the viewers as in the first instance.<sup>85</sup> In California, the courts take judicial notice of the streets in San

chargeable for work done by the contractor not in accordance with the plans and specifications to which his contract refers, as for a sum allowed him by the council by way of compromise for work not accepted as, nor constituting in fact a fulfilment of the contract. *Rork v. Smith et al.*, 55 Wis. 67, 12 N. W. 408.

<sup>82</sup> *Mitchell v. Milwaukee*, 18 Wis. 93.

<sup>83</sup> *Horbach v. Omaha*, 54 Neb. 83, 74 N. W. 434.

<sup>84</sup> *Joyce v. Barron*, 67 Ohio St. 264, 65 N. E. 1001; *State v. Perth Amboy*, 29 N. J. L. 259.

<sup>85</sup> *Commissioners v. Fuller*, 111 Ind. 410, 12 N. E. 298.

*Appearing, and failing to object.*

Where in a drainage matter a railroad company, after service of notice, appears and files a remonstrance challenging the assessment against its right of way, without making any objection to the sufficiency of the notice, or the regularity in filing the petition, such act is a



Francisco.<sup>86</sup> Some courts deny the necessity of notice, and on other grounds than those mentioned in the first part of this section, and some courts have changed front upon the question. The court of last resort in Maryland, in 1880, was of the opinion that the rights of owners of property fronting the street to be improved, to have a hearing, was indefeasible, and the fact that the tax levied upon them for the work is inconsiderable, as well as justly apportioned, in no degree abridged such right.<sup>87</sup> A little later the court overruled this wise and just opinion, and held that the notice to the abutting owners of a street paving proceeding is unnecessary, the imposition of the assessment being an exercise of the taxing power, and not of eminent domain.<sup>88</sup> This is another instance of erroneously attributing to special assessments all the ingredients of a tax. It can make no difference to the owner that his property is taken from him under the taxing power instead of under the power of eminent domain, if it be taken illegally and without due process of law. In its opinion the court say, "We hold it then to be clear, both upon reason and authority, that provisions for notice, or giving the right of a hearing, or an appeal to the courts and a jury trial, however wise and proper they may be in point of policy, are not essential to a valid exercise of this branch of the taxing power."<sup>89</sup>

waiver of all questions as to the jurisdiction of the court. *Pittsburgh, etc. R. Co. v. Machler*, 158 Ind. 159, 63 N. E. 210.

<sup>86</sup> *Brady v. Page*, 59 Cal. 52.

<sup>87</sup> *Mayor, etc. v. Scharf*, 54 Md. 499.

*Appearance waives notice.*

A notice of the meeting of commissioners for "Friday, the 6th July next," was undated; but as the prosecutors appeared at the proper time, and were heard through counsel on the merits, they cannot complain of want of

notice. *State v. Elizabeth*, 31 N. J. L. 547.

<sup>88</sup> *Mayor etc. v. Johns Hopkins Hospital*, 56 Md. 1. Followed in later cases and afterwards reversed. See next note.

<sup>89</sup> It is difficult to resist the inference that the court was unconsciously somewhat affected by the very large amount at stake, and a very natural and proper desire to see that those who had reaped the benefit should pay for it. But in a still later case, the same court held that an assessment levied un-



**351.** Sidewalks, being usually held to be ordered made under the police power, it is unnecessary to give other notice to those interested than the annual entry in the tax roll.<sup>90</sup> No notice is required of an assessment for the privilege of using a public sewer, when the charge is fixed by ordinance, it being a question of local policy whether property owners may use a public sewer without extra charge.<sup>91</sup> So, too, where the levy of the assessment is a mere mathematical computation, full notice being provided for as to all prior proceedings, and the notice of the assessment would be without value to the owner.<sup>92</sup>

**352.** Other instances are given in the note, both of cases where a notice is held unnecessary, and where it is held necessary.<sup>93</sup> It is hardly necessary to state that the greater

der an ordinance making no provision for a notice to or hearing of the interested property owners, is null and void as a taking of property without due process of law, in violation of the Federal Constitution and that of the state of Maryland. *Ulman v. Mayor, etc.*, 72 Md. 587, 11 L. R. A. 224, 20 Atl. 141, 21 Atl. 709; thus reaffirming the decision in *Scharf's* case and reversing the case previously cited, as well as those of *Moale*, 61 Md. 224, and that of *Alberger*, 64 Md. 1, 20 Atl. 988.

<sup>90</sup> *Hennepin Co. v. Bartleson*, 37 Minn. 343, 34 N. W. 222; *Hennesy v. Douglas Co.*, 99 Wis. 129, 74 N. W. 983.

<sup>91</sup> *Carson v. Brockleton Sewerage Com.*, 182 U. S. 398, 45 L. ed. 1151, 21 Sup. Ct. Rep. 860.

<sup>92</sup> *Gillette v. Denver*, 21 Fed. 822.

*Levying by measurement.*

<sup>93</sup> Where the city authorities have nothing to do in levying a tax but to measure how much each lot

or part of lot fronted on the street, without inquiring how far back from the street the rights of the several owners extended, and to apportion the cost accordingly, no notice or opportunity to be heard is necessary to make the tax valid, it being a mere mathematical calculation. *Amery v. Keokuk*, 72 Iowa, 701, 30 N. W. 780.

*When notice without advantage.*

Where it appears that notice to a taxpayer of the intended assessment and levy of a sewer tax would have been without advantage to him, such want of notice will not avail as a defense against the collection of the tax. *Dittoe v. Davenport*, 74 Iowa, 66, 36 N. W. 895.

*Petition — when notice unnecessary.*

Notice to a property owner of a proposed improvement of a street abutting on his land is not necessary, when the statutes and city charter authorize the city council to undertake such improve-



number of cases, and both reason and authority, hold that a valid notice is a condition precedent to a valid assessment.

### — Sufficiency of.

**353.** It is a legislative function to decide the kind of

ments upon the filing of a petition therefor by a majority of the abutting owners. *Jones v. Seattle*, 19 Wash. 669, 53 Pac. 1105.

*When owner not entitled to.*

A land owner is not entitled to notice of an ordinance providing for condemnation of his land for a sewer right of way, but only to notice of the proceedings to condemn. *Joplin etc. Co. v. Joplin*, 124 Mo. 129, 27 S. W. 406.

*When notice unnecessary.*

Where land is condemned for a public street, and the benefits assessed are equal to the damages awarded, so that nothing is owing the land owner for the land taken, the publication of a notice that the money in payment therefor was in the hands of the city treasurer, was unnecessary. *Fairchild v. St. Paul*, 46 Minn. 540, 49 N. W. 325.

*Sewers.*

No notice is required to be given to the owner of property in a sewer district of the passage of an ordinance establishing the district, nor of the assessment of a benefit against his property before the issuing of the special tax bill, nor is such notice necessary to the validity of the special tax. *Heman v. Allen*, 156 Mo. 534, 57 S. W. 559.

*Notice of enforcing lien.*

In a proceeding by a city to enforce the lien of a special tax bill for the cost of street paving, issued against an abutting owner, notice to such owner is not required.

Such proceeding calls for no inquiry into the weight of evidence, nor for anything in the nature of a judicial examination, and nothing could be changed by hearing the taxpayer. No right of his is therefore invaded. *Barber A. P. Co. v. French*, 158 Mo. 534, 54 L. R. A. 492, 58 S. W. 934.

*Notice of determination.*

Where the statute so provides, the publication of a notice of determination to improve a street is not a condition precedent to the authority to make the assessment in cases where *damages*, consequent on the improvement, are included in the assessment as a part of the cost thereof. *Finnell v. Kates*, 19 Ohio St. 405.

Notice not absolutely essential. *Galveston v. Heard*, 54 Tex. 429; *Adams v. Fisher*, 63 Tex. 651.

### **Contra.**

The author has collected here a few out of the many cases holding notice necessary, which present facts a little out of the usual routine.

*Work must be described.*

In order to get jurisdiction to do street work, the proper authorities must describe the work to be done in the preliminary notice. *Brady v. King*, 53 Cal. 44.

*Amendment to charter.*

An amendment to a city charter which provides for ascertaining damages for regrading of a street,



and their payment through a special assessment, and which provides no notice to the parties to be assessed, is wholly inoperative. *Sligh v. Grand Rapids*, 84 Mich. 497, 47 N. W. 1093.

*Effect of omission to give prescribed notice.*

Where a property owner is entitled to a notice of an assessment and none is given him, or if a hearing has been denied him, the assessment is void. *St. Louis v. Rankin*, 96 Mo. 497, 9 S. W. 910. *Filling land — Mailing assessment Bill.*

Notice to owners of lands proposed to be filled, of a meeting of the council to consider the matter, is sufficient notice; and a bill of the amount assessed sent by mail to the owner nine days after the assessment and received by him, is a good notice of assessment and a sufficient compliance with the statutory requirement that such notice shall be forthwith served. *Lawrence v. Webster*, 167 Mass. 513, 46 N. E. 123.

*Must correspond with proceedings.*

Where published notices for doing street work do not correspond with the ordinances and resolutions, the defect is fatal. *Gallagher v. Garland*, 126 Iowa, 206, 101 N. W. 867.

*Water Rates.*

Where under a city charter water rates are imposed upon lots within municipal limits, which are apportioned without giving to the owner or occupant an opportunity for a hearing, the act is unconstitutional. *Remsen v. Wheeler*, 105 N. Y. 573, 12 N. E. 564; *In re Trustees Union College*, 129 N. Y. 308, 129 N. E. 460.

*Notice of payment of assessment.*

Under the Galveston charter notice, after a valid assessment, must be given to the property owner that the assessment is due, and of the time within which payable, or no levy and sale of the property subject to the assessment can be legally made. *Adams v. Fisher*, 63 Tex. 651.

*A jurisdictional necessity.*

Under the Nebraska statute, a metropolitan city council has no jurisdiction to determine and fix the benefits to be levied as special taxes until it has given six days notice of its sitting. *Leavitt v. Bell*, 55 Neb. 57, 75 N. W. 524; *Equitable Trust Co. v. O'Brien*, 55 Neb. 735, 76 N. W. 417; *Wakeley v. Omaha*, 58 Neb. 245, 78 N. W. 511; *Medland v. Connell*, 57 Neb. 10, 77 N. W. 437.

Nor to pass an ordinance levying special taxes until it has first determined the amount of special taxes to be assessed against the real estate as benefits. *Leavitt v. Bell*, 55 Neb. 57, 75 N. W. 524; *Medland v. Connell*, 57 Neb. 10, 77 N. W. 437.

*County ditch.*

A special assessment against a resident owner for the cost of a county ditch affecting his lands, under a proceeding of which he had neither notice nor knowledge, is void. *B. O. & C. R. Co. v. Wagner*, 43 Ohio St. 75, 1 N. E. 91.

*No hearing on benefits.*

An assessment without an opportunity for a hearing on the question of benefits is a nullity, and not void merely as to so much as may be shown to be in excess of the benefits derived. *Hutcheson v. Storrie*, 92 Tex. 685.



hearing that is proper.<sup>94</sup> The manner of giving notice, where not prescribed by statute, its form, or the length of time, or personal service, are not of material importance if reasonable opportunity be in fact given of the time, place, and tribunal for a hearing.<sup>95</sup> The validity of a statutory provision as to notice depends not so much upon the time or mode of notice directed, but upon the fact that it is directed, and furnishes an effective opportunity to be heard,<sup>96</sup> and the question of the sufficiency of the notice cannot be raised for the first time on an appeal.<sup>97</sup> Where the charter provides for a hearing, it is an excess of authority for the council to limit the right to objections made in writing.<sup>98</sup> Notices to bidders for public work should contain the substantial requisites of the specifications, so that therefrom the bidders can obtain proper information to permit of their making an intelligent bid,<sup>99</sup> and in proceedings for opening a street or alley, the notices should describe in the precise language of the ordinance, the land to be taken, giving the numbers of the lots and the portions to be taken.<sup>1</sup> Where a statute provides that the assessment in a street opening case shall be made in the manner provided by charter, and the latter makes provision for due notice of the assessment, the statute and charter will be construed together, and the objection that notice is not provided by the former is untenable;<sup>2</sup> a notice of application for judgment against property assessed for private drains will not au-

<sup>94</sup> *Wilson v. State*, 42 N. J. L. 612; *Davies v. Los Angeles*, 86 Cal. 37, 24 Pac. 771.

<sup>95</sup> *Gilmore v. Hentig*, 33 Kan. 156, 5 Pac. 781; *Derby v. W. Chi. Park Com'rs*, 154 Ill. 213, 40 N. E. 438; *King v. Portland*, 38 Or. 402, 55 L. R. A. 812, 63 Pac. 2; *Norfolk v. Young*, 97 Va. 728, 47 L. R. A. 574, 34 S. E. 886.

<sup>96</sup> *In re Amsterdam*, 126 N. Y. 158, 27 N. E. 272.

<sup>97</sup> *Young v. People*, 155 Ill. 247, 40 N. E. 604.

<sup>98</sup> *State v. Jersey City*, 25 N. J. L. 309.

<sup>99</sup> *Wilkins v. Detroit*, 46 Mich. 120, 8 N. W. 701, 9 N. W. 427.

<sup>1</sup> *Hemingway v. Chicago*, 60 Ill. 324.

<sup>2</sup> *Grand Rapids etc. Co. v. Grand Rapids*, 92 Mich. 564, 52 N. W. 1028.



thorize a judgment against the same lands for an assessment to grade, pave, and curb a street.<sup>3</sup>

**354.** It is essential to the validity of an assessment for benefits that the land owners have notice of the meeting of the commissioners by whom the assessment is made and an opportunity of being heard before them. It is not sufficient that they have notice of the hearing before the court on an application for the confirmation of the report of the commissioners.<sup>4</sup>

— Notices held sufficient.

**355.** It has been held that the required notice of the meeting of the assessing board need not describe the property to be assessed, or the assessment district;<sup>5</sup> a general notice addressed to "all persons interested," or to "all whom it may concern," in the absence of any specific requirement as to the mode of address;<sup>6</sup> a notice of presentation of a petition which has been held by the court sufficient in taking action on the petition, is equally so on collateral attack;<sup>7</sup> where nothing appears to the contrary, the presumption will be indulged in that the location of the improvement provided by ordinance is in the city, although the notice does not so state;<sup>8</sup> one referring to information on file, without setting out the materials to be used or the character of the proposed work, where the charter requires the survey, diagram and estimate thereof to be filed in the

<sup>3</sup> Waller v. Chicago, 53 Ill. 88.

<sup>4</sup> State v. Road Com'rs, 41 N. J. L. 83.

<sup>5</sup> State v. District Court, 33 Minn. 235, 22 N. W. 625, 632.

With all deference, it is suggested that this decision is not upheld by the weight of either reason or of authority. Without a description of the assessment district, it is impossible for a property owner to know whether he is a party in interest, or not.

<sup>6</sup> Ottawa v. Macy, 20 Ill. 413;

Hennessy v. Douglas Co., 99 Wis. 129, 74 N. W. 983.

<sup>7</sup> Hackett v. State, 113 Ind. 532, 15 N. E. 799.

<sup>8</sup> Wheeler v. People, 153 Ill. 480, 39 N. E. 123; Stanton v. City, 154 Ill. 24, 39 N. E. 987; Chi. W. Div. R. Co. v. People, 154 Ill. 256, 40 N. E. 342; Sargent v. Evanston, 154 Ill. 268, 40 N. E. 440.



office of the city clerk; <sup>9</sup> an act authorizing a reclamation district to begin an action to determine the validity of an assessment, and making the judgment conclusive as to parties thereto, constitutes a proper notice; <sup>10</sup> where a street has been regularly ordered paved, and plans for water and gas connections filed and approved, under a law authorizing a special assessment to pay therefor, and all steps necessary to charge the abutting property had been taken by the council, the public letting of the contract to the lowest responsible bidder is sufficient notice to fix the cost as to each lot.<sup>11</sup>

**356.** An allegation in a complaint that "notice of the assessment and of the hearing and considering of objections to the assessment roll was given defendant personally," is sufficient, as against a demurrer, to show that actual notice was given defendant; <sup>12</sup> provisions that the board of public works shall make an assessment of damages, then give notice that same will be open at their office for twenty days; that upon a day named they would hear all objections, and all parties interested, reduce to writing all objections with evidence supporting them, and then have power to review, modify and correct said assessment; and that thereupon a complete and final assessment would be made, afford sufficient notice and opportunity to present evidence and be heard.<sup>13</sup>

**357.** Where a city charter provides that its board of public works, before ordering a street improved at expense of abutting owners, shall give such owners notice to do the work within a reasonable time, and if not done within such time, a contract for doing it would be let, it is the duty of the board to determine, in the first instance, what is a rea-

<sup>9</sup> Felker v. New Whatcom, 16 Wash. 178, 47 Pac. 505; State v. Pillsbury, 82 Minn. 359, 85 N. W. 175.

<sup>10</sup> Reclamation District v. McCullah, 124 Cal. 175, 56 Pac. 887.

<sup>11</sup> Gleason v. Waukesha Co., 103 Wis. 225, 79 N. W. 249.

<sup>12</sup> Tumwater v. Pix, 15 Wash. 324, 46 Pac. 388.

<sup>13</sup> State v. Oshkosh, 84 Wis. 548, 54 N. W. 1095.



sonable time. It is probable that when attacked collaterally, such determination is, in the absence of fraud, conclusive.<sup>14</sup> It is not necessary to the validity of a city charter conferring the right to improve a street that it should provide for notice of the time and place of apportioning the cost of the improvement, or that it shall be so provided in the charter at all; it is sufficient if reasonable notice be in fact given.<sup>15</sup>

**358.** An ordinance or notice of an improvement is sufficient where it describes generally the kind of improvement proposed to be made, and refers for a specific description to maps, plans, specifications or other details thereof on file in a public office and accessible to interested parties, for by such reference they become part of the ordinance or notice, and then the notice does specify "with convenient certainty," the kind of improvement to be made;<sup>16</sup> and where a charter authorizes the construction of sidewalks by a city, the cost to be assessed against abutting property, but providing, that the owners should, for the period of fifteen days, have the privilege of doing the work themselves, notice to the lot owner of the passage of the ordinance or resolution providing for the improvement is necessary in order to give a lien for the cost of such improvement; but actual notice is not required, and the passage and publication of the ordinance is sufficient constructive notice;<sup>17</sup> and as a general rule the publication of an ordinance will be deemed constructive notice of anything therein contained. Thus, where neither the city charter, nor the ordinance passed thereunder, in a street improvement proceeding, provides for notice to the property owners affected by the assessment, but the ordinance provides that the assessment shall be collected by the enforcement of the lien in the same manner as mort-

<sup>14</sup> *Fass v. Seehawer*, 60 Wis. 525, 19 N. W. 533.

<sup>15</sup> *Shannon v. Portland*, 38 Ore. 382, 62 Pac. 50.

<sup>16</sup> *Clinton v. Portland*, 26 Ore. 410, 38 Pac. 407.

<sup>17</sup> *C. & O. R. Co. v. Mullins*, 94 Ky. 355, 22 S. W. 558.



gages are foreclosed, which can only be after due notice, the property owner is afforded an opportunity to question the validity of the assessment and the ordinance is valid.<sup>18</sup>

<sup>18</sup> *Garvin v. Daussman*, 114 Ind. 429, 5 Am. St. Rep. 637, 16 N. E. 826.

For a case as to the sufficiency of notice of sewerage work to be done on several streets, and posted only on one, see *White v. Harris*, 116 Cal. 470, 48 Pac. 382.

The following are additional cases holding the notice sufficient. *No necessity of naming owners.*

Under a charter requiring thirty days' notice by publication requiring property owners within the assessment district to notify the council of their selection of paving material, it is unnecessary to name the owners, *Medland v. Linton*, 60 Neb. 250, 82 N. W. 866; *Portsmouth Sav. Bank v. Omaha*, 67 Neb. 50, 93 N. W. 231.

*Two weeks publication.*

A charter provision that a special assessment roll have two weekly publications in the official paper, and that two weeks after the first publication be given for the filing of objections. *Auditor General v. Hoffman*, 132 Mich. 198, 93 N. W. 259.

*Notice of fifteen days.*

A notice of fifteen days, as provided by charter, by publication in the official paper. *Jones v. Seattle*, 19 Wash. 669, 53 Pac. 1105.

*Publication of benefits.*

Publication of assessment of benefits, if charter provide. Personal service unnecessary. *Kansas City v. Ward*, 134 Mo. 172, 35 S. W. 600.

*Ordinance for street opening.*

The publication of an ordinance for opening a street. *Curry v. Mt. Sterling*, 15 Ill. 320.

*Storm Sewer.*

Resolution authorizing a street improvement and stating it is necessary to construct a storm water sewer, is sufficient notice that such sewer is to be constructed as a part of the improvement, and for the purpose of properly constructing and protecting the highway. *Gates v. Grand Rapids*, 134 Mich. 96, 95 N. W. 998.

*Failure to receive notice.*

Under a statute requiring special assessment notices to be sent to the persons who paid taxes on the respective parcels the last preceding year, the assessment is not void because the real owner did not receive such notice. *People v. Ill. Cent. R. Co.*, 213 Ill. 367, 72 N. E. 1069.

*Must be published before fixing tax district.*

But the statutory notice must be published before the limits of the district within which property will be specially benefited by a local improvement can be fixed. *State v. District Court*, 90 Minn. 294, 96 N. W. 737.

As to general sufficiency of notice, although not conforming to ordinance, see *Aberdeen v. Lucas*, 37 Wash. 190, 79 Pac. 632. As to owners of back-lying lands, under Indiana statute, see *Voris v. Pittsburg etc. Co.*, 163 Ind. 599, 70 N. E. 249.



— Notices held insufficient.

**359.** A notice of application for judgment of sale is fatally defective if it fail to sufficiently describe the property sought to be sold;<sup>19</sup> a notice for proposals for street work which does not state as nearly as practicable, the extent of the work, when to be done, and the time when proposals are to be acted upon, is insufficient;<sup>20</sup> where commissioners, after making an assessment, were required to publish a notice of the time and place when and where parties can be heard, but in the notice fixing such time and place stated that "all persons feeling themselves aggrieved must present their objections in writing," the commissioners exceeded their jurisdiction;<sup>21</sup> where the return of the proper officer is to be made at least six days before the one fixed for a hearing, no notice which is required to be included in said return will be valid if made later than six clear days be-

*Variance between date and first publication.*

Under a statute fixing the time within which objections may be filed as twenty days after the first publication is completed, a notice dated Aug. 6, requiring such objections to be filed within twenty days from date, is not rendered invalid by the fact that it was first published on Aug. 8, it being a mere irregularity, not going to the jurisdiction of the council, or preventing plaintiff from filing his objection within the time given by statute. *Owens v. Marion*, 127 Iowa, 469, 103 N. W. 381.

*When either verbal or written.*

Under a statute providing for ten day's notice to the owner if found or known, of intent to foreclose a special assessment lien, such notice may be either verbal or written. *Ross v. Van Watta*, 164 Ind. 557, 74 N. E. 10.

*Actual notice is sufficient.*

Any statutory notice to the property owner, which will enable him to appear before some duly constituted tribunal, where he may be heard with reference to the fairness and validity of the assessment before it becomes a fixed and established charge upon his property, is a sufficient notice. *Citizens, etc. Trust Co. v. Chicago*, 215 Ill. 174, 74 N. E. 115.

Held sufficient. See *State v. District Court (Minn.)*, 103 N. W. 744; *State v. District Court (Minn.)*, 104 N. W. 553.

*Sufficiency as to time.*

*Pierson v. People*, 204 Ill. 456, 68 N. E. 383.

<sup>19</sup> *Nichols v. People*, 165 Ill. 502, 46 N. E. 237.

<sup>20</sup> *Windsor v. Des Moines*, 101 Iowa, 343, 70 N. W. 214.

<sup>21</sup> *Merritt v. Port Chester*, 71 N. Y. 309, 27 Am. Rep. 47.



fore the day of hearing;<sup>22</sup> and where the ordinance requires thirty days' notice of the requirement for a new sidewalk, and only seventeen days' notice is given, the lot owner is not liable if the work be done by the city, he failing to comply with the notice;<sup>23</sup> a public notice for bids for a street improvement which fails to specify the extent of the work, or when it is to be done, or the proposals acted upon, is fatally defective;<sup>24</sup> a statute by which the right to contest the validity of special assessments for street improvements is barred as soon as improvement bonds are issued, which may be within forty days after the assessment of benefits is completed, without actual notice to land owners, and before work on the improvement is actually begun, is invalid, the time being too short for constructive notice;<sup>25</sup> and mere notice fixing the time for hearing objections to an assessment is not sufficient, but the persons having the power to hear and determine the objections should be in attendance;<sup>26</sup> a notice requiring objections to be filed "by February 19" is sufficient to sustain a default entered on that day, as the phrase "until the 19th" did not extend beyond the last moment on the 18th;<sup>27</sup> but where a notice for a street improvement given under a charter requirement "specifying with convenient certainty the street or part of street to be improved and the kind of improvement to be made," was published so as to read that the contemplated plank sidewalk should be laid "where the same may be required," its insufficiency is plain.<sup>28</sup>

<sup>22</sup> Powers' Appeal, 29 Mich. 504.

<sup>23</sup> Washington v. Mayor, 1 Swan, 177.

<sup>24</sup> Polk v. McCartney, 104 Iowa, 567, 73 N. W. 1067.

<sup>25</sup> Hayes v. Douglas Co., 92 Wis. 429, 31 L. R. A. 213, 435 Am. St. Rep. 926, 65 N. W. 482.

<sup>26</sup> Nashville v. Weiser, 54 Ill. 245.

<sup>27</sup> Burhans v. Norwood Park, 138 Ill. 147, 27 N. E. 1088.

<sup>28</sup> Hawthorne v. E. Portland, 13 Or. 271, 10 Pac. 342.  
*When too late.*

A notice of hearing before commissioners to assess benefits after the completion of the improvement does not suffice. *Sears v. Atlantic City* (N. J.), 60 Atl. 1093; *Wilkin-*



— What record must show.

**360.** The giving of the requisite notice must affirmatively appear upon the face of the record, or the assessment will be void.<sup>29</sup> On application for judgment against delinquent lands where the record on its face shows that proper notice was given, the owner cannot impeach the judgment by showing that in fact he did not receive notice, and proof of notice of making the assessment must be made, or

son v. Trenton, 36 N. J. L. 499;  
Bowne v. Logan, 43 N. J. L. 421.

*Notice wrongly directed.*

A statute requiring notice of hearing on an assessment for a public improvement is not complied with by publishing a notice to persons desiring to bid on the work. Daly v. Gubbins (Ind.), 73 N. E. 833.

*Time too short.*

Where a board, required to give notice of its sitting six days prior thereto, convenes on the 28th in pursuance of a notice published on the 23d, it is without jurisdiction to proceed. Leavitt v. Bell, 55 Neb. 57, 75 N. W. 524.

*Uncertainty in description.*

Notice to a person owning two lots on one street, to improve his lot on such street, without stating which, is void for uncertainty. Simmons v. Gardiner, 6 R. I. 255.

The following are more recent cases along the same line.

*Failure to give two weeks' notice.*

Where a full two weeks' notice of the meeting of the council as a special assessment board is not given as required by statute the council is without jurisdiction to proceed in the premises, and its acts are not aided by a general statute providing that no tax shall be held invalid by reason of any ir-

regularity, omission, etc., that does not prejudice the property rights of the person whose property is taxed. Auditor General v. Calkins, 136 Mich. 1, 98 N. W. 742.

*Invalid promise by officials.*

Proceedings for a new assessment, the statutory notice having been given, are not subject to arrest by an objecting owner because of the non-performance of a promise made him by certain officials that he should have personal notice, as public policy forbids such a rule. Alexander v. Tacoma, 35 Wash. 366, 77 Pac. 686.

*City official not chargeable with.*

Because the city attorney is the owner of lots sought to be assessed for a local improvement, he is not thereby chargeable with knowledge of notice of the proceedings of the city's various departments relative to their actions in the matter. Shannon v. Omaha (Neb.), 100 N. W. 298.

<sup>29</sup> Goodwillie v. Lake View, 137 Ill. 51, 27 N. E. 15; Waller v. Chicago, 53 Ill. 88; Van Sant v. Portland, 6 Or. 395; Pilon v. Rutherford, 65 N. J. L. 538, 47 Atl. 439; Bensinger v. Dist. of Col., 6 Mackey, 285. But see Walker v. District of Col., 6 Mackey, 352.



the judgment is void.<sup>30</sup> Under the provisions of a charter conferring the power to provide by ordinance for the construction of sidewalks on streets at the expense of abutting owners where there is no provision for constructive notice, it is essential that the proceedings of the council show that actual notice was given, or the ordinance will be void.<sup>31</sup>

— How given — Actual and constructive.

**361.** It is for the legislature to prescribe the method of giving notice, and an assessment is not invalid because of omission to give personal notice.<sup>32</sup> The notice may be either actual or constructive. Actual notice is such notice as is required to be given in some particular way to each owner. Constructive notice is such as results from some public act required to be done, and in a particular manner, and of which the owners of the property upon which the burdens are imposed are required to take notice.<sup>33</sup>

**362.** It has been held that in the absence of charter provisions as to notice, the city may by ordinance or otherwise provide for such notice as may give the property owners an opportunity for a hearing,<sup>34</sup> but it would seem to be the better rule that in such cases the power of the city council to prescribe the kind of notice is confined to a method which will give actual notice.<sup>35</sup> Where personal service of

<sup>30</sup> *Clark v. People*, 146 Ill. 348, 35 N. E. 60; *People v. Ryan*, 156 Ill. 620, 41 N. E. 180; *Honore v. Chicago*, 62 Ill. 305.

<sup>31</sup> *State v. Vineland*, 60 N. J. L. 264, 37 Atl. 625.  
*Sufficiency of record as to posting.*

Where a statute relative to special assessments requires a certain notice to be given by posting handbills, the record of a special assessment resolution which recites that handbills were posted as required by law is sufficient evidence of a compliance with the statute.

*Owens v. Marion*, 127 Iowa, 469, 103 N. W. 381.

<sup>32</sup> *In re De Peyster*, 80 N. Y. 565.

<sup>33</sup> *C. & O. R. Co. v. Mullins*, 94 Ky. 355, 22 S. W. 558.

<sup>34</sup> *Gatch v. Des Moines*, 63 Iowa 718, 18 N. W. 310.

<sup>35</sup> *State v. Jersey City*, 24 N. J. L. 662; *Hudson Co. v. State*, 24 N. J. L. 718; *State v. Morristown*, 34 N. J. L. 445; *Camden v. Mulford*, 26 N. J. L. 49; *Boice v. Plainfield*, 38 N. J. L. 95; *Stretch v. Hoboken*, 47 N. J. L. 268; *Traction Co. v. Board of Works*, 56 N. J. L. 431,



notice on residents is required by charter, such service, within the meaning of the statute, will appear from the fact of the delivery of a copy of the notice to an agent duly authorized to receive it, or from circumstances justifying an inference of the actual delivery of a copy to the person to be affected thereby, and service by leaving a copy of the notice at the residence, with a member of the family, is insufficient,<sup>36</sup> although actual personal notice is sufficient in a case where the charter provides for service by publication in an official newspaper.<sup>37</sup> But no assessment can be levied by a board of health under a statute providing for the giving of a specific notice, which has not been given, although the person had actual knowledge of the doing of the work in question.<sup>38</sup> And where the statutory requirements as to notice are somewhat obscure, a ten day notice by personal service is sufficient.<sup>39</sup>

**363.** Where a statute requires a notice to be posted in a public office for five full days, it must be posted before the opening of the office on the first day and remain posted until the close of the office on the fifth day,<sup>40</sup> and when the requirement is that it be posted in a certain place for five days, posting for only three days affects a substantial right of parties interested, and renders all subsequent proceedings void.<sup>41</sup>

**364.** In a direct proceeding to review a confirmation judgment, a recital therein that the legal requirements as to posting notices have been complied with, will not prevail over affirmative proof in the record to the contrary. Thus, a requirement that notices be posted in four different public

29 Atl. 163, 57 N. J. L. 710; State v. Vineland, 60 N. J. L. 264, 37 Atl. 625; State v. South Amboy, 62 N. J. L. 197, 40 Atl. 637.

<sup>36</sup> Wilson v. Trenton, 53 N. J. L. 645, 16 L. R. A. 200, 23 Atl. 278.

<sup>37</sup> Tumwater v. Pix, 15 Wash. 324, 46 Pac. 388.

<sup>38</sup> Grace v. Newton, 135 Mass. 490.

<sup>39</sup> Auburn v. Paul, 84 Me. 212, 24 Atl. 817.

<sup>40</sup> Himmelmann v. Cahn, 49 Cal. 285; Brooks v. Satterlee, 49 Cal. 289.

<sup>41</sup> Hewes v. Reis, 40 Cal. 255.



places is not complied with by posting three of such notices on "the tree at the N. E. cor. of O. and F. place."<sup>42</sup> A judgment awarding plaintiff damages to his lot caused by street improvements will not be disturbed because of a lack of proper service of notice on other property owners also affected by the ordinance authorizing the improvement, as their grievances will have to be redressed on their own application.<sup>43</sup>

**365.** The affidavit of mailing notices in a special assessment proceeding is a part of the process, and must be sufficient on its face to show compliance with statutory requirements.<sup>44</sup> Where the statute does not fix the time for mailing, a reasonable time therefor would not be less than ten days.<sup>45</sup> The affidavit of mailing a notice which otherwise conforms to the statute is not vitiated by inserting therein a copy of the notice which fails to give the year in which returnable, as such copy may be treated as surplusage.<sup>46</sup> And an affidavit of mailing and posting notices purporting to be made by one person and sworn to by another, is insufficient;<sup>47</sup> but such affidavit is similar to an officer's return on process, and may be amended to conform to the facts, even after judgment.<sup>48</sup>

**366.** The fact that one tenant in common received no statutory notice of the special taxation of the property is not a basis for an objection by his co-tenants, where they may pay their proportions of the tax and have their interests released.<sup>49</sup> Failure of the affidavit made by commissioners to show the date of mailing notices of special assessment to

<sup>42</sup> *White v. Chicago*, 188 Ill. 392, 58 N. E. 917.      *Co. v. People*, 155 Ill. 299, 40 N. E. 599.

<sup>43</sup> *Kansas City v. Block*, 175 Mo. 433, 74 S. W. 993.      <sup>47</sup> *Moll v. Chicago*, 194 Ill. 28, 61 N. E. 1012.

<sup>44</sup> *Sheridan v. Chicago*, 175 Ill. 421, 51 N. E. 898.      <sup>48</sup> *Michael v. Mattoon*, 172 Ill. 394, 50 N. E. 155; *Hinkel v. Mattoon*, 170 Ill. 316, 48 N. E. 908.

<sup>45</sup> *Perry v. People*, 155 Ill. 307, 40 N. E. 468.      <sup>49</sup> *Birket v. Peoria*, 185 Ill. 369, 57 N. E. 30.

<sup>46</sup> *Schemick v. Chicago*, 151 Ill. 336, 37 N. E. 888; *West C. S. R.*



property owners, is not available as a defense in collateral proceeding by the collector to obtain judgment against property for the delinquent assessment.<sup>50</sup> If sufficient notice of the first meeting of a board to consider an assessment be given, the board may adjourn such meeting from time to time, and parties desiring to present objections must attend at such adjourned meeting without further notice.<sup>51</sup> But where the time fixed for a hearing was 9.15 P. M., and notice thereof given to objectors, who attended, and before that hour, and without notice to the objectors, the meeting was adjourned to the next evening, the council lost jurisdiction in the matter, or to make a valid assessment, without a new notice.<sup>52</sup> The publication of the time and place of hearing objections to the report of the commissioners must conform strictly to the requirements of the charter.<sup>53</sup>

**367.** The legislature has the constitutional power to authorize proceedings against property upon which there is a municipal lien, in cases where the owner is a non-resident, and a statute providing for notice by posting and publication is constitutional.<sup>54</sup> A notice of assessment, published in a daily newspaper, as required by ordinance, is sufficient.<sup>55</sup> And where the ordinances of a city provide for giving notice of an assessment by publication in any newspaper of general circulation published in the city, such notice so given is sufficient, and personal notice is unnecessary,<sup>56</sup> and where the statute requires the making of an order

<sup>50</sup> *Dickey v. Kochersperger*, 160 Ill. 633, 43 N. E. 606; *McChesney v. People*, 145 Ill. 614, 34 N. E. 431 and 148 Ill. 221, 35 N. E. 739, explained. In these cases, no point was made or considered that the judgment of confirmation could not be collaterally attacked.

<sup>51</sup> *McChesney v. Chicago*, 201 Ill. 344, 66 N. E. 217.

<sup>52</sup> *Gill v. Oakland*, 124 Cal. 335, 57 Pac. 150.

<sup>53</sup> *State v. Bayonne*, 49 N. J. L. 311, 8 Atl. 295.

<sup>54</sup> *Philadelphia v. Jenkins*, 162 Pa. St. 451, 29 Atl. 794; and see *Arnold v. Fort Dodge*, 111 Iowa 152, 82 N. W. 495.

<sup>55</sup> *Williams v. Detroit*, 2 Mich. 560.

<sup>56</sup> *Lyman v. Plummer*, 75 Iowa 353, 39 N. W. 527. Cf. note 35.



prescribing the notice of time and place of hearing, and that such notice be served by publication, the publication of the entire order instead of the formal notice is a substantial compliance with the statute.<sup>57</sup> The same rigidity of compliance with the legislative will is required in the publication of notices that is required in any other portion of the process of acquiring jurisdiction.<sup>58</sup>

### — The official paper.

**368.** It is usual to have some one or more newspapers designated as the official papers of the municipality for the

<sup>57</sup> *Muskego v. Drainage Com'rs*, 78 Wis. 40, 47 N. W. 11.

Under a statute requiring notices of street work to be conspicuously posted along the line of said contemplated work at not more than 100 feet apart, but not less than three in all, an affidavit that such notices were "conspicuously posted along the line of H street, between S street and N street, notices not more than 100 feet apart, and six notices in all," is sufficient, H street being the line of the contemplated improvement, and 560 feet long, between the two cross streets. *Dowling v. Hibernia S. & L. Society*, 143 Cal. 425, 77 Pac. 141.

<sup>58</sup> In a proceeding to improve a street if the proper authorities do not make an order for the publication of the notice of the award of the contract, pursuant to statute, all the proceedings subsequent to the award including the assessment are void. *Reis v. Graff*, 51 Cal. 96.

An unauthorized publication of notice of intention to do street work, made in a paper other than that designated by the council for that purpose, is in effect no publi-

cation, and jurisdiction is not acquired thereby. *Chase v. Los Angeles*, 122 Cal. 540, 55 Pac. 414.

Where the original notice for bids was properly advertised and posted, any subsequent order to re-advertise for bids designating any newspaper must be considered as referred to the original order for its terms. *Ellis v. Witmer*, 134 Cal. 249, 66 Pac. 301.

Where a charter gave to the mayor and council power to grade streets and alleys, and to lay a special tax therefor, they to declare their intention by resolution to be published four consecutive weeks, and then the resident owners were to have twenty days in which to protest, the grading of an alley without observing these provisions was without jurisdiction, and the certificates issued to pay for the work were void. *McLauren v. Grand Forks*, 6 Dak. 397, 43 N. W. 710.

Where a petition mentions a party defendant as a *known* owner, and describes his property, a publication as to *unknown* owners is not a sufficient service. *Dickey v. Chicago*, 152 Ill. 468, 38 N. E. 932.



publication of notices, ordinances, resolutions, proposals, and other matters in which the property owner is usually more or less interested, and to which he can refer for the desired information. This, however, is not a universal requirement,

Where a charter provides for the publication of only such ordinances as are penal in their nature, it is the duty of property owners to take notice of the acts of the council, relating to public matters, and to inform themselves by what authority improvements are being made. *Elkhart v. Wickwire*, 121 Ind. 331, 22 N. E. 342.

Where a sidewalk ordinance provides for personal service of notice on known property owners and also by publication, "which publication shall be constructive notice to all non-resident property owners interested," a resident who has been served cannot complain that no publication of the notice was made. *Chariton v. Holliday*, 60 Iowa, 391, 14 N. W. 775.

Where a general ordinance provides that notices of proposals for doing street work shall be advertised in *three* newspapers, the advertising in only *one* newspaper invalidates an assessment levied to pay for the work. *Mayor, etc. v. Johnson*, 62 Md. 225.

Where it appears that there was a defect in the publication of a notice provided for in the city charter, and it does not appear that all the land owners were personally served, the entire proceedings are invalid, although the party making the objection was himself personally served. *Brush v. Detroit*, 32 Mich. 43.

*Publication of resolution.*

Omission to publish the resolu-

tion on report of a committee of either board of the council recommending the repaving of a street, as required by a city charter, before the final vote of that body, is fatal, and invalidates an assessment based thereon. *In re Little*, 60 N. Y. 343; *In re Anderson*, 60 N. Y. 457.

Under a requirement that notice of the meeting of the assessment board be published for at least six days, and notice of meeting on the 13th was published from the 6th to the 12th of the month, inclusive, it is no objection that one of the days fell on Sunday. *Portsmouth Sav. Bank v. Omaha*, 67 Neb. 50, 93 N. W. 231.

A notice published in the official papers for ten days before the day fixed for the alteration or confirmation of the assessment by the common council is all the notice necessary, as it gives to any person assessed an opportunity to be heard. *People v. Mayor, etc., of Brooklyn*, 4 N. Y. 19, 55 Am. Dec. 266.

Where a statute provides for publication of a notice to non-resident land owners of a pending proceeding, it is sufficient if such published notice be addressed to "the non-resident owners of the following lands, to-wit"—describing the lands. *Miller v. Graham*, 17 Ohio St. 1.

A notice of a street improvement required to be published in a certain paper, is not affected by a



and where a statute requires notice to be given by publication in the official newspaper, but the municipality is not authorized by law to designate one, the requirements of the statute will be met by personal service of such notice upon the parties affected.<sup>59</sup> In case the common council has undertaken to select an official paper, under the charter, in which to publish official notices, and acts irregularly, yet such paper so chosen will be the official paper *de facto*, and notices published therein will be held valid in collateral proceedings.<sup>60</sup>

**369.** Under a statute requiring all proceedings of the council to be published for three days in the papers to be designated by the mayor and comptroller, the clerk is without authority to publish in any other than papers so designated, although no designation has been made. A publication according to the statute being a condition precedent to any right of the council to act, and it appearing that no legal designation of papers was made, an assessment made under a resolution passed by the council is illegal.<sup>61</sup> And where a newspaper is designated as an official paper for one year, the employment ceases at the expiration of the year, and there is no presumption that it was continued without a new designation, or that a new designation was made, or that the proper authorities failed in their duty to make some

change in the name of the paper during the course of such publication, where the volume and number thereof were not changed, and the publication was continued for the requisite time thereafter. *Clinton v. Portland*, 26 Or. 410, 38 Pac. 407.

Under a statute requiring street improvement notices to be headed "Notice of Street Work" in letters not less than an inch in length, a notice in three-quarter inch type heading is insufficient to confer jurisdiction. *Bank of Columbia v. Portland*, 41 Or. 1, 67 Pac. 1112.

A notice to a lot owner to do certain street work within a reasonable time, or it will be let by contract, is a mere favor, and a law requiring notice to be given him by publication is valid. *Fass v. Seehawer*, 60 Wis. 525, 19 N. W. 533.

<sup>59</sup> *Tumwater v. Pix*, 15 Wash. 324, 46 Pac. 388.

<sup>60</sup> *Wright v. Forrestal*, 65 Wis. 341, 27 N. W. 52.

<sup>61</sup> *In re Burmeister*, 76 N. Y. 174.



designation as required by law.<sup>62</sup> But where a paper is once properly designated as the official paper, no time during which it shall so remain being fixed, such designation is an employment by the city, and in the absence of any evidence that the service was declined, or the designation revoked or superseded, the presumption is that the employment continues.<sup>63</sup>

### — Publication of.

**370.** The requirements of the statutes and ordinances of the many states and cities are naturally extremely varied, and many cases have arisen in which compliance with the statute or ordinance has been inquired into, and many interesting questions decided. The authority of the legislature to provide directly as to the length of notice by publication, or to delegate its power in that respect to cities, is no longer questioned, although the courts occasionally interfere if such notice be unreasonably short. Like all steps in proceedings *in invitum*, the record should affirmatively show proof of the necessary publication, and no presumption that the notice was in fact actually given will be indulged in,<sup>64</sup> although where plaintiff admitted that notice was published in two papers, it was held to be presumed that the publication was made the requisite number of times, notwithstanding the absence of any evidence of the fact.<sup>65</sup> This is apparently a relaxation of the general rule. As a rule, the question of the sufficiency of the publication, as well as proof thereof, is one of statutory construction, as the cases collated in the appended note will illustrate.<sup>66</sup>

<sup>62</sup> *In re Burke*, 62 N. Y. 244.

<sup>63</sup> *Petition of Astor*, 50 N. Y. 363; *In re Phillips*, 60 N. Y. 16; see *In re Folsom*, 56 N. Y. 60.

<sup>64</sup> *Wilson v. Seattle*, 2 Wash. 543, 27 Pac. 474.

<sup>65</sup> *Arnold v. Fort Dodge*, 111 Iowa, 152, 82 N. W. 495.

<sup>66</sup> The italicized words at the beginning of each case cited in this note indicate the exact words of the statute or ordinance the construction of which is determined in that case.

"*By six days' publication*" means a publication for six dif-



ferent days. *Scammon v. Chicago*, 40 Ill. 146. A notice published for six days, one of which is Sunday is invalid. *Sewall v. St. Paul*, 20 Minn. 511, Gil. 459.

"*At least ten days before application.*" One publication is sufficient. *Royal Ins. Co. v. S. Park Com'rs*, 175 Ill. 491, 51 N. E. 558.

"*At least ten days' notice by publication in one or more newspapers.*" A single publication in a newspaper selected for that purpose is sufficient. *P. W. & B. R. Co. v. Shipley*, 72 Md. 88, 19 Atl. 1

"*For at least six days prior thereto*" is not complied with by one publication six days before the meeting, but requires a publication each day for six days prior to meeting. *Scammon v. Chicago*, 40 Ill. 146. *Whitaker v. Beach*, 12 Kan. 492; *Leavitt v. Bell*, 55 Neb. 57, 75 N. W. 524; *Washington v. Bassett*, 15 R. I. 563, 2 Am. St. Rep. 929, 10 Atl. 625.

"*For ten days.*" Where the notice was not published on two days out of the ten (not being Sunday), there being no issue that day, the notice was insufficient and void. *Haskell v. Bartlett*, 34 Cal. 281.

"*For four weeks before,*" requires a publication once a week, or every seven days during that period, and a publication on May 20, May 27, June 4 and June 12 does not comply with the requirement. *Williams v. Supervisors*, 58 Cal. 237.

"*Two successive weeks.*" Such requirement is met by a publication on the 7th and 14th of the month, as it is not contemplated that it shall be for "two full

weeks" when made in a weekly paper. *Ricketts v. Hyde*, 85 Ill. 110.

"*Five successive days.*" A publication from July 1 to July 7 inclusive, Sunday July 3, and Monday, July 4, being *dies non juridicus*, and not counted. *Rasmussen v. People*, 155 Ill. 70, 39 N. E. 606; *McChesney v. People*, 145 Ill. 614, 34 N. E. 431.

"*To be published daily (Sundays excepted), in a daily newspaper for five days.*" A publication beginning Wednesday, March 4th, and ending Sunday, March 8th, is insufficient. The last publication should have been on the 9th. *Alameda, etc., Co. v. Huff*, 57 Cal. 331.

"*Five days, Sundays and non-judicial days excepted.*" A publication for four days, exclusive of the last day, which is Sunday, is invalid. *People v. McCain*, 50 Cal. 210.

*Six days — one Sunday.* In publishing a notice required by law to be published for six days, and one of the publication days occurs on Sunday, the publication on that day cannot be counted, it being at common law *dies non juridicus*. *Scammon v. Chicago*, 40 Ill. 146.

This decision is contrary to the general current of authority, and is no longer maintained in the same court.

*Ten days — Sundays.*

Under a statute providing for ten days' notice in special assessment proceedings, the Sundays intervening between the day of posting and the first day of the term should be counted. *Gordon*



— Proof of publication.

**371.** The fact that the notice has been duly published is usually established by the verified statement of the pub-  
v. People, 154 Ill. 664, 39 N. E. 560.

Sundays are included in the count of ten days in a notice regarding street work, which is required to be published. Taylor v. Palmer, 31 Cal. 240.

*Filing objections one day before meeting — Sunday.*

Where a charter requires objections to be filed at least one day prior to the meeting of the council, at which confirmation of an assessment will be asked for, it will be construed as intending that a day shall intervene between the last publication of the notice of such application and the meeting of the council, and if the last publication of the notice be on Saturday, and the council confirmed the assessment on the following Monday, the confirmation was void. Burton v. Chicago, 53 Ill. 87. See, in this connection: Wright v. Forrestal, 65 Wis. 341, 27 N. W. 52; Pittelkow v. Milwaukee, 94 Wis. 651, 69 N. W. 803; Pittelkow v. Herman, 94 Wis. 666, 69 N. W. 805; Friedrich v. Milwaukee, 114 Wis. 304, 90 N. W. 174.

*"As often as the same is issued"* does not require publication in an extra issue of half size, published upon a holiday on account of a strike. Perine v. Lewis, 128 Cal. 236, 60 Pac. 422, 772.

*Five successive days.*

Where a notice is required by charter to be published in five suc-

cessive numbers of the official paper, and was published five successive week days, omitting an intervening Sunday edition, such publication was sufficient, the Sunday issue, although numbered consecutively with the week day issue, was shown by the evidence to be furnished and sold under different terms. Voght v. Buffalo, 133 N. Y. 463, 31 N. E. 340.

*Consecutive days.*

The question as to what was sufficient to satisfy the requirements of a statute providing for a publication for "*consecutive*" days was carefully considered by the Supreme Court of Oregon. The notice in question was required by the charter to be published for ten consecutive days, and was published in each successive issue of the designated paper from May 4 to May 15 inclusive. During that time two Sundays intervened, on which days the paper was not issued, and of course there was no publication on those days, and the inquiry presented was, whether there was a publication for ten successive days, within the meaning of the charter. The court said that, construed within itself, they would answer, "No"; but because of the enactment of a statute to cure defective publications of notice, and to declare what was a sufficient publication thereof, which provided that, where a notice is required by any general or special law to be pub-



lished in a daily paper for successive or consecutive days, it shall be a full compliance, within the meaning of the law, if such notice is, or should have been, published on the week days only, this was held to be curative of the objections that the provision of the charter had not been complied with, and it was sufficient. *Bank of Columbia v. Portland*, 41 Or. 1, 67 Pac. 1112.

***Compliance with 10 day notice.***

An advertisement for bids to be put in June 23, published in the official paper on the 12th, and continued in each successive daily issue of such paper until the 22nd, is a full compliance with the charter requirement for a ten day notice. *Carpenter v. St. Paul*, 23 Minn. 232.

***Paper must be published in English.***

Where by statute any publication is directed to be in a newspaper, a paper published in the English language is to be understood, there being no provision to the contrary, and the statute is not complied with by publication in a paper printed in any other language. *Cincinnati v. Bickett*, 26 Ohio St. 49.

***Three days' notice — Council having two boards.***

Where, in a city having two boards in its common council, its charter provides that no vote shall be taken in either board upon the passage of a resolution or ordinance for a public improvement or laying an assessment, until after notice shall be published at least three days, each board, separate and independent of the other,

must cause notice of the introduction of a resolution into its own body to be published for three days before final action thereon; a publication by one board is insufficient. *In re De Pierris*, 82 N. Y. 243.

***Publication in supplement.***

A statutory requirement that a notice shall be published in a newspaper is sufficiently complied with by the publication in a sheet of the paper denominated a "supplement" which is circulated co-extensively with the balance of the paper. *Lent v. Tillson*, 72 Cal. 404, 14 Pac. 71.

***Sixty days' notice.***

Under a statute requiring that sixty days' notice of application for the passage of a street improvement ordinance shall be given in two daily newspapers of the city, it is not necessary that such notice be published any specified number of times; it merely requires that it shall be given, the sufficiency of the publicity of such application being left to the determination of the council. *Central Savings Banks v. Mayor, etc.*, 71 Md. 515, 18 Atl. 809, 20 Atl. 283.

***When mailing, insufficient.***

Where a charter requires notice of a street opening proceeding to be given non-residents by publication, the mailing of a copy of such notice to the address of a non-resident is insufficient. *Wilson v. Trenton*, 53 N. J. L. 645, 16 L. R. A. 200, 23 Atl. 278.

***Prior publication.***

When prior publication a mere irregularity. See *Moore v. Mayor*, 73 N. Y. 238, 29 Am. Rep. 134.



lisher or printer of the paper, but may be made by parol.<sup>67</sup> Where the notice is published as required in the paper which is recognized as the official paper, the fact may be established by the certificate of the publisher, and it is unnecessary to produce the record of the appointment of such paper as the official paper.<sup>68</sup> If the certificate be fatally defective, extrinsic evidence may be admitted to prove that notice was in fact duly given.<sup>69</sup> The seal of a corporation publishing the official paper need not be affixed to the certifi-

*Error — republication.*

Where in the publication of the first notice, there was an error which made the publication erroneous, and the city clerk then made a proper publication naming a different day for the meeting of the council, and that body met in accordance with the notice and awarded the contract, the proceedings were not invalidated, in the absence of any evidence, that any one was misled or failed to bid on account of the mistake, and jurisdiction was not lost, the first publication being treated as of no validity and the proceedings having been begun *de novo*. *Gilmore v. Utica*, 131 N. Y. 26, 29 N. E. 841.

*Five times, instead of five successive days.*

Judgment of sale for a delinquent special assessment cannot be rendered where the judgment of confirmation was rendered on default, and the certificate of publication for such confirmation shows the notice was published "five times," instead of "on five successive days." *Chandler v. People*, 161 Ill. 41, 43 N. E. 590.

*Publication in three daily papers.*

Where the statute requires cer-

tain notices to be published in three daily papers in the city, this requirement is met by publishing such notices in two dailies printed in English, and one daily printed in German, these being all the daily papers printed in such city. *John v. Connell* (Neb.), 98 N. W. 457.

*Two weeks' notice.*

A statutory requirement that two weeks' notice of the time and place of meeting of the special assessment board is not complied with by a publication once a week for two weeks, unless the time for hearing was two weeks after the first publication. *Auditor General v. Calkins*, 136 Mich. 1, 98 N. W. 742.

When Sunday included in 20 day limit, although last day of publication. See *Denver v. Londoner*, 33 Colo. 104, 80 Pac. 117.

Laws relating to notice by publication, construed, and necessity of legal notice affirmed. *Hawes v. Fliegler*, 87 Minn. 319, 92 N. W. 223.

<sup>67</sup> *Lingle v. Chicago*, 172 Ill. 170, 50 N. E. 192.

<sup>68</sup> *Rich v. Chicago*, 59 Ill. 286.

<sup>69</sup> *Rue v. Chicago*, 66 Ill. 256.



cate of publication.<sup>70</sup> The certificate must show that the necessary requirements as to publication have been complied with, or it is insufficient to give the authorities jurisdiction to proceed. It is insufficient where it gives the date of the first, and not of the last publication, under a requirement that the notice be published six days consecutively, except Sundays and holidays,<sup>71</sup> or if signed by one who did not become the publisher of the paper until after the time of the publication of the notice.<sup>72</sup> Whether or not the certificate is signed or certified by the printer or publisher of the newspaper in which it was claimed to have been published, is open to proof.<sup>73</sup>

**372.** Where the certificate of publication of notice did not state that it was published a certain number of days, "exclusive of Sundays and holidays," but certified it had been published for ten days consecutively, beginning at a certain date mentioned, it was deemed sufficient, as, from the language used, the court could ascertain the date of the first and last publications.<sup>74</sup>

**373.** In an affidavit stating that a certain notice was published "four weeks successively, commencing with the number of said paper published Dec. 10, 1887, and ending with the paper published Dec. 3, 1887," the last date should manifestly be Dec. 31, and the affidavit be treated as amended accordingly, or the error disregarded.<sup>75</sup> And under a statute which requires a publication for "five successive days," a certificate that it "has been published five times," giving the first and last days of publication, is fatally defective, and confers no jurisdiction to proceed.<sup>76</sup>

<sup>70</sup> Hertig v. People, 159 Ill. 237, 50 Am. St. Rep. 162, 42 N. E. 879.

<sup>71</sup> Rich v. Chicago, 59 Ill. 286; Allen v. Chicago, 57 Ill. 264; Rue v. Chicago, 57 Ill. 435.

<sup>72</sup> Armstrong v. Chicago, 61 Ill. 352.

<sup>73</sup> Armstrong v. Chicago, 61 Ill. 352.

<sup>74</sup> Griffin v. Chicago, 57 Ill. 317; Smith v. Chicago, 57 Ill. 497.

<sup>75</sup> Muskego v. Drainage Com'rs, 78 Wis. 40, 47 N. W. 11.

<sup>76</sup> Evans v. People, 139 Ill. 552, 28 N. E. 1111; Toberg v. Chicago,



So, too, is a certificate dated Feb. 8th, stating that the first publication was on Feb. 5th, and the last on Feb. 10th, it being impossible to certify on the 8th that the notice was published on the 9th and 10th of the same month.<sup>77</sup> But where the certificate gives the dates of the first and last publication as seven days apart, such certificate is not defective as showing a publication for five days, and therefore not successive ones, but sufficiently shows the publication was for seven consecutive days.<sup>78</sup>

### — Waiver of.

**374.** Like all other statutory provisions which are designed to protect the interests of the property owner, the requirements as to notice may be waived by the interested party, and in some cases his actions may be such that he will be conclusively presumed to have waived notice. All objections to the sufficiency of a notice are waived by a gen-

164 Ill. 572, 45 N. E. 1010; *Casey v. People*, 165 Ill. 49, 46 N. E. 7.

<sup>77</sup> *McChesney v. People*, 145 Ill. 614, 34 N. E. 431.

<sup>78</sup> *Perry v. People*, 155 Ill. 307, 40 N. E. 468.

#### *Omission of proof of date of notice.*

The failure to state in the certificate of the publication of the notice of the meeting of commissioners to make the assessment, the date of the last paper containing such notice, or anything from which it can be inferred, will prevent a valid judgment. *Brown v. Chicago*, 62 Ill. 106; *Brown v. Chicago*, 62 Ill. 289; *Marsh v. Chicago*, 62 Ill. 115; *Andrews v. Chicago*, 57 Ill. 239.

#### *Failure to receive notice.*

Full compliance with the statute as to notice gives the court the

necessary jurisdiction over property to subject it to the payment of an assessment. And a special assessment for constructing a sewer is not made invalid because of the failure of the real owner to receive notice, when it was sent to the person who paid the taxes the preceding year in accordance with statutory requirements. *People v. Ill. C. R. Co.*, 213 Ill. 367, 72 N. E. 1069.

#### *Objection to proof—when too late.*

When objectors urge that notice of the public hearing by the board of public improvements is not in compliance with the statutes, but offer no proof thereon until after the case is closed, the offer is properly rejected. *Betts v. Naperville*, 214 Ill. 380, 73 N. E. 752.



eral appearance,<sup>79</sup> or appearing and filing objections,<sup>80</sup> or urging general objections to the merits of the special assessment certificate;<sup>81</sup> and such an appearance in an application for judgment of sale is a waiver of all defects in the notice of such application.<sup>82</sup> One who is assessed without notice and afterwards appears before an appellate tribunal having power to return the assessment for the correction of errors, and fails to object to such want of notice, will be deemed to have waived the same.<sup>83</sup> And if the owner of land which has been assessed for benefits fails to make his objection to the confirmation of the assessment before the proper authorities, he will be deemed to have waived his rights in that regard.<sup>84</sup> An objection that a notice is defective is waived by appearance of parties and a failure to make specific objection on that ground.<sup>85</sup>

**375.** Where the statute provides for constructive notice by mail, a compliance with the statute is sufficient.<sup>86</sup> And an appearance at the time and place designated, will be a waiver of objections to the formality of the notice.<sup>87</sup> A non-resident owner who does not appear after notice waives his right to obtain a review of the constitutionality of a statute limiting the right of protesting against the proceedings to

<sup>79</sup> *Gilkerson v. Scott*, 76 Ill. 509; *People v. Sherman*, 83 Ill. 165; *White v. Allen*, 149 Ill. 626, 37 N. E. 96; *Walters v. Lake*, 129 Ill. 23, 21 N. E. 556; *Nicholas v. People*, 165 Ill. 502, 46 N. E. 237; *Bradford v. Pontiac*, 165 Ill. 612, 46 N. E. 794; *State v. Elizabeth*, 31 N. J. L. 547.

<sup>80</sup> *I. C. R. Co. v. People*, 170 Ill. 224, 48 N. E. 215.

<sup>81</sup> *Hintze v. Elgin*, 186 Ill. 251, 57 N. E. 856; *Walker v. Aurora*, 140 Ill. 402, 29 N. E. 741.

<sup>82</sup> *Zeigler v. People*, 164 Ill. 531, 45 N. E. 965; *McChesney v. People*, 178 Ill. 542, 53 N. E. 356;

*McManus v. People*, 183 Ill. 391, 55 N. E. 886; *Fiske v. People*, 188 Ill. 206, 52 L. R. A. 291, 58 N. E. 985.

<sup>83</sup> *State v. Jersey City*, 41 N. J. L. 489.

<sup>84</sup> *Le Moyne v. W. Chicago Park Com'rs*, 116 Ill. 41, 4 N. E. 498, 6 N. E. 48.

<sup>85</sup> *Bass v. People*, 203 Ill. 206, 67 N. E. 806.

<sup>86</sup> *State v. Elizabeth*, 42 N. J. L. 56; *Wilson v. State*, 42 N. J. L. 612.

<sup>87</sup> *State v. Elizabeth*, 42 N. J. L. 56.



resident owners,<sup>88</sup> and any one who has had ample opportunity to present to the council his objections to a special assessment, is held to have waived all irregularities.<sup>89</sup>

**376.** A legal defect in the notice given of the filing of a commissioner's report is not cured or waived by the appearance of a party who objects to the legality of the notice.<sup>90</sup> And it is no waiver of the statutory requirement for a notice of time and place of hearing be given, that a meeting was held to hear objections to a proposed assessment, and that a party appeared and objected to all proceedings.<sup>91</sup> Where the act of giving notice in the manner prescribed is a condition precedent to the acquirement of jurisdiction over the subject-matter, and the improvement could not lawfully be made without it, the filing of a remonstrance against the improvement is not a waiver of the compliance on the part of the council with the charter requirements.<sup>92</sup> But if a waiver be relied upon, it must be pleaded.<sup>92a</sup>

— Computation of time.

**377.** Where an act is to be performed within a specified period, after a day named, the rule of computation is to exclude that day, and include the day named for the performance.<sup>93</sup> Under a charter provision requiring every resolu-

<sup>88</sup> *Field v. Barber Asphalt Paving Co.*, 117 Fed. 925.

<sup>89</sup> *McBride v. Chicago*, 22 Ill. 577; *Ottawa v. C. R. I. & P. R. Co.*, 25 Ill. 43.

<sup>90</sup> *State v. Bayonne*, 51 N. J. L. 428, 17 Atl. 971.

<sup>91</sup> *State v. Perth Amboy*, 29 N. J. L. 259.

<sup>92</sup> *Bank of Columbia v. Portland*, 41 Or. 1, 67 Pac. 1112.

As to facts constituting a waiver, see *Philadelphia v. Schofield* 166 Pa. St. 389, 31 Atl. 119.

Where a notice required to be given by the city authorities for 30 days is a jurisdictional requis-

ite, and the city relies upon a waiver of this notice, it must be pleaded in order to be considered by the court. *Eddy v. Omaha* (Neb.), 101 N. W. 25.

In the absence of proof to the contrary, it is the presumption that owners of land in a drainage district were served with notice of the action of the board, as required by statute, and that they appeared at the time and place stated; and that no objections having been filed, they would be deemed waived. *People v. Chapman*, 127 Ill. 387, 19 N. E. 872.

<sup>93</sup> *Bowman v. Wood*, 41 Ill. 203.



tion for street work to lie over "at least four weeks after its introduction," a resolution introduced on Monday might properly be acted upon the fourth Monday following.<sup>94</sup> The court which announced this decision afterwards criticized its correctness, and disapproved of the reasoning, but followed it on the principle of *stare decisis*.<sup>95</sup> The decision is not in accordance with the general rule governing such matters.

### Definitions.

**378.** Many terms used in special assessment proceedings have been defined by the courts that have had the consideration of such proceedings, and they will be found alphabetically arranged in the accompanying note.<sup>96</sup> In some cases,

<sup>94</sup> Wright v. Forrestal, 65 Wis. 341, 27 N. W. 52.

<sup>95</sup> Pittelkow v. Milwaukee, 94 Wis. 651, 69 N. W. 803; Pittelkow v. Herman, 94 Wis. 666, 69 N. W. 805; Friedrich v. Milwaukee, 114 Wis. 304, 90 N. W. 174; Ward v. Walters, 63 Wis. 44, 22 N. W. 844; Dougherty v. Porter, 18 Kan. 206; Reed v. Sexton, 20 Kan. 195.

Anderson v. Shelbyville, 154 Ind. 467, 49 L. R. A. 797, 77 Am. St. Rep. 484, 57 N. E. 114; Anderson's Law Dict., Bouvier's Law Dict.

#### <sup>96</sup> *Assessment.*

The adjusting of the shares of a contribution by several towards a common beneficial object according to the benefit received.

*Between* — See *To*.

*Boulevard* — See *Street*.

*Concrete.*

The meaning of the term, used in connection with street improvements, is well understood, and courts will take judicial notice

of its meaning. Gage v. Chicago, 201 Ill. 93, 66 N. E. 374.

#### *Corporate Authorities.*

This term, as used in the Illinois Constitution, means those municipal officers who are either elected directly by the population sought to be taxed by them, or appointed in some mode to which they have given their assent. Harvard v. St. Clair, etc., Drainage Co., 51 Ill. 130; Hessler v. Drainage Com'rs, 53 Ill. 105; Gage v. Graham, 57 Ill. 144; Wetherell v. Devine, 116 Ill. 631, 6 N. E. 24; Snell v. Chicago, 133 Ill. 413, 8 L. R. A. 858, 24 N. E. 532; Givins v. Chicago, 188 Ill. 348, 58 N. E. 912.

The West Chicago Park Commissioners are "corporate authorities" within the meaning of Section 9, Article 9 of the Illinois constitution, and as such are properly clothed by statute with power to make local improvements by special assessment. W. Chi. Prk. Com'rs v. Sweet, 167 Ill.



it is inexact to state that the word or term is "defined"; but by excluding certain elements, and comparing with others, the meaning is accurately gained.

326, 47 N. E. 728; *Farr v. W. Chi. Prk. Com'rs*, 167 Ill. 355, 46 N. E. 893.

Park commissioners may be constituted by statute a *quasi* municipal corporation, with power to levy and assess taxes and condemn property within their district. *W. Chicago Park Com'rs v. W. U. Tel. Co.*, 103 Ill. 33.

*For.*

Where by statute a notice is to be given "for at least six days prior" to a certain time, the word "for" therein is construed as meaning "during," and the whole phrase construed as though it read that notice of the sitting must be given at least during the six days immediately prior to the fixed date. *Shannon v. Omaha (Neb.)*, 100 N. W. 298.

*Frontage of Lot.*

Where the boundary lines of a corner lot extend along one of its two abutting streets a materially greater distance than along the other, a presumption arises that it fronts upon the latter street. *Toledo v. Sheill*, 53 Ohio St. 447, 30 L. R. A. 598, 42 N. E. 323.

*Frontage on Street.*

Where both a dwelling house and a business house are erected separately on a corner lot, the former fronting on the breadth-wise street, and the latter on the lengthwise street, so much of the lot as the latter building occupies, or is clearly used as appurtenant to it, should be held to front on the street which it faces. *Toledo*

*v. Sheill*, 53 Ohio St. 447, 30 L. R. A. 598, 42 N. E. 323.

*General Improvement* — see *Local Improvement*.

*Highway Commissioners.*

This term does not include municipal authorities of cities, exempting them from a certain constitutional provision. *Campau v. Detroit*, 14 Mich. 276.

*Keep in Repair* — see *Maintain*.

*Local Improvement.*

Is a public improvement which, by reason of its being confined to a locality, enhances the value of adjacent property, as distinguished from benefits diffused by it throughout the municipality. As applied to a street, it signifies the actual or presumptive betterment of the street, and involves the idea of permanency. *Chicago v. Blair*, 149 Ill. 310, 24 L. R. A. 412, 36 N. E. 829; *I. C. R. Co. v. Decatur*, 154 Ill. 173, 38 N. E. 626. In a plant for electric lighting, the power house and generators are improvements of general utility, but the poles, wires and lamps may constitute a local improvement. *Ewart v. Western Springs*, 180 Ill. 318, 54 N. E. 478.

*Lot.*

Is synonymous with "tract" or "parcel." *State v. Robert P. Lewis Co.*, 72 Minn. 87, 42 L. R. A. 639, 75 N. W. 108.

*Macadamize.*

The covering of a street by the process introduced by Macadam, consisting of the use of small



stones of a uniform size, consolidated and leveled by heavy rollers. It is entirely distinct from the construction of rock gutters by laying flat stones even on their upper surface, and filling the interstices with clean, hard rock, finely broken and screened. *Part-ridge v. Lucas*, 99 Cal. 519, 33 Pac. 1082.

*Maintain.*

Is synonymous with the term "Keep in repair," as used in amended Sec. 31, Art. IV, Illinois Constitution. *McChesney v. Hyde Park*, 151 Ill. 634, 37 N. E. 858.

*Occupied.*

As used in the tax law of Michigan, does not signify the same as "seated," or "surveyed," as used in the tax laws of some of the states. *Hill v. Warrell*, 87 Mich. 135, 49 N. W. 479.

*Owners.*

As used in the statute requiring a petition to be signed by the owners of a majority of abutting property, means owners of the fee of such property. *Merritt v. Kewanee*, 175 Ill. 537, 51 N. E. 867.

*Party Aggrieved.*

See *In re Gantz*, 85 N. Y. 536.

*Public Improvement* — See *Local Improvement.*

*Relaying.*

Under the Wisconsin Statute means the relaying of some part of the existing pavement, in the ordinary course of repairs, and not the entire repaving of the street. *Adams v. Beloit*, 105 Wis. 363, 47 L. R. A. 441, 81 N. W. 869.

*Resident Freeholders.*

Within the meaning of a char-

ter providing that after the confirmation of an original resolution for the street improvement, the same shall be conclusive on all persons, unless within 10 days ( $\frac{2}{3}$  of all the resident free-holders upon the street) remonstrate against it, means resident free-holders upon the street and not simply residents of the city owning property on the street. *Kirkland v. Indianapolis*, 142 Ind. 123, 41 N. E. 374.

*Repaving* — See *Street.*

*Road* — See *Street.*

*Rock Gutters* — See *Macadamize. Special Benefits.*

The increase in the market value caused by the improvement. *Fahnestock v. Peoria*, 171 Ill. 454, 49 N. E. 496.

*Street*

A "street" includes sidewalks and gutters, and "paving" includes "flagging," and the work of setting curb and gutter stones, and flagging the sidewalk of a street, are included in the phrase "repaving any street." In *re Burmeister*, 76 N. Y. 174. The word "street" is a generic one, and embraces sidewalks, and under authority to improve streets, a municipality may improve sidewalks. *Taber v. Grafmiller*, 109 Ind. 206, 9 N. E. 721.

When used in an act conferring power on park commissioners to levy assessments for improving a "street or streets," it is broad enough to include a "boulevard" where the context does not show a more restricted meaning. The word "road," in legal acceptance, is the same as "public highway." A "street" is a road in a city



or village. *Heiple v. E. Portland*, 13 Or. 97, 8 Pac. 907.

*Tax certificate.*

A certificate issued on a sale of land for nonpayment of an assessment of benefits for a street improvement is a "tax certificate," within the meaning of Sec. 1210h. Rev. Stats., Wisconsin. *Pratt v. Milwaukee*, 93 Wis. 658, 68 N. W. 392.

*To.*

A charter provided that damages incurred in extending a street shall be paid by the real estate fronting on either side of the extension, and of the original street, to a point to be fixed by the common council, and also by the real estate fronting on the cross streets within a hundred feet. Under this

provision, an assessment was ordered for the extension of a street "from a street southerly to R. street," but the assessment actually made included the property on the north line of R. street. This was improperly included, and vitiated the entire assessment. *Schumacker v. Toberman*, 56 Cal. 508.

*Unoccupied.*

And "vacant" are words of the same import, and unoccupied premises are vacant premises, meaning that there is no one in the actual possession, exercising any acts of control over the premises, or any part thereof. *Hill v. Warrell*, 87 Mich. 135, 49 N. W. 479.



## CHAPTER VII.

### OF THE PROCEEDINGS NECESSARY TO ACQUIRE JURISDICTION — THE ORDINANCE.

**Necessity for, 379-381.**

**Adoption — Presumption — Records, 382-383.**

**Requisites to validity, 384-385.**

**Construction of, 386.**

**Effect of repeal of, 387.**

**Must be reasonable, 388.**

**Reference to plans, etc., on file, 389.**

**Omission to state location of improvement, 390.**

**Must be substantially complied with — Variance, 391-392.**

**Embracing more than one improvement, 393.**

**Validity — In general, 394-402.**

**Sufficiency of description, 403.**

**Grade ordinances, 404.**

**Paving ordinances, 405-407.**

**Curb ordinances, 408.**

**Sidewalk ordinances, 409.**

**Waterworks ordinances, 410.**

**Sewer ordinances, 411-414.**

**Invalidity — In general, 415-422.**

**Invalid grade ordinances, 423.**

**Invalid paving ordinances, 424.**

**Invalid curb ordinances, 425.**

**Invalid sidewalk ordinances, 426.**

**Invalid waterworks ordinances, 427.**

**Invalid sewer ordinances, 428-429.**

**Delegation of power, 430-431.**

**Evidence, and burden of proof, 432.**

**When "may" means "must," 433.**

**Publication of, 434.**

#### **Necessity for.**

**379.** That the determination of the local authorities to make a public improvement and pay for the same in whole or in part by a special assessment on the property benefited thereby, must be expressed in some permanent form, is apparent. In cities, it is the legislative branch of the local government that is invested with the determination of the necessity for the improvement, and how it shall be paid for. This determination is usually expressed by ordinance, although where the city council is authorized by charter to do certain things "by ordinances, resolutions, by-laws, rules or regulations," any one of the stated forms of procedure



may be resorted to in order to express its determination, if such procedure be made to appear upon the records in a permanent written form.<sup>1</sup> An ordinance, being the occasion of more deliberation, as well as a measure of greater dignity, is more in accordance with the importance of the proceedings than a mere resolution, and it is certainly not open to the objections that surround a resolution. In some states it is held unqualifiedly that a valid and sufficient ordinance lies at the basis of every special assessment proceeding where land is to be taken, or a public improvement made,<sup>2</sup> without which the entire proceedings are rendered invalid, and the court is without jurisdiction to award judgment of confirmation.<sup>3</sup> It has been held that a city may, unless prohibited by constitution or statute, prescribe by ordinance the means by which it may acquire jurisdiction over a particular subject.<sup>4</sup>

**380.** The legal enactment of the ordinance is a condition precedent, and without it no work can be done or expense incurred which can be charged upon property to be afterwards assessed,<sup>5</sup> nor will an ordinance ratifying and confirming the former acts so far as possible, cure the de-

<sup>1</sup> *Green Bay v. Brauns*, 50 Wis. 204, 6 N. W. 503.

See, however, *Nevin v. Roach*, 86 Ky. 492, 5 S. W. 546, that it is not essential to its validity that an ordinance be spread upon the record.

<sup>2</sup> *Jacksonville R. Co. v. Jacksonville*, 114 Ill. 562, 2 N. E. 478; *Lindsay v. Chicago*, 115 Ill. 120, 3 N. E. 443; *People v. Hyde Park*, 117 Ill. 462, 6 N. E. 33; *St. John v. East St. Louis*, 136 Ill. 207, 27 N. E. 543; *Alton v. Middleton's Heirs*, 158 Ill. 442, 41 N. E. 926; *Paxton v. Bogardus*, 201 Ill. 628, 66 N. E. 853; *American Hide & Leather Co. v. Chicago*, 203 Ill. 451, 67 N. E. 979; *McManus v.*

*Hornaday*, 99 Iowa, 507, 68 N. W. 812.

<sup>3</sup> *Jacksonville R. Co. v. Jacksonville*, 114 Ill. 562, 2 N. E. 478; *Lindsay v. Chicago*, 115 Ill. 120, 3 N. E. 443; *American Hide & Leather Co. v. Chicago*, 203 Ill. 451, 67 N. E. 979.

<sup>4</sup> *Ives v. Irey*, 51 Neb. 136, 70 N. W. 961.

<sup>5</sup> *Freeport St. R. Co. v. Freeport*, 151 Ill. 451, 38 N. E. 137; *Thaler v. West Chi. Park Com'rs*, 174 Ill. 211, 52 N. E. 116.

"A city council has no right to make an improvement, and then, after the improvement is made, pass an ordinance providing for the making of the improvement.



fects in the case of a special assessment,<sup>6</sup> although it may sustain the levy of a special tax.<sup>7</sup> It is clear that a valid assessment cannot be made under an invalid law or ordinance, and its validity is to be tested, not by what has been done under it, but what it authorizes to be done by virtue of its provisions,<sup>8</sup> and a municipal ordinance, passed in pursuance of valid authority, has the same force and effect, within proper limits, as if passed by the Legislature itself.<sup>9</sup> Where its charter authorizes a city to enact ordinances to make street improvements, assessments levied to pay for such improvements under a resolution are void.<sup>10</sup> The act of a city council in establishing the grade of a street is legislative in character, and must be in the form of an ordinance.<sup>11</sup> And it is fundamental, that in all matters legislative in character, a municipality has power to act only through the medium of an ordinance, and especially must the grant of power be strictly construed in the enforcement of an assessment upon private property to meet the cost of a public improvement.<sup>12</sup>

The passage of the ordinance must precede the making of the improvement, or the making of the improvement and all steps thereafter are absolutely void. *Pells v. Paxton*, 176 Ill. 318, 52 N. E. 64.

<sup>6</sup> *Newman v. Emporia*, 32 Kan. 456, 4 Pac. 815.

<sup>7</sup> *Weld v. People*, 149 Ill. 257, 36 N. E. 1006.

<sup>8</sup> *Brown v. Denver*, 7 Colo. 305, 3 Pac. 455.

<sup>9</sup> *Lewis v. Water Works Co.*, 19 Colo. 236, 41 Am. St. Rep. 248, 34 Pac. 993; *Wolff v. Denver* (Colo.) 77 Pac. 364.

<sup>10</sup> *Newman v. Emporia*, 32 Kan. 456, 4 Pac. 815; *Trenton v. Coyle*, 107 Mo. 193, 17 S. W. 643; *Nevada v. Eddy*, 123 Mo. 546, 27 S. W. 471.

*Iowa.*

<sup>11</sup> *Kepple v. Keokuk*, 61 Iowa,

653, 17 N. W. 140; *McManus v. Hornaday*, 99 Iowa, 507, 68 N. W. 812; *Blanden v. Fort Dodge*, 102 Iowa 441, 71 N. W. 411; *Eckert v. Walnut*, 117 Iowa, 629, 91 N. W. 929; *Reilly v. Fort Dodge*, 118 Iowa, 633, 92 N. W. 887.

*Illinois.*

*C. & N. P. R. Co. v. Chicago*, 174 Ill. 439, 51 N. E. 596; *Galt v. Chicago*, 174 Ill. 605, 51 N. E. 653.

*New Jersey.*

*State v. Rutherford*, 55 N. J. L. 450, 26 Atl. 933.

<sup>12</sup> *Coggeshall v. Des Moines*, 78 Iowa, 235, 41 N. W. 617, 42 N. W. 650; *Zelie v. Webster City*, 94 Iowa, 393, 62 N. W. 796; *Henis v. Lincoln*, 102 Iowa, 69, 71 N. W. 189; *Zalesky v. Cedar Rapids*, 118 Iowa, 714, 92 N. W. 657; *Martin v. Oskaloosa* (Ia.), 99 N. W. 557;



**381.** In Illinois, it is essential that the first step to be taken in making a local improvement to be paid for by special assessment or special taxation, is the passage of an ordinance specifying the nature, character, locality and description of the improvement and the mode in which its cost shall be collected, and no work can be done or expense incurred which can become a charge upon property of the land owner before such ordinance is passed.<sup>13</sup> And this is required as a safeguard for the protection of the property owner.<sup>14</sup> But under a charter providing that when street improvements are to be made the council shall cause the recorder to give notice thereof, it is not necessary to pass an ordinance declaring the intention of the council to make the improvement, but a resolution directing the recorder to publish notice is sufficient.<sup>15</sup> And where the Legislature has charged the burden on the lots, and directed the street commissioner to make out the

*Hedge v. Oskaloosa, id.; Ross v. Oskaloosa, id.*

<sup>13</sup> When a city undertakes a public improvement to be paid for by a special assessment, the first step to be taken is the passage of an ordinance specifying the nature, character, locality and description of the improvement. The ordinance lies at the foundation of the proceeding, and in its absence there is nothing upon which such proceeding may rest, or work done which will become a charge against the property. *East St. Louis v. Albrecht*, 150 Ill. 506, 37 N. E. 934; *Smith v. Chicago*, 169 Ill. 257, 48 N. E. 445; *Davis v. Litchfield*, 155 Ill. 384, 40 N. E. 354; *Carlyle v. Clinton Co.*, 140 Ill. 512, 30 N. E. 782 and *East St. Louis v. Albrecht*, 150 Ill. 506, 37 N. E. 934 distinguished. In those

cases, the ordinance passed after completion of the work, was declared void.

The power to make local improvements must be exercised by the passage of an ordinance prescribing the mode to be pursued, and whether the improvement shall be paid for by special assessment or special taxation, or general taxation, or both. When the improvement is to be made by special taxation, the method of levying assessment and collection is the same as in case of special assessment. *Adams Co. v. Quincy*, 130 Ill. 566, 6 L. R. A. 155, 22 N. E. 624.

<sup>14</sup> *Carlyle v. Clinton Co.*, 140 Ill. 512, 30 N. E. 782.

<sup>15</sup> *Clinton v. Portland*, 26 Or. 410, 38 Pac. 407.



assessment, it is not necessary that the city should assess the tax by ordinance.<sup>16</sup>

### Adoption — Presumption — Records.

**382.** Where the council records show the adoption of an ordinance, it will be presumed to have been adopted by the requisite majority.<sup>17</sup> The recommendation of the improvement board for the passage of an ordinance is *prima facie* evidence that all preliminary requirements, including notice, have been performed.<sup>18</sup> Where nothing appears in the record to the contrary, under a charter requirement that a street improvement ordinance be passed only by unanimous consent, it will be presumed to have been so passed.<sup>19</sup> And where the same requirement is made a condition precedent to the entry of an order, the fact that the order was entered, affords a presumption that the required unanimity obtained.<sup>20</sup> An ordinance authorizing a street improvement will be presumed to have been passed at a regular meeting by all councilmen present when the proof tends to show that its passage was at an adjourned meeting from a regular meeting, and the record states that the same was passed, and that several councilmen, naming them, voted in the affirmative, and that none voted against it.<sup>21</sup> Where the ordinance for a special improvement is omitted from the record by stipulation, on appeal from a judgment of confirmation, it will be presumed that such ordinance showed enough to

<sup>16</sup> *Schenley v. Commonwealth*, 36 Pa. St. 62.

<sup>17</sup> *Brewster v. Davenport*, 51 Iowa, 427, 1 N. W. 737.

<sup>18</sup> *Chicago U. T. Co. v. Chicago*, 202 Ill. 576, 67 N. E. 383.

Under a city charter which requires that the enacting clause of ordinances should read, "Be it ordained by the city council of the city of C," an ordinance entitled "Be it ordained by the city of

C" is not made void because of the failure to follow the exact form, such provisions being merely directory. *People v. Burke*, 206 Ill. 358, 69 N. E. 45; *Law v. People*, 87 Ill. 385.

<sup>19</sup> *Lexington v. Headley*, 5 Bush. 508.

<sup>20</sup> *Lexington v. Headley*, 5 Bush. 508.

<sup>21</sup> *Seattle v. Doran*, 5 Wash. 482, 32 Pac. 105, 1002.



establish that it was in force when the assessment was made by the commissioners and their estimate returned, notwithstanding the statutory provision that ordinances do not take effect for five days unless approved by the mayor.<sup>22</sup>

**383.** An ordinance can neither be amended, repealed nor suspended by an order, or resolution, or other act of the council of less dignity than the ordinance itself,<sup>23</sup> and a resolution of the council appointing commissioners to estimate the cost of an improvement, passed by way of amendment to the ordinance which omitted such appointment, is invalid.<sup>24</sup> Legislation which does not impair vested rights, but is purely remedial in its operation on pre-existing rights and liabilities, is not within the inhibition of the constitution which forbids the passage of retroactive laws. Therefore it follows that where a city passed an ordinance under legislative authority for a street improvement and an assessment for two thirds of its cost, and the street was improved but the ordinance proved defective because of the illegal apportionment of the tax, it was competent for the city to so amend its ordinance after the work was completed as to conform to the provisions of the statute touching a legal apportionment.<sup>25</sup> But where a city deems it wise to change the grade of a street, and abandon the construction contemplated in the petition therefor, and by the board of local improvements and its ordinance, it should not attempt to amend the ordinance, but should repeal it, and leave it to those who are authorized by law to petition for a pavement at the level fixed by the new grade, to determine whether they desire the improvement to be made under the changed conditions.<sup>26</sup> And a general ordinance providing how sidewalks shall be built may be incorporated into a special ordi-

<sup>22</sup> *Gage v. Chicago*, 162 Ill. 313, 44 N. E. 729.

<sup>23</sup> *C. & N. P. R. Co. v. Chicago*, 174 Ill. 439, 51 N. E. 596; *People v. Latham*, 203 Ill. 9, 67 N. E. 403.

<sup>24</sup> *Paxton v. Bogardus*, 201 Ill. 628, 66 N. E. 853.

<sup>25</sup> *Bacon v. Savannah*, 105 Ga. 62, 31 S. E. 127.

<sup>26</sup> *Whaples v. Waukegan*, 179 Ill. 310, 53 N. E. 618.



nance directing the location of such walks, by proper reference.<sup>27</sup> A statute requiring cities to have all ordinances and resolutions in a separate book is directory only so far as respects the particular mode in which the record shall be made.<sup>28</sup>

### Requisites to validity.

**384.** Where the cost of a local street improvement is raised in whole or in part by special taxation, the ordinance must either state the sum or give the necessary facts by which the commissioners can fix the amount to be raised, and when so fixed and ascertained in conformity with the ordinance, it is conclusive upon the property owners,<sup>29</sup> and the estimate of cost cannot be resorted to in aid of a defective description of the work in the ordinance.<sup>30</sup> The object of the statute requiring the ordinance to set forth the nature, character and description of the improvement is, that an intelligent estimate of the cost be made;<sup>31</sup> and if the ordinance be defective in that particular the ordinance cannot be confirmed.<sup>32</sup> It is unnecessary that all the details and particulars of the work be set forth. A substantial compliance

<sup>27</sup> *Pierson v. People*, 204 Ill. 456, 68 N. E. 383.

Under an ordinance for a sidewalk to be laid on a grade established by another ordinance on file and of record in the city clerk's office during the time when the walk was to be constructed by the lot owner, and which furnished him all necessary information, it is no objection that the grade ordinance was passed the same day as the sidewalk ordinance, and had not been recorded by the clerk when the sidewalk ordinance was passed. *People v. Burke*, 206 Ill. 358, 69 N. E. 45.

<sup>28</sup> *Upington v. Oviatt*, 24 Ohio St. 232.

<sup>29</sup> *Sterling v. Galt*, 117 Ill. 11, 7 N. E. 471; *Green v. Springfield*, 130 Ill. 515, 22 N. E. 602.

<sup>30</sup> *McChesney v. Chicago*, 171 Ill. 253, 49 N. E. 548.

<sup>31</sup> *Levy v. Chicago*, 113 Ill. 650; *Barber v. Chicago*, 152 Ill. 37, 38 N. E. 253; *Culver v. Chicago*, 171 Ill. 399, 49 N. E. 573; *Lusk v. Chicago*, 176 Ill. 207, 52 N. E. 54.

Such an ordinance is binding on the commissioners in their action, and they have no power to correct a mistake in the same. *Jefferson Co. v. Mt. Vernon*, 145 Ill. 80, 33 N. E. 1091.

<sup>32</sup> *Levy v. Chicago*, 113 Ill. 650.



with the statute is all that is required.<sup>34</sup> But if the ordinance fails to give a sufficient description of the proposed improvement, so that a correct estimate of the cost can be had, the ordinance will be void. Such ordinance will not be aided by the report of the committee, when it also contains the same indefiniteness.<sup>35</sup> It need not, however, show that the improvement will be beneficial,<sup>36</sup> but it must be unambiguous as to what is required.<sup>37</sup>

**385.** The question of the sufficiency of an ordinance may be determined by the appellate court from a copy of the ordinance attached to the assessment petitions, even when not included in the bill of exceptions, such copy being a part of the record.<sup>38</sup> The court is without authority to take under advisement preliminary legal questions involving the validity of a special assessment ordinance, and not pass upon them until after a trial by jury. The objectors have a right to a decision as to whether the ordinance and assessment legally afforded any basis for a trial upon the question of benefits, before being required to try the issue.<sup>39</sup> And an objection as to the insufficiency of the ordinance as not adequately describing the improvement is not available on application for judgment of sale for a delinquent special assessment.<sup>40</sup> An ordinance providing for a street improvement to be made in a certain manner, will prevail over a previous general ordinance in conflict therewith.<sup>41</sup>

<sup>34</sup> *Kankakee v. Potter*, 119 Ill. 324, 10 N. E. 212; *Springfield v. Mathus*, 124 Ill. 88, 16 N. E. 92; *Pearce v. Hyde Park*, 126 Ill. 287, 18 N. E. 824.

<sup>35</sup> *Gage v. Chicago*, 143 Ill. 157, 32 N. E. 264.

<sup>36</sup> *Culver v. Chicago*, 171 Ill. 399, 49 N. E. 573.

<sup>37</sup> *State v. South Amboy*, 62 N. J. L. 197, 40 Atl. 637.

<sup>38</sup> *Maxwell v. Chicago*, 185 Ill. 18, 56 N. E. 1101.

<sup>39</sup> *Title Guarantee & Trust Co.*

*v. Chicago*, 162 Ill. 505, 44 N. E. 832.

<sup>40</sup> *People v. Lingle*, 165 Ill. 65, 46 N. E. 10.

<sup>41</sup> *Holdom v. Chicago*, 169 Ill. 109, 48 N. E. 164.

The following cases involve questions similar in scope to the matters discussed in the text: *Georgia*.

The choice of materials may be made after the adoption of the ordinance. *Bacon v. Savannah*, 86 Ga. 301, 12 S. E. 580.



**Construction of.**

**386.** Practically the same rules which provide for the construction of statutes also apply to the construction of ordinances, which in effect are local statutes. A special assessment ordinance must be viewed as a whole, and one portion of it may be referred to for the purpose of explaining another.<sup>42</sup> If the facts regarding such an ordinance are capable of two different constructions, that which will sup-

*Illinois.*

If the ordinance which is the foundation of a special assessment does not contain a description of the nature, character and locality of the improvement, the court will have no authority to confirm the assessment. *Kankakee v. Potter*, 119 Ill. 324, 10 N. E. 212.

Where the statute does not require a special assessment ordinance to be certified by the clerk, such certificate if made is no part of the ordinance. *Wadlow v. Chicago*, 159 Ill. 176, 42 N. E. 866.

The failure of the city clerk to certify that a copy of an ordinance attached to the petition was passed by the council affords no ground for objection to confirmation. *Ferris v. Chicago*, 162 Ill. 111, 44 N. E. 436.

The caption of an ordinance "for the grading, draining, paving, and otherwise improving" a street, covers a provision in the ordinance for making parkways in the street. *Thompson v. Highland Park*, 187 Ill. 265, 58 N. E. 328.

Ordinance — supplemental — need not repeat description. *Markley v. Chicago*, 189 Ill. 276.

Work on a public improvement is begun before the final passage of the ordinance if it is begun before the passage of an amendment

making a material change in the improvement. *Paxton v. Bogardus*, 201 Ill. 628. 66 N. E. 853.

*Iowa.*

Where a general city ordinance provides that the cost of street improvements shall be assessed against the abutting property, an objection by plaintiff that she had no notice that the cost of guttering and curbing the street in front of her lots was to be assessed against them is unavailing. *Arnold v. Fort Dodge*, 111 Iowa, 152, 82 N. W. 495.

*Ohio.*

An ordinance of a town (which afterwards became an incorporated village) prescribing method of assessing for improvements, continues in force as a valid ordinance of such village, if the mode prescribed is consistent with the statutory powers given to the village. *Neff v. Bates*, 25 Ohio St. 169.

An ordinance for improving a street between two points may properly except an intermediate part of such street which is by existing contract to be contemporaneously improved without expense to the city; and such separated parts may be improved and assessed as if contiguous. *Wilder v. Cincinnati*, 26 Ohio St. 284.



port the ordinance will be preferred to the one which will defeat it.<sup>43</sup> An ordinance which authorizes a city to require the owners of lots adjacent to a street to pave it, does not authorize the city to pave a street at the expense of a railroad company having a mere right of way over adjacent lots.<sup>44</sup> And an ordinance permitting an elevated road to maintain and operate its road, but requiring them to restore the pavements, gutters, sidewalks, water pipes, sewer pipes, or gas pipes, and replace them in good condition in case of disturbance in constructing the road, is merely a safety clause, and not a contract precluding the city from making special assessment of the property for a street improvement.<sup>45</sup> One which provides for improving several streets and for laying the assessment of the cost upon the lots and parts of lots upon the streets to be improved, in proportion to the frontage upon such streets, will be held to apply only to the lots or parts of lots bounded by the lines of the streets severally to be improved, and not to inside lots not abutting upon such streets.<sup>46</sup>

### Effect of Repeal of.

**387.** The repeal of an ordinance for a special assessment, pending an appeal from a judgment confirming it, does not justify the court in setting aside the judgment of confirmation at a subsequent term. Such judgment of confirmation is a final judgment.<sup>47</sup> And as a street may be widened or opened in sections, the effect of the repeal of an ordinance to open a street, except as to the lands already taken for pub-

<sup>42</sup> *McChesney v. Chicago*, 173 Ill. 75, 50 N. E. 191; *Gage v. Chicago*, 196 Ill. 512, 63 N. E. 1031.

<sup>43</sup> *Harmon v. Chicago*, 140 Ill. 374, 29 N. E. 732; *Berry v. Chicago*, 192 Ill. 154, 61 N. E. 498.

<sup>44</sup> *Muscatine v. C. R. I. & P. R. Co.*, 88 Iowa, 291, 55 N. W. 100.

<sup>45</sup> *Lake St. El. R. Co. v. Chi-*

*cago*, 183 Ill. 75, 47 L. R. A. 624, 55 N. E. 721.

<sup>46</sup> *Wilbur v. Springfield*, 123 Ill. 395, 14 N. E. 871.

For construction of term "thereafter," see *Kendig v. Knight*, 60 Iowa, 29, 14 N. W. 78.

<sup>47</sup> *People v. McWethy*, 165 Ill. 222, 46 N. E. 187.



lic use, is not a vacation of the entire street, but only of the part not yet opened.<sup>48</sup>

### Must be reasonable.

**388.** It is well settled that an ordinance to be valid must be reasonable and not oppressive. It must be impartial and fair,<sup>49</sup> and it is the duty of the court to pass upon its validity.<sup>50</sup> The rule that where the legislature has, in terms, conferred upon a municipal corporation power to pass an ordinance of a definite, specified character, such an ordinance cannot be impeached as unreasonable, applies where the ordinance follows the power conferred by the legislature. But such rule does not apply where the grant of power is general in its nature, for there is then an implied limitation that its exercise shall be reasonable, and if it be clearly unreasonable, unjust or oppressive, it may be held invalid by the court.<sup>51</sup> The courts will not declare an ordinance void for unreasonableness unless it is manifestly so, and in view of existing circumstances and contemporaneous conditions as clearly disclosed by the evidence.<sup>52</sup> The enactment of an ordinance by a body having authority to pass it, is *prima facie* evidence of its reasonableness.<sup>53</sup> The facts upon which various ordinances have been upheld as reasonable, or adjudged invalid

<sup>48</sup> *People v. Hyde Park*, 117 Ill. 462, 6 N. E. 33.

<sup>49</sup> *Hyde Park v. Carton*, 132 Ill. 100, 23 N. E. 590; *Bloomington v. Latham*, 142 Ill. 462, 18 L. R. A. 487, 32 N. E. 506; *Job v. Alton*, 189 Ill. 256, 82 Am. St. Rep. 448, 59 N. E. 622.

<sup>50</sup> *Hyde Park v. Carton*, 132 Ill. 100, 23 N. E. 590; *Chicago v. Brown*, 205 Ill. 568, 69 N. E. 65; *Walker v. Chicago*, 202 Ill. 531, 67 N. E. 369.

<sup>51</sup> *Title Guarantee & Trust Co. v. Chicago*, 162 Ill. 505, 44 N. E. 832; *Hyde v. Carton*, 132 Ill. 100,

23 N. E. 590; *Hawes v. Chicago*, 158 Ill. 653, 30 L. R. A. 225, 42 N. E. 373; *Chicago v. Brown*, 205 Ill. 568, 69 N. E. 65. (Paving ordinance held unreasonable.)

<sup>52</sup> *Myers v. Chicago*, 196 Ill. 591, 63 N. E. 1037; *Walker v. Chicago*, 202 Ill. 531, 67 N. E. 369; *Chicago v. Brown*, 205 Ill. 568, 69 N. E. 65; *McFarlane v. Chicago*, 185 Ill. 242, 57 N. E. 12. And see *C. & N. W. R. Co. v. Elmhurst*, 165 Ill. 148, 46 N. E. 437.

<sup>53</sup> *Morse v. West Port*, 110 Mo. 502, 19 S. W. 831.



for the opposite reason are collated in the marginal note.<sup>54</sup>

**Reference to plans, etc., on file.**

**389.** Where the statute so provides, the nature, locality and description of the contemplated improvement may be specified in the ordinance by a reference to maps, plans, pro-

**<sup>54</sup> Ordinances held reasonable.**

*Illinois.*

An ordinance of a town opening a street across a railroad track is not so unreasonable and oppressive as to authorize the courts to hold it void, simply because the existing streets across the tracks on either side of the proposed street are but 620 feet apart. *C. & N. W. R. Co. v. Cicero*, 154 Ill. 656, 39 N. E. 574.

A street paving ordinance will not be held void for unreasonableness, although the improvement was a rather expensive one for a street upon which there were few residences, where not a property owner kept a horse or vehicle and the land was mostly open prairie, it also appearing that during a considerable portion of the year the street was impassable. *Peyton v. Morgan Park*, 172 Ill. 102, 49 N. E. 1003.

When ordinance for construction of cement sidewalk not void as being unreasonable. *Chicago v. Wilson*, 195 Ill. 19, 57 L. R. A. 127, 62 N. E. 843.

An ordinance for laying water pipe in front of lots worth \$250 each at an expense of \$18.50 per lot is not so unreasonable as to make the ordinance void. *Myers*

*v. Chicago*, 196 Ill. 591, 63 N. E. 1037.

A sewer ordinance providing for two house slants for each corner lot is not unreasonable. *Duane v. Chicago*, 198 Ill. 471, 64 N. E. 1033.

A provision in an ordinance which require bidders to submit specimen bricks which must withstand certain "absorption" and "abrasion" tests by the board, is not an unreasonable restraint upon competitive bidding. *Chicago v. Singer*, 202 Ill. 75, 66 N. E. 874.

*Missouri.*

An ordinance providing for an advertisement for bids on a paving contract by posting the notices at ten public places within the city for five days is *prima facie*, reasonable. *Warren v. Barber A. P. Co.*, 115 Mo. 572, 22 S. W. 490.

Under an ordinance providing that when a sidewalk in a certain district of the city became out of repair, it should be replaced by one of stone flagging, and it was shown that such district contained 200 miles of brick sidewalk, and that such walk in front of plaintiff's premises was out of repair, but could be repaired with brick at a cost of seven dollars, but that a new stone walk would cost



three hundred dollars, the ordinance was not void. *Skinker v. Heman*, 148 Mo. 350, 49 S. W. 1026.

**Ordinances held unreasonable.**

*Illinois.*

An ordinance compelling the substitution of a cement sidewalk in the place of a plank walk in front of a 20-acre lot which had been laid less than six months, but in conformity to the ordinance, and which was in good condition and in all respects safe and convenient for public use, is unreasonable, unjust and oppressive, and therefore void. *Hawes v. Chicago*, 158 Ill. 653, 30 L. R. A. 225, 42 N. E. 373.

An ordinance requiring a brick pavement to be laid on a street is unreasonable as to a portion thereof at the end of the improvement which has a cedar block pavement four years old in good condition, where it is not shown the brick pavement is necessary in that particular locality, and other portions of the block pavement have been without explanation excepted from the operation of the ordinance. *McFarlane v. Chicago*, 185 Ill. 242, 57 N. E. 12.

An ordinance providing for sewer connections every twenty feet on both sides of the sewer is unreasonable in that regard, where the territory is used mostly for hay land, is unsubdivided and held in large tracts, practically uninhabited, with neither streets nor houses in most of the districts. *Bickerdike v. Chicago*, 185 Ill. 280, 56 N. E. 1096.

House slants—when unreasonable. See *Smythe v. Chicago*, 197 Ill. 311, 64 N. E. 361.

The question as to the unreasonableness of an ordinance for a sewer will not be considered solely with reference to the objector's property, where it consists of five and ten-acre unsubdivided tracts surrounded by territory in the same district subdivided into lots, blocks, streets and alleys. *Washburn v. Chicago*, 198 Ill. 506, 64 N. E. 1064.

An ordinance to lay two blocks of asphalt pavement, which requires the expense of tearing out a practically new macadam pavement in good condition at the single street intersection and of replacing it with asphalt, to be borne by the property owners in the two blocks, is void, as being unreasonable. *Chicago v. Brown*, 205 Ill. 568, 69 N. E. 65.

Where a macadam pavement has been laid down only four years, is in good condition, and no reason for removing it appears, an ordinance requiring it to be replaced with asphalt at the expense of the abutting owners, is void, as being unreasonable and oppressive. *Chicago v. Brown*, 205 Ill. 568, 69 N. E. 65.

*Missouri.*

An ordinance for grading a street which authorizes the cost of grading a section to be charged in part against the property fronting on that section and in part on property fronting on another section which has already been graded at the cost of that property exclusively, is so inequitable and unjust that it will not be sustained unless the power to enact it is clearly given by the charter; and even then it is a matter of doubt if it could be upheld. *Halpin v. Campbell*, 71 Mo. 493.



files and specifications on file in a certain office.<sup>55</sup> Where a city ordinance by its own terms sufficiently describes the improvement, it is not invalidated by the fact that it further refers to plans and specifications on file in the department of public works.<sup>56</sup> There seems to be no reasonable ground for holding that, as a general proposition, an ordinance may not state where the detailed information requisite for the information both of bidder and tax-payer may be had, irrespective of a permissive statute, and it is so held in other states than Illinois.<sup>57</sup> But the very stringent provisions of the statute of that state requiring the ordinance to specify the nature, character and description of the improvement has caused a line of decisions in that state holding that a reference in the ordinance to plans and specifications on file in the office of the city clerk was not a compliance with the statute, and those decisions should be read in the light of the statutory requirements. The law was amended in 1887 so as to specially permit of such reference.

### Omission to state location of improvement.

**390.** An ordinance for a public improvement, showing upon its face that it was enacted by the council of a certain

<sup>55</sup> *Pearce v. Hyde Park*, 126 Ill. 287, 18 N. E. 824; *L. & A. R. Co. v. East St. Louis*, 134 Ill. 656, 25 N. E. 962; *Callon v. Jacksonville*, 147 Ill. 113, 35 N. E. 223; *Alton v. Middleton's Heirs*, 158 Ill. 442, 41 N. E. 926; *Steele v. River Forest*, 141 Ill. 302, 30 N. E. 1034.

As to sufficiency of profile, see *Carlville v. McClure*, 156 Ill. 492, 41 N. E. 169.

<sup>56</sup> *Cunningham v. Peoria*, 157 Ill. 499, 41 N. E. 1014.

<sup>57</sup> An ordinance for opening a street need not define with accuracy the lines of the proposed

street, but may refer to a plat for that purpose; and in case of a variance between the two as to courses and distances, the latter will prevail. *Burk v. Mayor, etc.*, 77 Md. 469, 26 Atl. 868.

An ordinance for grading and macadamizing a street is not void for uncertainty because the specifications for the work are not embodied in the ordinance, but are referred to as being on file in the city clerk's office. *Becker v. Washington*, 94 Mo. 375, 7 S. W. 291.

An ordinance for the letting of public work may properly refer for



city, sufficiently shows that the street to be improved is within the limits of the city passing the ordinance, such being the presumption.<sup>58</sup>

**Must be substantially complied with — Variance.**

**391.** A substantial compliance of the work done with that provided for by the ordinance is unquestionably necessary, and such substantial compliance will be sufficient where a literal compliance is impossible; and the fact that some changes are made in the character of the improvement is not a defense to a special assessment, because the acceptance of the work by the authorities is final, in the absence of fraud, and such objection, if tenable, should have been brought by a bill for an injunction before the completion of the work.<sup>59</sup> So a slight deviation in laying a sewer from the line prescribed in the ordinance, made necessary by the presence of water-pipes, where it is as beneficial as if laid on the original line, and the only difference being that it shortened the connecting pipes, does not render the ordinance invalid, and defeat judgment of sale;<sup>60</sup> but expensive changes, adding greatly to the cost, such as the substitution of flush tanks for

details to specifications on file in the city engineer's office. *Barber Asphalt P. Co. v. Ullman*, 137 Mo. 543, 38 S. W. 458. But see, *Alton v. Middleton's Heirs*, 158 Ill. 442, 41 N. E. 926.

<sup>58</sup> *Meadowcroft v. People*, 154 Ill. 417, 40 N. E. 442; *Stanton v. Chicago*, 154 Ill. 23, 39 N. E. 987; *Young v. People*, 155 Ill. 247, 40 N. E. 604; *West Chi. S. R. Co. v. People*, 155 Ill. 299, 40 N. E. 599; *West Ch. S. R. Co. v. People*, 156 Ill. 18, 40 N. E. 605; *Wisner v. People*, 156 Ill. 180, 40 N. E. 574; *Bliss v. Chicago*, 156 Ill. 584, 41 N. E. 160; *Chicago v. Silverman*, 156 Ill. 601, 41 N. E. 162; *Beach v. People*, 157 Ill. 659, 41 N. E.

1117; *P. & R. C. & I. Co. v. Chicago*, 158 Ill. 9, 41 N. E. 1102; 43 N. E. 335.

<sup>59</sup> *Ricketts v. Hyde Park*, 85 Ill. 110; *Peters v. Chicago*, 192 Ill. 437, 61 N. E. 438; *People v. Church*, 192 Ill. 302, 61 N. E. 496.

So that any contractor or person experienced in the construction of kind of work required can comply with the ordinance according to its intent. *Chicago Union Tr. Co. v. Chicago*, 215 Ill. 410, 74 N. E. 449.

<sup>60</sup> *People v. Church*, 192 Ill. 302, 61 N. E. 496; *Church v. People*, 174 Ill. 366, 51 N. E. 747; followed in *Church v. People*, 179 Ill. 205, 53 N. E. 554.



lamp-holes, are not chargeable to the assessment fund, even if regarded as necessary to the perfect working of the sewer system.<sup>61</sup> And an ordinance providing, "That electric lamp-posts be and they are hereby ordered erected," will not justify a special assessment to pay for the lamp, fixtures, and other articles provided for in a subsequent section.<sup>62</sup>

**392.** On general principles, however, the ordinance being the sole authority for the construction of a public improvement to be paid for by special assessment, the municipal authorities have no right to change the nature, locality, character or description of the improvement as prescribed in the ordinance.<sup>63</sup> Thus where the improvement which has been constructed is materially and substantially different from that authorized by the ordinance, the grade changed from six to nine feet, and the cost of the improvement materially increased, the special assessment levied to pay the cost is not enforceable.<sup>64</sup> But a departure from the terms of the ordinance is not sufficient ground for refusing confirmation of an assessment unless it be established that by reason of such departure the improvement constructed is different from the one provided for.<sup>65</sup> A number of cases giving concrete illustrations of the decisions of the courts in cases of variance will be found in the marginal note.<sup>66</sup>

**Embracing more than one improvement.**

**393.** It is a general rule that an ordinance providing for a public improvement to be paid for by special assessment or

<sup>61</sup> *People v. McWethy*, 177 Ill. 334, 52 N. E. 479.

<sup>62</sup> *Smith v. Chicago*, 169 Ill. 257, 48 N. E. 445.

<sup>63</sup> *Church v. People*, 174 Ill. 366, 51 N. E. 747; *Gage v. People*, 200 Ill. 432, 65 N. E. 1084.

<sup>64</sup> *Eustace v. People*, 213 Ill. 424, 72 N. E. 1089.

<sup>65</sup> *Wells v. People*, 201 Ill. 435, 66 N. E. 210; *Chicago v. Hulbert*, 205 Ill. 346, 68 N. E. 786.

<sup>66</sup> *Variances invalidating assessment.*

Paving a street to width of 64 feet, where ordinance provided for 50 feet in width, although 16 feet in center was paid for by a street railway company by agreement. *Chicago v. Ayers*, 212 Ill. 59, 72 N. E. 32.

The passage of the ordinance for a street pavement of reduced width is a valid objection to the



special taxation should embrace but one improvement.<sup>67</sup> But an ordinance for paving several streets and alleys with the same material, and in the same manner, is not invalid as embracing more than one improvement, even where there is a difference of a few feet in the width of the streets, and the cost of paving railway tracks be excluded,<sup>68</sup> especially when in the case of sewer construction, the same material and mode of construction is provided for, although not connected with each other.<sup>69</sup> The principle is that only one kind of improvement shall be provided for, although different streets or assessment districts are not covered by the

judgment against lands for a delinquent assessment levied under a previous ordinance for the same improvement providing for the wider pavement. And the consent of the lot owner to the reduction does not waive his right to a new estimate and assessment. *Pells v. People*, 174 Ill. 580.

Where a paving ordinance calls for a foundation layer six inches deep of the best quality of broken limestone, the city authorities, after confirmation, have no power to change it to a seven-inch layer of rolling-mill slag; and if such change be so made, an objection thereto is available on application for sale. *Young v. People*, 196 Ill. 603, 63 N. E. 1075.

*Variances insufficient to invalidate assessment.*

Use of cement inferior to kind called for. *Wells v. People*, 201 Ill. 435, 66 N. E. 210.

Use of paving blocks seven to eight inches in depth, the ordinance calling for eight-inch blocks, but the custom having been followed for two years. *Cole v. Skrainka*, 105 Mo. 303, 16 S. W. 491.

Use of five-inch curb and gutter instead of six-inch, and the fact that part of the limestone used was four-inch size instead of three-inch, where the value of the improvement is not affected by such change, and the objecting property owners remained silent during the progress of the work. *Chicago v. Sherman*, 212 Ill. 498, 72 N. E. 396. And see *Pierson v. People*, 204 Ill. 456, 68 N. E. 383.

Untenable claim as to variance between caption and body. *Chicago Union Tr. Co. v. Chicago*, 207 Ill. 544, 69 N. E. 849.

<sup>67</sup> *Boorman v. Santa Barbara*, 65 Cal. 313, 4 Pac. 31; *Weekler v. Chicago*, 61 Ill. 142; *In re Powelton Avenue*, 11 Phila. 447.

<sup>68</sup> *Springfield v. Green*, 120 Ill. 269, 11 N. E. 261; same case, 123 Ill. 395, 14 N. E. 871.

<sup>69</sup> *Hinsdale v. Shannon*, 182 Ill. 312, 55 N. E. 327. See, also, *Watson v. Chicago*, 115 Ill. 78, 3 N. E. 430; *Beach v. People*, 157 Ill. 659, 41 N. E. 1117; *Payne v. South Springfield*, 161 Ill. 285, 44 N. E. 105.



rule.<sup>70</sup> The constitutional provision that no law shall contain more than one subject, which shall be expressed in its title, does not apply to city ordinances.<sup>71</sup>

### Validity — In general.

**394.** Where an ordinance gives a full and detailed description of the proposed improvement, in all its parts, the failure of the engineer to furnish the plans and maps referred to in the ordinance as being on file in his office, will not invalidate the ordinance or the proceedings under it;<sup>72</sup> nor will failure to specify the section of land in which the improvement is to be made, if in other respects the locality is sufficiently designated;<sup>73</sup> and one which names the limits of the proposed street extension, describes by metes and bounds the lands to be taken for the same, and provides for the opening of the described tract for a street, sufficiently describes the locality;<sup>74</sup> so, too, does one which describes the land to be taken "in accordance with the plan hereto annexed";<sup>75</sup> one which with particularity and certainty describes the brick to be used is not rendered invalid because bidders are required to submit specimens to be subjected to certain "absorption" and "abrasion tests" by the board, and requiring the latter to reject all specimens not sustaining the tests;<sup>76</sup> nor is one invalid or insufficient because in providing for the proportions of cement, limestone and sand to form concrete, the word "measure" is used with respect to

<sup>70</sup> *People v. Yonkers*, 39 Barb. 266. And see, *Wilbur v. Springfield*, 123 Ill. 395, 14 N. E. 871; *Adams Co. v. Quincy*, 130 Ill. 566, 6 L. R. A. 155, 22 N. E. 624; *Ronan v. People*, 193 Ill. 631, 61 N. E. 1042; *State v. District Court*, 29 Minn. 62, 11 N. W. 133; *State v. District Court*, 33 Minn. 295, 23 N. W. 222; *Burlington v. Quick*, 47 Iowa, 222.

<sup>71</sup> *Chicago Union Tr. Co. v. Chicago*, 207 Ill. 544, 69 N. E. 849.

<sup>72</sup> *White v. Alton*, 149 Ill. 626, 37 N. E. 96.

<sup>73</sup> *Chytraus v. Chicago*, 160 Ill. 18, 43 N. E. 335.

<sup>74</sup> *Danville v. McAdams*, 153 Ill. 216, 38 N. E. 632.

<sup>75</sup> *Hutt v. Chicago*, 132 Ill. 352, 23 N. E. 1010.

<sup>76</sup> *Chicago v. Singer*, 202 Ill. 75, 66 N. E. 874.



cement, and "parts" to the sand and limestone;<sup>77</sup> nor is it rendered indefinite by the use of the word "filling" in grading a street, it being shown the word has a definite meaning among engineers and contractors;<sup>78</sup> and when the meaning of the term "property crossings" is understood by all parties, a sidewalk ordinance requiring such crossings to be laid "for the use of property owners" is not void for failure to fix their number, location, nor method of construction.<sup>79</sup>

**395.** A street improvement ordinance cannot be condemned because difficulties, inconvenience or loss may possibly result therefrom, if the improvement be lawfully made, with due care, and due regard for the rights of others.<sup>80</sup> One for widening a street may be valid although a condition thereto annexed, to the effect that a certain railway company shall, within a certain time therein limited, indemnify the city, is not fulfilled;<sup>81</sup> and a city may extend a street improvement a few feet into cross-streets, and beyond the distance fixed in the ordinance, without affecting its validity in that respect, but must pay for the excess by general taxation, and not from special assessment.<sup>82</sup>

**396.** Where a general ordinance and a special ordinance referring thereto were both passed the same day, the former to go into effect from and after its passage, and the latter from and after its passage and publication, the latter date being three days later, the special ordinance is not invalid as being based on a general ordinance not yet gone into effect.<sup>83</sup>

<sup>77</sup> *Sawyer v. Chicago*, 183 Ill. 57, 55 N. E. 645.

<sup>78</sup> *Levy v. Chicago*, 113 Ill. 650.

<sup>79</sup> *People v. Burke*, 206 Ill. 358, 69 N. E. 45. And see, generally, as to the necessity of the ordinance being specific, *C. B. & Q. R. Co. v. Quincy*, 136 Ill. 563, 29 Am. St. Rep. 334, 27 N. E. 192; *Ewart v. Western Springs*, 180 Ill. 318, 54 N. E. 478; *I. C. R. Co. v. Effing-*

*ham*, 172 Ill. 607, 50 N. E. 103; *Hynes v. Chicago*, 175 Ill. 56, 51 N. E. 705.

<sup>80</sup> *C. B. & Q. R. Co. v. Quincy*, 139 Ill. 355, 28 N. E. 1069.

<sup>81</sup> *Uhrig v. St. Louis*, 44 Mo. 458.

<sup>82</sup> *White v. Alton*, 149 Ill. 626, 37 N. E. 96.

<sup>83</sup> *Pierson v. People*, 204 Ill. 456, 68 N. E. 383.



**397.** The rule is that unless there is a total failure to include in an ordinance the necessary element of a specification of the nature, character, locality and description of the improvement as required by the statute, the mere fact that the specification is defective in some respect will not be a defense on the application for judgment on a delinquent list,<sup>84</sup> but a street improvement ordinance must of necessity show the grade in order that an accurate estimate of the excavation and filling may be made.<sup>85</sup> The fact that a street to be improved has a "jog" in it, does not constitute the portion on each side a separate street so as to make the improvement double.<sup>86</sup> A new ordinance levying a new assessment for work completed under a prior ordinance which has been held invalid need not describe the improvement in detail;<sup>87</sup> and one for a public improvement providing "that said improvement shall be made and the cost thereof paid by special assessment, to be levied upon the property being benefited thereby, to the amount that the same may be legally assessed therefor, and that the remainder of the cost shall be paid by general taxation, will be construed merely as a declaration that the improvement shall be paid in part by special assessment, and is not invalid.<sup>88</sup> A mere inaccuracy of the description of one of the termini in a local improvement ordinance, which may be cured by reference to the plat attached to the petition for confirmation, or which may be rendered certain by a simple computation, does not render the ordinance invalid.<sup>89</sup>

**398.** Where the statute provides that in case a special assessment is payable in installments, fixing the maximum for the first one, and dividing the balance into four pay-

<sup>84</sup> *Gross v. People*, 172 Ill. 571, 50 N. E. 334.

<sup>85</sup> *Carlinville v. McClure*, 156 Ill. 492, 41 N. E. 169.

<sup>86</sup> *Culver v. Chicago*, 171 Ill. 399, 49 N. E. 573.

<sup>87</sup> *Chicago v. Hulbert*, 205 Ill. 346, 68 N. E. 786.

<sup>88</sup> *Burhans v. Norwood Park*, 138 Ill. 147, 27 N. E. 1088.

<sup>89</sup> *Nicholes v. People*, 171 Ill. 376, 49 N. E. 574; *Houston v. Chicago*, 191 Ill. 559, 61 N. E. 396.



ments, an ordinance properly fixing the amount of the first installment, or one which fixes the time of payment at twenty per cent after the confirmation of the assessment, and twenty per cent of the total each year thereafter, is sufficiently specific, and a separate ordinance to effect such division is unnecessary.<sup>90</sup> The existence of a general ordinance requiring bidders for public work to employ union labor only, is not ground for refusing judgment of sale where it is not shown that the ordinance for the improvement, or the bid or contract contained such a clause, or that the union labor ordinance was employed or enforced in any manner in the contract or proceeding.<sup>91</sup> An assessment ordinance need not set out the particular statute under which the assessment is to be collected, as it will be presumed that it was made in accordance with any then existing statute which authorized it,<sup>92</sup> and its publication in a newspaper of general circulation is valid and sufficient if made in a newspaper published only on Sunday.<sup>93</sup>

**399.** The validity of a condemnation ordinance cannot be assailed collaterally in an action to collect a paving assessment;<sup>94</sup> but that a special assessment ordinance is void so that no rights or steps could be taken under it, is an objection available on collateral attack.<sup>95</sup> It need not specify in detail the quantity of each article to be used,<sup>96</sup> and it may by reference adopt the city dictum established by a previous ordinance without setting forth the former one.<sup>97</sup> That an ordinance for new assessment for completed work does not cure the defects in description for which the original ordinance

<sup>90</sup> *Andrews v. People*, 164 Ill. 581, 45 N. E. 965; *Davis v. Litchfield*, 155 Ill. 384, 40 N. E. 354; *Walker v. People*, 170 Ill. 410, 48 N. E. 1010.

<sup>91</sup> *Grey v. People*, 194 Ill. 486, 62 N. E. 894.

<sup>92</sup> *Andrews v. People*, 173 Ill. 123, 50 N. E. 335.

<sup>93</sup> *Hastings v. Columbus*, 42 Ohio St. 585.

<sup>94</sup> *Dashiell v. Mayor, etc.*, 45 Md. 615.

<sup>95</sup> *Hull v. People*, 170 Ill. 246, 48 N. E. 984.

<sup>96</sup> *Woods v. Chicago*, 135 Ill. 582, 26 N. E. 608.

<sup>97</sup> *Kunst v. People*, 173 Ill. 79, 50 N. E. 168.



was held invalid, and that there were slight departures from the original ordinance in making the improvement, will not defeat the new assessment where the city has accepted the work as satisfactorily complying with the ordinance.<sup>98</sup> An objection to an assessment for work done under an ordinance assessing the expense on the property benefited, as being void because the ordinance purports to direct a tax regardless of the question whether the benefit equalled the expenditure, is untenable, for the reason that the ordinance was passed under authority, and there being no allegation or proof to the contrary, it is to be assumed that the legislative judgment was that the benefit would be as great as the cost.<sup>99</sup>

**400.** The mere lapse of a year between the introduction of an ordinance and its passage does not render it void,<sup>1</sup> nor a provision that it shall go into effect from its passage, while the statute requires ten days after publication to elapse before it becomes operative;<sup>2</sup> and where the date of an ordinance is correctly set forth in an assessment petition, a misstatement of such date in the preamble of the commissioners' estimate is of no effect, when there is a default, nor can the objection be first raised on appeal.<sup>3</sup> One passed in pursuance of a charter requirement that the city keep its streets in repair, is not unconstitutional because it directs the city engineer to make the repairs at the expense of the adjacent property owner without notice to the latter, as he may have his day in court if sued on the special tax bill,<sup>4</sup> nor is one authorizing the city engineer to make certain street improvements invalidated because no time is therein specified for the completion of the work.<sup>5</sup> A street im-

<sup>98</sup> *Markley v. Chicago*, 190 Ill. 276, 60 N. E. 512; *Chicago v. Hulbert*, 205 Ill. 346, 68 N. E. 786; *Chicago v. Sherman*, 212 Ill. 498, 72 N. E. 396.

<sup>99</sup> *In re Roberts*, 81 N. Y. 62.

<sup>1</sup> *McLaughlin v. Chicago*, 198 Ill. 518, 64 N. E. 1036.

<sup>2</sup> *I. C. R. Co. v. People*, 161 Ill. 244, 43 N. E. 1107.

<sup>3</sup> *Hull v. West Chi. Park Comr's*, 185 Ill. 150, 57 N. E. 1.

<sup>4</sup> *Kansas City v. Huling*, 87 Mo. 203.

<sup>5</sup> *Strassheim v. Jerman*, 56 Mo. 105; *Carlin v. Cavender*, 56 Mo. 286.



provement ordinance is not made void because of a provision therein that the authorities reserve the right to reject "any proposal, at their discretion," such clause being in conflict with the statute. Such provision will be regarded as nugatory and the ordinance valid where it does not appear that the authorities ever acted thereunder,<sup>6</sup> nor is it made void because of authorizing the city to advance money to the contractor, upon his assigning to it his liens for such improvement, which is made at the expense of abutting property.<sup>7</sup> A defective description in an assessment ordinance is no defense to an application for sale unless it be of such a character as to render the ordinance void.

**401.** It cannot be said, as matter of law, that an ordinance requiring lot owners to pay for the improvement of the street or the streets by which their lots are bounded, is so oppressive and unjust to the owners of corner lots as to justify the courts in declaring the same void,<sup>8</sup> nor because it provides for a special tax upon contiguous property to pay the entire cost of the street improvement, except at street intersections and along a public park, without any provision therein, limiting the tax to the benefits received by the property. The amendment of 1895 to the city and village act does not abridge the powers of the council, but merely gives the property owner the right to have the question of benefits submitted to the jury if dissatisfied with the assessment.<sup>10</sup> A provision in a contractor's bond that he will keep the pavement laid by him in repair for five years, and attached to the plans and specifications for a street pavement, forms no part of the plans and specifications adopted by and made a part of the ordinance.<sup>11</sup> After the adoption of an ordinance providing that the cost of making the assessment should be paid by the assessment, a statute

<sup>6</sup> *Walker v. People*, 170 Ill. 410, 48 N. E. 1010.

<sup>10</sup> *Hull v. People*, 170 Ill. 246, 48 N. E. 984.

<sup>7</sup> *Becker v. Hudson*, 100 Ky. 450,

<sup>11</sup> *Cole v. People*, 161 Ill. 16, 43

<sup>8</sup> *Springfield v. Green*, 120 Ill. 269, 11 N. E. 261.

N. E. 607; *Rich v. People*, 152 Ill. 18, 38 N. E. 255.



providing that such expense should be paid from the general fund took effect. The illegal item was deducted, and the roll as recast was confirmed, after notice. The court having jurisdiction, there was no error in the proceedings.<sup>12</sup>

**402.** Where a special assessment ordinance fails to make the first installment include all fractional amounts, leaving the remaining installments equal in amount and multiples of \$100, as required by statute, such failure will not render the assessment void, nor will the objection be heard for the first time on appeal.<sup>13</sup> Where the cost of certain work not provided for in the ordinance relates merely to the matter of repairing a small portion of an intersecting street, the cost of such work may be rejected and the assessment reduced accordingly, without declaring the entire ordinance void.<sup>14</sup> Under a street improvement ordinance in respect to a portion of which it omits to provide for any levy or assessment, the mere fact of such omission will not invalidate a levy or assessment which is provided for in respect to other and distinct portions of the improvement proposed — as, if it be proposed to pave certain streets and alleys, but the ordinance provides for a levy only for the paving of the streets, that levy will be good;<sup>15</sup> nor is a similar one void because a provision therein requiring the sale of the old paving blocks to the highest bidder was not complied with.<sup>16</sup>

— Sufficiency of description.

**403.** Inasmuch as the ordinance, which is the foundation for the assessment, must describe the work to be done, it

<sup>12</sup> *McChesney v. Chicago*, 205 Ill. 528, 69 N. E. 38. And see, *Gage v. People*, 207 Ill. 377, 69 N. E. 840.

<sup>13</sup> *Delamater v. Chicago*, 158 Ill. 575, 42 N. E. 444.

<sup>14</sup> *Shannon v. Hinsdale*, 180 Ill. 202, 54 N. E. 181.

<sup>15</sup> *Wilbur v. Springfield*, 123 Ill. 395, 14 N. E. 871.

<sup>16</sup> *Royal Ins. Co. v. South Park Comr's*, 175 Ill. 491, 51 N. E. 558. *Legislative authority for assessment.*

Where authority to impose special assessments by a municipality is neither conferred by its charter in express terms, nor derived by necessary implication therefrom, a municipal ordinance directing such



will not, if made for paving a street, authorize an assessment for paving only part of it, and the property owners cannot properly be assessed for the cost of work not intended to be done.<sup>17</sup> Where it improperly describes the terminus of a street improvement, an objection for that cause is available on application for judgment of confirmation, but too late on application for judgment of sale.<sup>18</sup> And where such termination is described as the "north curb line" of a certain street, and the location of that line can be definitely determined neither by the ordinance, nor the maps and plans accompanying it, it is insufficient.<sup>19</sup> But such insufficiency may be cured, where there is an uncertainty as to the roadways of intersecting streets, by a general ordinance fixing the width of sidewalks in streets of certain width, thus showing the width of the roadways therein.<sup>20</sup> An ordinance opening a street 50 feet wide, with sides parallel, will not authorize one side to vary from 50 to 60 feet in width from the other because the city in some instances took whole lots and not parts.<sup>21</sup> And where work has been largely done by private individuals prior to an assessment therefor, an ordinance providing for the making of the improvement "except such portion as has already been done in a suitable manner," is not sufficiently definite.<sup>22</sup>

#### — Grade ordinances.

**404.** An ordinance fixing the excavation of the street at the center at a certain number of inches "below the established street grade," the excavation of the side lines being of greater depth, but similarly described, is sufficiently specific.<sup>23</sup> So, too, is one fixing the grade at certain heights

imposition is void. *Mayor, etc., v. Weeks*, 104 La. 489, 29 So. 252.

<sup>17</sup> *St. John v. E. St. Louis*, 136 Ill. 207, 27 N. E. 543.

<sup>18</sup> *Steenberg v. People*, 164 Ill. 478, 45 N. E. 970.

<sup>19</sup> *Sanger v. Chicago*, 169 Ill. 286, 48 N. E. 309.

<sup>20</sup> *Topliff v. Chicago*, 196 Ill. 215, 63 N. E. 692.

<sup>21</sup> *Taylor v. Bloomington*, 186 Ill. 497, 58 N. E. 216.

<sup>22</sup> *L. S. & M. S. R. Co. v. Chicago*, 56 Ill. 454.

<sup>23</sup> *Cramer v. Charleston*, 176 Ill. 507, 52 N. E. 73.



above low-water mark which is capable of identification,<sup>24</sup> and one for paving which refers to the established grade,<sup>25</sup> nor does it invalidate one as requiring a reference to matters *dehors* the record to fix a grade measured from the "plane of low water in Lake Michigan of A. D. 1847."<sup>26</sup> If that part of a city ordinance for grading a street which provides for payment of the work, be invalid, that portion of it which directs the work to be done and contract for same entered into, may be valid, and mandamus may lie to compel a proper levying of a tax.<sup>27</sup> If there be in existence an ordinance defining the manner of grading a street, an ordinance directing the city engineer to have a certain street graded according to law, is valid.<sup>28</sup> The failure of an ordinance to designate the grade of a street, and whether it is to be paved or not, will not render it invalid where the amount to be apportioned upon the property benefited is free from doubt.<sup>29</sup> An ordinance providing for the "grading" of a certain street sufficiently authorizes "grading, grubbing, guttering and curbing."<sup>30</sup> Where the charter makes the cost of grading and improving streets charge-

<sup>24</sup> Mead v. Chicago, 186 Ill. 54, 57 N. E. 824.

<sup>25</sup> Claflin v. Chicago, 178 Ill. 549, 53 N. E. 339.

Provisions in a street paving ordinance that the center thirty feet of the street designated in the particular ordinance should be brought to a uniform grade, under the direction of the engineer in charge, excavated to a uniform grade, under the direction of the engineer in charge, excavated to a certain depth at the center and sides, particularly stated, and then covered with broken stone of the kind, size and quality described in the specifications to a depth stated, and the road-bed covered with a top dressing of fine limestone screenings of

sufficient depth to make a smooth top and solid surface, after having been wet and thoroughly rolled — are sufficiently specific. Gross v. People, 172 Ill. 571, 50 N. E. 334.

<sup>26</sup> Givins v. Chicago, 186 Ill. 399, 57 N. E. 1045; Chicago Ter. Tr. Co. v. Chicago, 184 Ill. 154, 56 N. E. 410; Hardin v. Chicago, 186 Ill. 424, 57 N. E. 1048.

<sup>27</sup> State v. Portage, 12 Wis. 562.

<sup>28</sup> Moran v. Lindell, 52 Mo. 229.

<sup>29</sup> Pearson v. Chicago, 162 Ill. 383, 44 N. E. 739. Washington Ice Co. v. Chicago, 147 Ill. 327, 37 Am. St. Rep. 222, 35 N. E. 378, distinguished.

<sup>30</sup> Spokane v. Brown, 8 Wash. 317, 36 Pac. 26.



able in whole or in part to the lots abutting thereon, the proceedings must comply with the charter requirements, and an ordinance which does not comply therewith, and does not charge the abutting lots with the cost of grading and filling, in whole or in part, is void, and the city is liable for the injuries caused by its action under such void ordinance.<sup>31</sup> Where it fails to fix the grade at a certain point, it will not be insufficient if the grade at that point can be determined by mere mathematical calculation.<sup>32</sup> And if both ordinance and estimate are silent as to "filling," it will be presumed none is necessary.<sup>33</sup>

#### — Paving ordinances.

**405.** An ordinance is not void on collateral attack as providing for street repairs by special taxation, because of a provision in the contract filed with the plans and specifications, but forming no part thereof, that the pavement shall be kept in repair by the contractor for five years, and it is no defense in the collateral proceeding to obtain judgment for a delinquent special tax.<sup>34</sup> And where in estimating the cost of an improvement, the expense of keeping same in repair was not taken into consideration, a provision in the ordinance that the contractor shall keep the pavement in repair for two years, without extra compensation, is a guaranty that the work is properly done, and does not invalidate the ordinance.<sup>35</sup> A city ordinance authorizing the paving of a street with asphalt and providing that in the gutters and other parts of streets where the city engineer deemed it advisable, vitrified brick might be used, is not invalid as

<sup>31</sup> *Drummond v. Eau Claire*, 79 Wis. 97, 48 N. W. 244.

<sup>32</sup> *Chicago Union Tr. Co. v. Chicago*, 215 Ill. 410, 74 N. E. 449.

<sup>33</sup> *Givins v. Chicago*, 186 Ill. 399, 57 N. E. 1045; *Hardin v. Chicago*, 186 Ill. 424, 57 N. E. 1048. And see, as to sufficiency in gen-

eral, *Guyer v. Rock Island*, 215 Ill. 144, 74 N. E. 105; *Chicago Union Tr. Co. v. Chicago*, 207 Ill. 544, 69 N. E. 849.

<sup>34</sup> *Cole v. People*, 161 Ill. 16, 43 N. E. 607.

<sup>35</sup> *Latham v. Wilmette*, 168 Ill. 153, 48 N. E. 311.



being a delegation of power reserved to the common council.<sup>36</sup> And it is no valid objection to an ordinance providing for street paving by special taxation, that it also provides for curbing on each side of the street to be included in the estimate of the expense of the improvement ordered, as such curbing may be deemed part of the payment.<sup>37</sup> The same may be said of a repaving ordinance which did not provide for paving between the tracks of a street railway company when the charter of the latter required it to keep such portion of the street in repair, and that it should be assessed its proportion for the cost of repaving. The obligation of the company is to keep the street in repair, and not to repave it with a new and different, and perhaps more costly material.<sup>38</sup>

**406.** An ordinance for paving several streets and alleys, and parts of streets with the same material and in the same manner, is not obnoxious to the objection that it embraces more than one improvement, although there may be a difference in the width of the streets to be paved.<sup>39</sup> One providing that a street, in the city of E., from the west line of M. avenue to the east line of W. avenue, in said city, be paved, fixes the precise designation of the locality within the city, without resort to presumption or intendment;<sup>40</sup> and one for paving and curbing of an entire street for a designated distance is not void as failing to specify the width of the street.<sup>41</sup>

<sup>36</sup> Mayor etc. v. Stewart, 92 Md. 535, 48 Atl. 165.

<sup>37</sup> Enos v. Springfield, 113 Ill. 65.

*Objection that present pavement sufficient.*

An objection that a street ordered to be paved with asphalt is already sufficiently paved with cobblestones and needs no other pavement, is untenable, since the propriety or necessity for the new pavement is a matter entirely within the discretion of the city

council. Mayor etc. v. Stewart, 92 Md. 535, 48 Atl. 165.

Query: But is not this a question of fact, reviewable by the courts for fraud, mistake or oppressive action?

<sup>38</sup> Mayor etc. v. Scharf, 54 Md. 499.

<sup>39</sup> Adams Co. v. Quincy, 130 Ill. 566, 6 L. R. A. 155, 22 N. E. 624.

<sup>40</sup> Sargent v. Evanston, 154 Ill. 269, 40 N. E. 440.

<sup>41</sup> People v. Markley, 166 Ill. 48, 46 N. E. 742.



The title of a city ordinance authorizing the repaving of a street with asphalt does not violate the provisions of the charter declaring the subject of every ordinance shall be expressed in its title, when the body of the ordinance contains a proviso permitting the use of vitrified brick in the gutters and other portions of the street deemed desirable by the city engineer.<sup>42</sup> It is not necessary to constitute a local improvement that the old material of the street should be entirely removed, and replaced by material of a different character; and an ordinance providing that a macadamized road-bed shall be scraped, cleaned, filled and rolled so as to present an even surface, and that a new coating of macadam six and one-half inches thick shall be placed thereon, provides for a local improvement, and not repair.<sup>43</sup> The purpose of a provision in a street paving ordinance concerning the grade of the street is that an intelligent estimate can be made of the cost of grading and filling.<sup>44</sup>

**407.** Ordinances containing the following provisions have been sustained as being sufficiently specific: As to width of pavement, when it provides that the street shall be improved to the width of thirty feet, states the thickness of the curb and width of gutter flag, and that the road-bed between shall be paved with asphalt;<sup>45</sup> as to the width of the improvement on intersecting streets, by directing the macadamizing of the central twenty-seven feet of the street and the central twenty-seven feet of the intersecting streets to the outer line of such street;<sup>46</sup> as to the width to be paved and the location of the curb stones, when the ordinance provides generally for paving and curbing a street of known and fixed width, as the pavement in such case will be understood to fill the space between the sidewalks;<sup>47</sup> as

<sup>42</sup> Mayor etc. v. Stewart, 92 Md. 535, 48 Atl. 165.

<sup>43</sup> Field v. Chicago, 198 Ill. 224, 64 N. E. 840.

<sup>44</sup> Gross v. People, 172 Ill. 571, 50 N. E. 334.

<sup>45</sup> Lehmers v. Chicago, 178 Ill. 530, 53 N. E. 394.

<sup>46</sup> Shannon v. Hinsdale, 180 Ill. 202, 54 N. E. 181.

<sup>47</sup> Dickey v. Chicago, 164 Ill. 37, 45 N. E. 537.



to the width of the pavement, where the ordinance provides for paving a street "excepting a space sixteen feet in width in the middle of said street," the width of the street being shown by the recorded plat, and the width of the sidewalks having been fixed by a prior ordinance;<sup>48</sup> as to the description of the termini, when the paving ordinance reads "from the south line of the street railway right of way on H. Street to the north line of the street railway right of way on T. Street," the street railway tracks being laid in the street, and the ordinances under which they were laid specifying the requisite details;<sup>49</sup> as to the standard of shale to be used, where the paving brick is required to be "of pure shale, of equal quality to that found in Galesburg, Glen Carbon and Streator, in the state of Illinois, and Canton, in the state of Ohio;"<sup>50</sup> the use of the words "not less than," in a paving ordinance, describing dimensions, as, "not less than seven inches of sand," "a finishing coat not less than one-half inch thick;"<sup>51</sup> that the brick shall be firmly settled by a roller of certain weight, *or*, a paving ram, at the engineer's discretion, in the requirements for laying a brick pavement;<sup>52</sup> a street paving ordinance requiring the pavement to conform to the established grade as fixed in an ordinance "now on file in the office of the city clerk;"<sup>53</sup> where a street is to be paved with brick, to be laid on a foundation of cinders, sand, gravel, "or other material equally suitable," and where the estimate of cost shows that cinders are to be used, the words quoted may be rejected as surplusage.<sup>54</sup> "Paved with Trinidad sheet asphaltum, according to specifications in the office of the city engineer," is a sufficiently

<sup>48</sup> Woods v. Chicago, 135 Ill. 582, 26 N. E. 608.

<sup>49</sup> Rawson v. Chicago, 185 Ill. 87, 57 N. E. 35.

<sup>50</sup> Hintze v. Elgin, 186 Ill. 251 57 N. E. 856.

<sup>51</sup> Latham v. Wilmette, 168 Ill. 153, 48 N. E. 311.

<sup>52</sup> Trimble v. Chicago, 168 Ill. 567, 48 N. E. 416.

<sup>53</sup> C. & N. P. R. Co. v. Chicago, 172 Ill. 66, 49 N. E. 1006.

<sup>54</sup> Jacksonville R. Co. v. Jacksonville, 114 Ill. 562, 2 N. E. 478.



definite description in an ordinance prescribing the materials of a street improvement.<sup>55</sup> The width of a pavement need not be specified when shown by the plat,<sup>56</sup> nor need a former grade ordinance referred to, be recited, or the fact that it is on file in the office of the clerk.<sup>57</sup>

— Curb ordinances.

**408.** In an ordinance for a street improvement, the precise thickness of curbstones, and their depth, need not be given, where the minimum thickness and depth is provided for. Nor need the nature of the stone nor manner of dressing it be precisely given. An ordinance may lack desirable precision, and still may so provide for the manner in which an improvement shall be made, and be such a compliance with the law, although a loose one, that the courts would not be authorized to invalidate the action of the city officers under it.<sup>58</sup> Failure to describe "flat stones" upon which the curb is to be bedded does not avoid the ordinance so that it is subject to collateral attack,<sup>59</sup> nor because the kind of stone and its thickness and width are not prescribed, as such details may properly be left to the city engineer.<sup>60</sup> An ordinance which fixes the height of the curb at the back and from the inside of the gutter at certain points, and providing a uniform slope between such points; one which fixes the top of the curb at the established grade of the street; and one for curbing "on either side" (meaning both sides) of a certain street, is sufficient.<sup>61</sup>

<sup>55</sup> Barber Asphalt Paving Co. v. Ullman, 137 Mo. 543, 38 S. W. 458. See, also, on the general question of sufficiency, McChesney v. Chicago, 205 Ill. 611, 69 N. E. 82; Gage v. Chicago, 207 Ill. 56, 69 N. E. 588.

<sup>56</sup> Harrison v. Chicago, 163 Ill. 129, 44 N. E. 395. See, also, Perry v. People, 206 Ill. 334, 69 N. E. 63.

<sup>57</sup> Shannon v. Hinsdale, 180 Ill. 202, 54 N. E. 181; McChesney v. Chicago, 205 Ill. 611, 69 N. E. 82.

<sup>58</sup> Sheehan v. Gleeson, 46 Mo. 100.

<sup>59</sup> Johnson v. People, 189 Ill. 83, 59 N. E. 515.

<sup>60</sup> Board of Councilmen v. Murray, 99 Ky. 422, 36 S. W. 180.

<sup>61</sup> Mead v. Chicago, 186 Ill. 54,



— Sidewalk ordinances.

**409.** The failure of an ordinance to specify the kind of stone to be used in a cross-walk is immaterial, it being shown that the word "stone" has a well understood and established local meaning as being "limestone," and the specification that they shall be of "not less than" certain dimensions is sufficiently specific.<sup>62</sup> The engineer of a city having charter authority to provide by ordinance for laying and maintaining sidewalks, has no authority to order a sidewalk to be laid except pursuant to an ordinance.<sup>63</sup> An ordinance for constructing a sidewalk on both sides of a street is not invalid as embracing two separate and distinct local improvements.<sup>64</sup> Where one section provided for constructing a sidewalk "on both sides of Sixty-fifth . . . from," etc., and another section of the same ordinance provides for the construction on both sides of "Sixty-fifth Street," etc., it is sufficiently specific.<sup>65</sup> The same may be said of an ordinance which provides that a street shall be "improved by graveling in street, brick sidewalks and paved gutters," according to specifications to be prepared by the city engineer, for advertising for bids and the assessment of abutting property, and it is sufficient to authorize the letting of a contract for doing the work.<sup>66</sup> One which provides for a cinder, cement, concrete, torpedo sand, and lime-

57 N. E. 824; *Lehmers v. Chicago*, 178 Ill. 530, 53 N. E. 394; *C. & N. P. R. Co. v. Chicago*, 172 Ill. 66, 49 N. E. 1006. And see, *Fay v. Chicago*, 194 Ill. 136, 62 N. E. 530; *White v. Chicago*, 188 Ill. 392, 58 N. E. 917; *Hackworth v. Louisville etc. Co.*, 106 Ky. 234, 50 S. W. 33; *Chicago v. Sherman*, 212 Ill. 498, 72 N. E. 396; *Guyer v. Rock Island*, 215 Ill. 144, 74 N. E. 105.

<sup>62</sup> *Shannon v. Hinsdale*, 180 Ill. 202, 54 N. E. 181. *Mansfield v.*

*People*, 164 Ill. 611, 45 N. E. 976, distinguished.

<sup>63</sup> *Louisiana v. Miller*, 66 Mo. 467.

<sup>64</sup> *Watson v. Chicago*, 115 Ill. 78, 3 N. E. 430. See, also, as to ordinance not being void as providing for two kinds of sidewalks, *Gage v. Chicago*, 196 Ill. 512, 63 N. E. 1031.

<sup>65</sup> *McChesney v. Chicago*, 173 Ill. 75, 50 N. E. 191.

<sup>66</sup> *Ross v. Stackhouse*, 114 Ind. 200, 16 N. E. 501. See, also, *Hy-*



stone walk covers a resolution and estimate for a "cement sidewalk." <sup>67</sup>

— Waterworks ordinances.

**410.** An ordinance for a connected system of waterworks for a whole village provides for but one local improvement, and is not invalid as embracing separate and distinct improvements, although it provides that the reservoirs and works shall be paid for by general taxation, while the mains are to be paid for by local assessment;<sup>68</sup> nor is one which provides for laying water-pipe in certain streets because of the fact of the existence in some of the streets of the pipes of a private company.<sup>69</sup>

— Sewer ordinances.

**411.** Where a city ordinance providing for constructing sewers also provides that the council may order them constructed by resolution, and the resolution is passed, it is sufficient,<sup>70</sup> and when the council has under the charter power to lay down necessary sewers, and charge their cost to the property directly benefited, it is unnecessary that the council shall first declare by ordinance that the sewer is necessary, or create a taxing district to be charged with the

man v. Chicago, 188 Ill. 462, 59 N. E. 10, and for a case holding the ordinance not uncertain as to depth of sidewalk, see Gage v. Chicago, 196 Ill. 512, 63 N. E. 1031.

<sup>67</sup> Storrs v. Chicago, 208 Ill. 364, 70 N. E. 347; Gage v. Chicago, 196 Ill. 512, 63 N. E. 1031.

<sup>68</sup> People v. Sherman, 83 Ill. 165; Hughes v. Momence, 163 Ill. 535, 45 N. E. 300; Harts v. People, 171 Ill. 458, 49 N. E. 538.

An ordinance to raise money by special assessments to pay for a "connected system of water works, with the necessary reservoirs, fire

hydrants and water-mains," will not be held void as being uncertain as to whether the construction of a standpipe, engine house and other general improvements was contemplated, where all action taken under the ordinance clearly shows that it was understood as limiting the special assessment to the local improvement alone. O'Neil v. People, 166 Ill. 561, 46 N. E. 1096.

<sup>69</sup> Hughes v. Momence, 163 Ill. 535, 45 N. E. 300.

<sup>70</sup> Grinnell v. Des Moines, 57 Iowa, 144, 10 N. W. 330.



cost of construction.<sup>71</sup> An ordinance for an outfall sewer, which provides for the use and benefit of the same by all property owners obtaining permission to make connection therewith, is not objectionable as granting away the police power of the city, as it may still regulate the manner of making such connections and to abate any nuisance which might be created.<sup>72</sup> It is not a valid objection to the confirmation of a sewer assessment that future legislation will be necessary before non-abutting property will be benefited, where the ordinance provides that all property in the district may drain into the sewer.<sup>73</sup> An ordinance for the construction of a sewer is not made unreasonable by a provision therein for "house connection slants every twenty feet on each side of the sewer," where there is no proof that such a provision is oppressive or unreasonable,<sup>74</sup> nor for one such slant to each lot, tract or parcel of land, and allowing all owners of the lots, tracts or parcels of land, and all unsubdivided lands lying within the drainage limits, to be entitled at all times to the use and benefit of the sewer;<sup>75</sup> nor does such an ordinance amount to a subdivision of the abutting property into twenty-foot lots, where the assessment is made against the property by its legal description,<sup>76</sup> nor need its caption state that the purpose of the ordinance, in part, is to provide for house connections.<sup>77</sup>

**412.** In the following cases, objections that the ordinance was invalid as providing for a double improvement was declared untenable: Authorizing the laying of sewers in sev-

<sup>71</sup> *Strowbridge v. Portland*, 8 Or. 67.

<sup>72</sup> *Gray v. Cicero*, 177 Ill. 459, 53 N. E. 91.

<sup>73</sup> *Walker v. Chicago*, 202 Ill. 531, 67 N. E. 369.

<sup>74</sup> *Vandersyde v. People*, 195 Ill. 200, 61 N. E. 1050, 62 N. E. 806; *Walker v. Chicago*, 202 Ill. 531, 67 N. E. 369.

<sup>75</sup> *Gage v. Chicago*, 195 Ill. 490, 63 N. E. 184.

<sup>76</sup> *Vandersyde v. People*, 195 Ill. 200, 61 N. E. 1050, 62 N. E. 806; *Chicago v. Corcoran*, 196 Ill. 146, 63 N. E. 690.

<sup>77</sup> *Hinsdale v. Shannon*, 182 Ill. 312, 55 N. E. 327.



eral different streets; <sup>78</sup> for the construction of a main sewer with branches; <sup>79</sup> for the construction of a sewer and providing for manholes; <sup>80</sup> for an outlet into a previously constructed sewer running at right angles therewith, and when the first sewer runs in each direction from the outlet of the new sewer; <sup>81</sup> where it becomes necessary to establish pumping works in connection with a sewerage system, and pay for the same by special assessment.<sup>82</sup>

**413.** Where the charter requires that the size of a sewer to be constructed be prescribed by ordinance, but contains no such requirements as to inlets, manholes, nor material of construction, they may be regarded as matters of detail not necessary to be specifically set forth in the ordinance.<sup>83</sup> This is undoubtedly the general rule, but contrary to the Illinois statute to which reference has been hereinbefore made, but the following Illinois cases, upholding the sufficiency of the ordinance, are in point: Where the ordinance gives the dimensions of a wall for strengthening a sewer outfall, the size and quality of the stone need not be specified therein; <sup>84</sup> the requirements that the sewer be "cylindrical in shape, shall be two feet internal diameter and constructed with a single ring of sewer brick laid edgewise," makes sufficiently certain the thickness of the sewer wall, the manner of laying the bricks and their size and quality; <sup>85</sup> where the sewer is to be constructed of vitrified tile-pipe of a certain internal diameter, the thickness of the pipe need not be specified; <sup>86</sup> that certain manholes and catch-basins shall be located as "designated," and that the brick-work shall be

<sup>78</sup> *Beach v. People*, 157 Ill. 659, 41 N. E. 1117; *Walker v. People*, 170 Ill. 410, 48 N. E. 1010.

<sup>79</sup> *Payne v. South Springfield*, 161 Ill. 285, 44 N. E. 105.

<sup>80</sup> *Steele v. River Forest*, 141 Ill. 302, 30 N. E. 1034.

<sup>81</sup> *Church v. People*, 179 Ill. 205, 53 N. E. 554.

<sup>82</sup> *Drexel v. Lake*, 127 Ill. 54, 20 N. E. 38.

<sup>83</sup> *St. Joseph v. Owen*, 110 Mo. 445, 19 S. W. 713.

<sup>84</sup> *Bickerdike v. Chicago*, 185 Ill. 280, 56 N. E. 1096.

<sup>85</sup> *Peters v. Chicago*, 192 Ill. 437, 61 N. E. 438.

<sup>86</sup> *Hynes v. Chicago*, 175 Ill. 56, 51 N. E. 705.



done under the supervision of the department of public works, is sufficiently specific to satisfy the local statute;<sup>87</sup> where from the entire ordinance the starting point of a sewer can be fixed and its depth at that place ascertained;<sup>88</sup> where it is provided that the sewer shall be two feet inside diameter, etc., with necessary manholes and inlets for surface drainage, etc., the location of the manholes is sufficiently certain.<sup>89</sup>

**414.** An ordinance providing for a connected system of drains and sewers, specifying the various streets to be improved, the grade of the sewer of each street, its internal dimensions, materials of which to be constructed and the character of the work in detail, and which in addition expressly approves the plans, specifications, maps and profiles on file with the Clerk, is not void for uncertainty;<sup>90</sup> and if it specifies the number of manholes and catch-basins, their dimensions, material, and construction, is not invalid for insufficiency of description of the improvement, though the places at which they are to be located are not designated;<sup>91</sup> the failure to give the radii of three curves between two points is without effect, where the curves are for short distances, adapted to the purposes of the sewer, and can properly be located in one way only, from the whole ordinance taken together.<sup>92</sup> A sewer ordinance is not invalid because it fails to provide an outlet,<sup>93</sup> nor because the outlet is insufficient.<sup>94</sup>

<sup>87</sup> *Springfield v. Mathus*, 124 Ill. 88, 16 N. E. 92; *Barber v. Chicago*, 152 Ill. 37, 38 N. E. 253.

<sup>88</sup> *Steele v. River Forest*, 141 Ill. 302, 30 N. E. 1034.

<sup>89</sup> *Springfield v. Mathus*, 124 Ill. 88, 16 N. E. 92; *Rich v. Chicago*, 152 Ill. 18, 38 N. E. 255; *Barber v. Chicago*, 152 Ill. 37, 38 N. E. 253.

<sup>90</sup> *Walker v. People*, 170 Ill. 410, 48 N. E. 1010.

<sup>91</sup> *Walker v. People*, 166 Ill. 96, 46 N. E. 761.

<sup>92</sup> *Hyde Park v. Borden*, 94 Ill. 26.

<sup>93</sup> *Payne v. South Springfield*,

161 Ill. 285, 44 N. E. 105; *Cochran v. Park Ridge*, 138 Ill. 295, 27 N. E. 939. The case of *Pearce v. Hyde Park*, 126 Ill. 287, 18 N. E. 824, is quite broad, and is perhaps the leading case in Illinois as to what is a sufficient description. See, also, *Smythe v. Chicago*, 197 Ill. 311, 64 N. E. 361; *Duane v. Chicago*, 198 Ill. 471, 64 N. E. 1033; *Walker v. Chicago*, 202 Ill. 531, 67 N. E. 369; *Kimble v. Peoria*, 140 Ill. 157, 29 N. E. 723.

<sup>94</sup> *Bickerdike v. Chicago*, 185 Ill. 280, 56 N. E. 1096.



**Invalidity — In general.**

**415.** It is elementary that an ordinance must comply with the statute, or it will be held void;<sup>95</sup> but matters fairly included in general terms are within the description.<sup>96</sup> Where the statute requires the passage of an ordinance, and the work is done under a resolution or an invalid ordinance, no lien is created against the property assessed, the assessment being absolutely void.<sup>97</sup> But the fact that the assessment was made on an improper basis will not work a forfeiture if the liability of the abutting owners can be correctly ascertained, and their liability limited to that amount.<sup>98</sup> And it is a well settled principle, applicable to by-laws and ordinances, that if there be a provision relating to one subject matter which is void, and as to another which is valid, it may be enforced as to the valid portion, the same as if the void part had been omitted, where the two are not necessarily or inseparably connected.<sup>99</sup> An ordinance increasing the estimate of cost after a public hearing, without any public hearing as to such increase, is void.<sup>1</sup>

**416.** Where the improvement is of such nature that it cannot be described in the ordinance, but must depend on the exigencies of construction, it is one that cannot be made by special assessment.<sup>2</sup> The general principle of law that delegated powers cannot be delegated, applies with full force to special assessments. Thus, where the charter requires an improvement ordinance shall be referred to the commissioners of an assessment and a city surveyor not interested in the improvement, and it is referred to the commissioners

*Catch basins.* See *Gage v. Chicago*, 216 Ill. 107, 74 N. E. 726.

<sup>95</sup> *Shreveport v. Prescott*, 51 La. An. 1895, 46 L. R. A. 193, 26 So. 664; *Zelie v. Webster City*, 94 Iowa, 393, 62 N. W. 796.

<sup>96</sup> *People v. McWethy*, 177 Ill. 334, 52 N. E. 479.

<sup>97</sup> *State v. Dunellen*, 50 N. J. L.

565, 15 Atl. 529; *Pells v. Paxton*, 176 Ill. 318, 52 N. E. 64.

<sup>98</sup> *Kelly v. Chadwick*, 104 La. 719, 29 So. 295.

<sup>99</sup> *Wilbur v. Springfield*, 123 Ill. 395, 14 N. E. 871.

<sup>1</sup> *Chicago v. Walsh*, 203 Ill. 318, 67 N. E. 774.

<sup>2</sup> *Lundberg v. Chicago*, 183 Ill. 572, 56 N. E. 415.



only; and where the responsibility of deciding what improvements shall be made is vested in the council, and an ordinance undertakes to vest such discretion in the board of public works, in both cases the ordinances are void.<sup>3</sup> So specifications made part of a paving ordinance by reference render it invalid where they empower the engineer, in his discretion, to make changes which increase or diminish the expense of the improvement, to determine the value of such alterations, and add to or deduct same from the contract prices,<sup>4</sup> as well as in a case where raised crossings are to be laid at all street intersections, "and at such other places as the board may deem necessary."<sup>5</sup>

**417.** An ordinance requiring the employment of union labor only, upon public improvements, is unconstitutional and void, being an unjust discrimination between classes of citizens, which restricts competition and increases the cost of the work.<sup>6</sup> But an ordinance which is invalid as limiting the time of men employed at public work to eight hours a day, is no defense to an application for sale where the record fails to show that anything was done under such ordinance.<sup>7</sup> An assessment for a local improvement is invalid where the estimate of the cost does not appear to have been made under the ordinance authorizing such improvement, but under some former ordinance;<sup>8</sup> and an ordinance passed after the work will not authorize the levy of a special assessment to pay for such improvement.<sup>9</sup>

**418.** Under the Illinois statute the ordinance must specify the nature, character and locality of the proposed im-

<sup>3</sup> *State v. Bayonne*, 49 N. J. L. 311, 8 Atl. 295; *Foss v. Chicago*, 56 Ill. 354; *Walker v. Chicago*, 62 Ill. 286.

<sup>4</sup> *Bradford v. Pontiac*, 165 Ill. 612, 46 N. E. 794.

<sup>5</sup> *De Witt Co. v. Clinton*, 194 Ill. 521, 62 N. E. 780.

<sup>6</sup> *Fiske v. People*, 188 Ill. 206, 52 L. R. A. 291, 58 N. E. 985; *Hol-*

*den v. Alton*, 179 Ill. 318, 53 N. E. 556; *Adams v. Brennan*, 177 Ill. 194, 42 L. R. A. 718, 69 Am. St. Rep. 222, 52 N. E. 314.

<sup>7</sup> *Fiske v. People*, 188 Ill. 206, 52 L. R. A. 291, 58 N. E. 985.

<sup>8</sup> *Clark v. Chicago*, 152 Ill. 223.

<sup>9</sup> *Conn. Mutual L. Ins. Co. v. Chicago*, 185 Ill. 148, 56 N. E. 1071.



provement, or it is defective, and the special assessment based thereon will be invalid.<sup>10</sup> Where the requirements of the charter are to the effect that a public improvement may be ordered only after a petition therefor, and providing who may sign, not only are all subsequent proceedings void in

<sup>10</sup> A city ordinance for a local improvement to be paid by a special assessment, is fatally defective if it fails to describe the nature and character of the proposed improvement. It is not sufficient that it refer to specifications on file in a public office as showing the nature and character of the improvement, as that is not made a source of information. *Sterling v. Gault*, 117 Ill. 11, 7 N. E. 471.

An ordinance for the making of a local improvement to be paid for by special assessments which fails to specify the nature, character, locality and description of the proposed improvement with sufficient certainty, is defective, and special assessments based thereon will be invalid. *Hyde Park v. Spencer*, 118 Ill. 446, 8 N. E. 846; *Hyde Park v. Carton*, 132 Ill. 100.

An ordinance for a local improvement by special assessment must describe the improvement contemplated; and if that description show an attempt to do something which there is no authority for doing, the ordinance is void on its face. *Maywood Co. v. Maywood*, 140 Ill. 216, 29 N. E. 704.

An ordinance which gives no basis or data from which an estimate of the cost of the proposed improvement can be made, in accordance with the statute, to be apportioned among and upon the property benefited is fatally defective. *Washington Ice Co. v. Chi-*

*cago*, 147 Ill. 327, 37 Am. St. Rep. 222, 35 N. E. 378.

Failure of an ordinance to specify the nature, character and locality of the improvement, either within its own four corners or by reference to maps, plats, plans, profiles or specifications on file in the office designated by the statute, affords no jurisdiction or authority to confirm the assessment. *Alton v. Middleton's Heirs*, 158 Ill. 442, 41 N. E. 926.

An ordinance which fails to sufficiently specify the nature, character and description of a proposed improvement, but leaves the same largely to be determined by the department of public works is void, as clothing such department with discretionary powers vested in the council. *Cass v. People*, 166 Ill. 126, 46 N. E. 729; *People v. Hurford*, 167 Ill. 226, 47 N. E. 368.

An ordinance providing for the erection of "thirty-two lamp posts and two lamp post connections," which does not specify the material of which the posts are to be made, nor the character of the light to be used or connections to be furnished, is insufficient and invalid.

The provision of the statute that an ordinance for a local improvement to be paid for by a special assessment must specify the nature, character, locality and description of the improvement, is



the absence of such petition, but the signatures must be properly given and in accordance with the statute, and the record must affirmatively show a compliance with all such requirements.<sup>11</sup> Where a special assessment is illegal because of the invalidity of the ordinance under which it is made, such defect cannot be cured by a new assessment and report under such invalid ordinance.<sup>12</sup> The legal passage of the ordinance is a condition precedent to any further pro-

mandatory. *Otis v. Chicago*, 161 Ill. 199, 43 N. E. 715.

The ordinance is the basis for the estimate of cost, and if the ordinance fails to sufficiently specify the nature, character, locality and description of the improvement, neither the original estimate nor a subsequent one can be sustained. *Paxton v. Bogardus*, 201 Ill. 628, 66 N. E. 853.

*Illinois.*

<sup>11</sup> Where the charter provides that an improvement may not be ordered without a petition by a majority of the property owners to be assessed, except by a vote of at least three-fourths of the aldermen present, to be recorded on the journal by ayes and noes, and the record does not show a compliance with such provisions, the ordinance and all proceedings thereunder are void. *Rich v. Chicago*, 59 Ill. 286.

A petition by a city for an assessment for a public improvement does not comply with the statute requiring a recital of the ordinance for the proposed improvement by setting out a certified copy of the report of the commissioner of public works submitting to the council the draft of the ordinance providing for such improvement, without anything to indicate that such or-

dinance was passed. *Hull v. Chicago*, 156 Ill. 381, 40 N. E. 937.

An ordinance based on a petition by abutting owners under a statute requiring the signature of a majority of the owners is void where the unauthorized signatures of parties as owners of abutting property must necessarily be included so as to obtain a majority of property representation. *Merritt v. Kewanee*, 175 Ill. 537, 51 N. E. 867.

*Iowa.*

Where an ordinance provides the manner in which the sufficiency of a petition shall be ascertained, and the procedure for authorizing such improvement by the council, a departure from the methods prescribed in the ordinance will invalidate the assessment made to pay for the improvement. *Hager v. Burlington*, 42 Iowa, 661.

*Kentucky.*

Where the charter provides that a street improvement may be ordered only after a petition therefor, an ordinance for such improvement, not based on a petition, is void, and no lien for the expense of the work attaches to the property fronting on the street. *Covington v. Casey*, 3 Bush. 698.

<sup>12</sup> *Chicago v. Wright*, 80 Ill. 579.



cedure, as it is the ordinance which is the basis of jurisdiction.

**419.** An ordinance, not for making a public improvement, but for levying a special tax for one after its completion, is void, and cannot furnish the basis of such taxation. Until an ordinance is passed for the making of the improvement, no expense can be incurred which can become a charge on the property owner,<sup>13</sup> and an amendatory ordinance, passed after the question of the validity of the original ordinance was submitted to the court and taken under advisement, is ineffectual.<sup>14</sup> The appointment of viewers or appraisers before the adoption of an ordinance providing how the assessment should be made, is fatally defective to the assessment, and cannot be cured by a subsequent ordinance.<sup>15</sup> Where a contract made under authority of an ordinance becomes forfeited for failure to perform on time, a subsequent ordinance approving the contract in all its terms does not thereby validate the tax bills issued to pay for the work, time being of the essence of the contract.<sup>16</sup>

**420.** The question of the proper basis for special assessment has frequently come up for consideration when the validity of ordinances providing for assessing the cost directly upon the property, without any consideration or inquiry as to benefits, were being investigated, and the various courts have been largely controlled in their opinions by their former decisions. The overwhelming weight of authority is to the effect that an ordinance which excludes the consideration of benefits is invalid, and all subsequent proceedings are void.<sup>17</sup>

<sup>13</sup> *Carlyle v. Clinton Co.*, 140 Ill. 512, 30 N. E. 782.

<sup>14</sup> *Western Springs v. Hill*, 177 Ill. 634, 52 N. E. 959.

<sup>15</sup> *Scranton v. Barnes*, 147 Pa. St. 461, 23 Atl. 777.

<sup>16</sup> *Neill v. Gates*, 152 Mo. 585, 54 S. W. 460.

*Illinois.*

<sup>17</sup> An ordinance assessing the entire expense of a street improvement upon the property fronting on the same, irrespective of actual benefit, is unconstitutional and void. *St. John v. E. St. Louis*, 50 Ill. 92; *Larned v. Chicago*, 34 Ill.



**421.** Where a statute requires that work involving an aggregate expenditure of more than \$1,000 be let to the lowest bidder, an ordinance involving such an expenditure, authorizing it to be done in such manner as the commissioner

203; *Ottawa v. Spencer*, 40 Ill. 211.

An ordinance requiring a specified sum to be assessed on the property of a town, benefited by the improvement, without reference to whether the property is benefited in an amount equal to the assessment, and without requiring it to be levied on the principle of equality of benefits and burthen, is void. *Greeley v. People*, 60 Ill. 19.

Under an ordinance for sidewalk construction providing that it be paid for by special assessment "to the amount that it may be legally assessed therefor," and the balance to be paid by general taxation, the words "to the amount, etc.," are to be construed to mean the amount of benefit derived by the property from the improvement. *Watson v. Chicago*, 115 Ill. 78, 3 N. E. 430.

Where an ordinance shows on its face an attempt to subject property to special taxation for a local improvement, which property will in no way be benefited by the improvement, it will not sustain proceedings for the levy of a tax therefore. Special taxes for local improvements are justified only on the ground that the subject of the tax receives an equivalent. *Bloomington v. C. & A. R. Co.*, 134 Ill. 451, 26 N. E. 366.

A city ordinance provided for a street pavement of various widths, so that the cost in front of the

various lots was not uniform as to the entire length, to be paid for according to frontage by special taxation of contiguous property, except the street and alley intersections, which were to be paid for by general taxation. A subsequent amendment to the ordinance required the tax to be levied upon contiguous lots according to frontage, "but only in proportion to the amount of the pavement in front of each of said lots, parts of lots, and parcels of land along the line of said improvement."

The amendment, and proceedings under it, rendered the ordinance void. *Davis v. Litchfield*, 145 Ill. 313, 21 L. R. A. 563, 33 N. E. 888.

*Iowa.*

The repeal of a statute authorizing special assessments by the front foot operates upon a city ordinance authorizing assessments on that basis, and renders it *eo instanti* void. *Martin v. Oskaloosa (Iowa)*, 99 N. W. 557. *Hedge v. Same*; *Ross v. Same*.

*Ohio.*

An ordinance providing that the cost of improving a street "shall be assessed upon all the lots and parcels of land benefited thereby, in proportion to the number of feet front in each," does not comply with the municipal code of Ohio, which reads, "For the payment of the costs of making said improvement, the council may by ordinance, levy and assess a tax on all



of public works "may deem expedient, and for the best interests of the city and for the property owners," and the work shall be done under a contract made with that officer, without public advertisement for bids, is void upon its face.<sup>18</sup> Where proceedings for opening a street over plaintiff's lands have been set aside, an ordinance requiring abutting owners to grade the street in front of their respective lots, must also be set aside.<sup>19</sup> And a holding by the appellate court that an assessment ordinance is void in effect sets aside the assessment and renders the judgment of confirmation void;<sup>20</sup> and the objection that the ordinance is void is available on application for judgment.<sup>21</sup> Judgment confirming a special assessment payable in five installments instead of seven, as provided in the ordinance, is an error of substance, and prejudicial to the property owners;<sup>22</sup> and judgment refusing sale of land for a delinquent installment of an assessment, on the ground that the ordinance was wholly void, is conclusive as to other installments.<sup>23</sup> Where an ordinance as published contained an error in the size of the brick required, and afterwards the error was corrected by amendment, and the amendatory ordinance published the requisite number of times, it was unnecessary to republish the entire ordinance.<sup>24</sup>

**422.** General objections that an ordinance "does not specify the nature, character, locality and description of the proposed improvement," and that "said ordinance is void

the lots and lands bounding or abutting on the proposed improvement, such tax to be either in proportion to the foot front of the lot and lands so bounding or abutting, or according to the value of such lot or lands as assessed for taxation under the general law of the state, as may be entitled, and as the council may in each case determine. *Kelly v. Cleveland*, 34 Ohio St. 468.

<sup>18</sup> *Phelps v. Mayor*, 112 N. Y. 216, 2 L. R. A. 626, 19 N. E. 408.

<sup>19</sup> *Meredith v. Perth Amboy*, 63 N. J. L. 523; 44 Atl. 1101.

<sup>20</sup> *Murray v. Chicago*, 175 Ill. 340, 51 N. E. 654.

<sup>21</sup> *People v. Hurford*, 167 Ill. 226, 47 N. E. 368.

<sup>22</sup> *Michael v. Mattoon*, 172 Ill. 394, 50 N. E. 155.

<sup>23</sup> *Markley v. People*, 171 Ill. 260, 63 Am. St. Rep. 234, 49 N. E. 502.

<sup>24</sup> *People v. Burke*, 206 Ill. 358, 69 N. E. 45.



for uncertainty, insufficiency and informality," are broad enough to include the ground that the ordinance was uncertain as to the description of brick to be used.<sup>25</sup>

— Invalid grade ordinances.

**423.** A general ordinance establishing height of curbstones on a paved street does not thereby fix the grade of the sidewalk,<sup>26</sup> and a street grading ordinance which fails to comply with charter provisions is void.<sup>27</sup> Where it is provided that a pavement be laid to conform to the established grade of the street, "as shown by an ordinance fixing the grade of said street now on file in the office of the city clerk," while *prima facie* sufficient in its description of the grade, it is yet fatally defective where it appears the ordinance so referred to was not then in existence; and such defect cannot be cured by the subsequent passage of an ordinance fixing the grade.<sup>28</sup> A change of grade made under the provisions of a statute whereby railroads entering cities may elevate their tracks, must be confined to such limits as are necessary for the proper accomplishment of that purpose, and an ordinance which extends the lines of such change clearly beyond what is required by the alteration of grade at the point of railroad crossing is illegal.<sup>29</sup>

— Invalid paving ordinances.

**424.** An ordinance providing that the entire cost of a pavement shall be assessed upon the abutting owners, and which includes the cost of paving a portion of the street which a railroad was bound to improve, is void, and no jurisdiction to proceed is acquired under such ordinance.<sup>30</sup>

<sup>25</sup> Chicago v. Singer, 202 Ill. 75, 66 N. E. 874.

<sup>26</sup> Biggins' Estate v. People, 193 Ill. 601, 61 N. E. 1124.

<sup>27</sup> Hall v. Chippewa Falls, 47 Wis. 267, 2 N. W. 279; Drummond v. Eau Claire, 79 Wis. 97, 48 N. W. 244.

<sup>28</sup> C & N. P. R. Co. v. Chicago, 174 Ill. 439, 51 N. E. 596.

<sup>29</sup> State v. Bayonne, 54 N. J. L. 293, 23 Atl. 648.

<sup>30</sup> American Hide & L. Co. v. Chicago, 203 Ill. 451, 67 N. E. 979.

Where an ordinance for paving



An ordinance for the paving and curbing of a street sufficiently includes the adjustment of sewers necessary to guard against taking up parts of the work after it is finished,<sup>31</sup> but under charter authority to a council to order a street "graded and paved," there is no authority for enacting an ordinance for grading without paving.<sup>32</sup> An ordinance providing for the construction of a brick pavement is not repugnant because it requires the surface of the concrete pavement upon which the bricks are to rest, to be "parallel with the surface of the foundation pavement," and also for six inches of sand and brick above such pavement as the words "parallel with the surface," do not mean level therewith.<sup>33</sup> A statute providing that no street shall be paved at the expense of abutting owners, "unless the ordinance for such improvement shall have been passed by a vote of two thirds of all the members of each branch of councils," is not merely directory, but a limitation on the power of the councils; and unless the ordinance is so passed, recovery for the cost of the improvement cannot be had from the abutting owners.<sup>34</sup> The rules regarding the sufficiency of an ordinance authorizing paving or macadamizing are the same as in other improvements,<sup>35</sup>

part of a street requires that the whole cost of the proposed improvement, other than street and alley intersections, shall be levied by special taxation of the contiguous lots, etc., but only to the amount of the cost of the pavement in front of any such lot or parcel of land, so that each piece of property shall pay the full amount of the cost of the improvement in front of it, and no more or less, this will not be the imposition of a special tax upon contiguous property but will be an arbitrary and unlawful imposition of the burden upon each lot of the making of the improvement in front of it. *Davis v. Litchfield*,

145 Ill. 313, 21 L. R. A. 563, 33 N. E. 888.

<sup>31</sup> *Gage v. Chicago*, 162 Ill. 313, 44 N. E. 729.

<sup>32</sup> *Taylor v. Patten*, 160 Ind. 4, 66 N. E. 91.

<sup>33</sup> *Cunningham v. Peoria*, 157 Ill. 499, 41 N. E. 1014.

<sup>34</sup> *Bradford v. Fox*, 171 Pa. St. 343, 33 Atl. 85.

<sup>35</sup> An ordinance directing the curbing and paving of an avenue between two points, which fails to state where the curbing is to be set and the width of the pavement is insufficient to form the basis of a special assessment for the cost of the proposed improvement, and the proceeding is not aided by the



and the same is true of cases involving a delegation of power or the construction of an apportionment.<sup>36</sup>

— Invalid curb ordinances.

**425.** An ordinance which fails to prescribe the height of a combined curb and gutter, or to state where the curb is to be placed, is insufficient to sustain a special assessment for doing such work.<sup>37</sup> So, also, in one for grading, curbing and tiling a street, where it fails to specify the height of the tile, its composition, inlets, outlets or connections, the number of lines to be laid or the depth for laying;<sup>38</sup> and one for paving and curbing "the public square," where it leaves uncertain the question as to whether the streets around the square are to be paved, or the area embraced within the

passage at the same time of an ordinance providing for the width of certain roadways at thirty feet, when it does not appear that a roadway is in the avenue proposed to be curbed and paved, or that the attention of the committee estimating the cost was called to such other ordinance, and when neither ordinance refers to the other. *Gage v. Chicago*, 43 Ill. 157, 32 N. E. 264.

An ordinance which simply authorizes the macadamizing of a particular street between certain points, without furnishing any directions for doing the work, is insufficient to sustain an action by a contractor on a certified tax bill against the owner of property adjoining the street so improved. *Haegele v. Mallinckrodt*, 46 Mo. 577.

<sup>36</sup> A paving ordinance is invalid where the specifications made a part thereof by reference provide for the placing of inlets and catch basins where directed by the engi-

neer, and that crosswalks be built in the form directed by him, at street intersections and other points, according to the grades and plans of the engineer. *Bradford v. Pontiac*, 165 Ill. 612, 46 N. E. 794.

An ordinance for paving a street a certain number of feet on each side of the center line, between certain designated terminal points, and to be paid for by special taxation of contiguous property except opposite street intersections and city property, is a declaration that it shall be apportioned on the basis of frontage. *Cramer v. Charleston*, 176 Ill. 507, 52 N. E. 73.

<sup>37</sup> *Holden v. Chicago*, 172 Ill. 263, 50 N. E. 181; *Jacobs v. Chicago*, 178 Ill. 560, 53 N. E. 363; *Lundberg v. Chicago*, 183 Ill. 572, 56 N. E. 415; *Essroger v. Chicago*, 185 Ill. 420, 56 N. E. 1086; *Fehring v. Chicago*, 187 Ill. 416, 58 N. E. 303.

<sup>38</sup> *I. C. R. Co. v. Effingham*, 172 Ill. 607, 50 N. E. 103.



square.<sup>39</sup> Where a similar ordinance provides that "said curb shall be six inches in thickness throughout, and the gutter flags shall be eighteen inches in width," the top of the curb to be "at the established grade of said street," there is nothing from which to ascertain how deep the curb is to be set, and the ordinance is insufficient to give the court jurisdiction to enter a judgment of confirmation.<sup>40</sup> The same objection applies where the ordinance provides for "a granite concrete, combined curb and gutter," to "be laid in alternate blocks of six feet in length and six inches in thickness," the other dimensions not being specified, and the height of the curb impossible to be determined.<sup>41</sup> Neither is it sufficient for an ordinance to describe the foundation upon which the curb stones are to be imbedded merely as "flat stones," and describing neither the quality nor the size,<sup>42</sup> although the city may show, if it can, that the term "flat stones" has such a well understood local meaning as not to be indefinite or uncertain;<sup>43</sup> but it is insufficient when it fails to state the height of the curb on each side of the street.<sup>44</sup>

#### — Invalid sidewalk ordinances.

**426.** A sidewalk ordinance which does not show at what grade the walk is to be laid, or whether it adjoins the curb line or property line, is insufficient, either by express terms or by reference, so that a property owner may know definitely at what grade to lay the walk in case he avails himself of

<sup>39</sup> DeWitt Co. v. Clinton, 194 Ill. 521, 62 N. E. 780.

<sup>40</sup> Willis v. Chicago, 189 Ill. 103, 59 N. E. 543.

<sup>41</sup> Holden v. Chicago, 172 Ill. 263, 50 N. E. 181; Jacobs v. Chicago, 178 Ill. 560, 53 N. E. 363.

<sup>42</sup> Lusk v. Chicago, 176 Ill. 207, 52 N. E. 54; Davidson v. Chicago, 178 Ill. 582, 53 N. E. 367; Gage v. Chicago, 179 Ill. 392, 53 N. E. 742; Kuester v. Chicago, 187 Ill. 21, 58 N. E. 307; Anderson v. Chi-

cago, 187 Ill. 264, 58 N. E. 1094; Rich v. Chicago, 187 Ill. 396, 58 N. E. 306; Beach v. Chicago, 193 Ill. 162, 61 N. E. 1015; Moll v. Chicago, 194 Ill. 29, 61 N. E. 1012; Nichols v. Chicago, 192 Ill. 290, 61 N. E. 435.

<sup>43</sup> Chicago v. Holden, 194 Ill. 213, 62 N. E. 550.

<sup>44</sup> Holden v. Chicago, 172 Ill. 263, 50 N. E. 181; Mills v. Chicago, 182 Ill. 249, 54 N. E. 987.



his right to construct the walk in front of his own property, and a special tax therefor is invalid.<sup>45</sup> The use of the word "proper" alone is not a sufficient designation of the width,<sup>46</sup> and one providing that the walk shall be "not less than" a certain width, and constructed of "brick" *or*, "paving tile," is fatally defective for uncertainty.<sup>47</sup> It is indefinite if it provides for an excavation of four inches below the established grade of the street, "except where it would be better and more practicable, on account of proper drainage, to excavate less or grade up at low places."<sup>48</sup> An ordinance for the construction of a sidewalk providing in one part that it shall be constructed of pine planks, and in another part that it shall be constructed of stone, and which is otherwise contradictory is so uncertain as to render it void.<sup>49</sup>

#### — Invalid waterworks ordinances.

**427.** The city council cannot provide for the construction of water and sewer service pipes by special taxation, and then ignore the very principle on which such taxation is based. The work must be regarded as an entirety, and its cost apportioned and assessed on some principle of equality and uniformity, on all of the contiguous property—that is, on all the lots and parcels of land in the taxing district.<sup>50</sup> Under

<sup>45</sup> *McChesney v. Chicago*, 171 Ill. 253, 49 N. E. 548; *Biggins' Estate v. People*, 193 Ill. 601, 61 N. E. 1124; *Craig v. People*, 193 Ill. 199, 61 N. E. 1072.

<sup>46</sup> *People v. Hills*, 193 Ill. 281, 61 N. E. 1061.

<sup>47</sup> *Mansfield v. People*, 164 Ill. 611, 45 N. E. 976.

<sup>48</sup> *McDowell v. People*, 204 Ill. 499, 68 N. E. 379.

<sup>49</sup> *Hull v. Chicago*, 156 Ill. 381, 40 N. E. 937.

In speaking of the frontage rule, and apprehensions of its abuse, "So long as it is confined to sidewalks there is little cause for such

apprehension. It will be time enough to consider the question when a case for apprehension occurs. Meanwhile it may not be amiss to suggest that all this must be done, if at all, by ordinance, and it must be remembered that ordinances, to be valid, must be reasonable,—not unfair or oppressive,—and must spring from an honest exercise of legislative discretion." *Dickey, C. J., in Craw v. Tolono*, 96 Ill. 261, 36 Am. Rep. 143.

<sup>50</sup> *Palmer v. Danville*, 154 Ill. 156, 38 N. E. 1067.



an ordinance providing for an assessment for laying water-pipes, the expense of hydrants cannot be included, the ordinance not making provision therefor.<sup>51</sup> Description of fire hydrants, crosses, tees and supply-pipes as "city of Chicago standard" is insufficient, even though the internal diameter of the pipes and the weight per foot are given, where there is no proof that the description has a well known and local meaning, and there is no reference in the ordinance to any particular existing hydrant or pipe of the "city of Chicago standard."<sup>52</sup> An ordinance providing for the laying of water service pipes in certain streets which fails to specify the dimensions of the pipes or to designate of what material they are to be composed, does not sufficiently describe the nature and character of the improvement.<sup>53</sup>

#### — Invalid sewer ordinances.

**428.** An ordinance for a special tax which has the effect of creating a taxing district, and which specially assesses the cost of each lateral service and sewer connection against the particular lot with which it is to connect, instead of apportioning the entire cost among the continuous lots upon some rule of equality, is illegal and void.<sup>54</sup> A city has no power to provide that "house connection slants" be placed on both sides of a sewer opposite each twenty feet of lot frontage, when the property affected is divided into lots having a greater frontage than twenty feet.<sup>55</sup> Under a statute requiring that a notice of the construction of sewers containing a statement of the contemplated size, should be published before passage of the ordinance for the construction, a notice that the sewer would be "of various diameters," and with

<sup>51</sup> *Cicero v. Green*, 211 Ill. 241, 71 N. E. 884.

<sup>52</sup> *Washburn v. Chicago*, 202 Ill. 210, 66 N. E. 1033; *McChesney v. Chicago*, 213 Ill. 592, 73 N. E. 368, distinguishing *Lamphere v. Chicago*, 212 Ill. 440, 72 N. E. 426.

<sup>53</sup> *Cass v. People*, 166 Ill. 126, 46 N. E. 729.

<sup>54</sup> *Palmer v. Danville*, 154 Ill. 156, 38 N. E. 1067.

<sup>55</sup> *Gage v. Chicago*, 191 Ill. 210, 60 N. E. 896.



nothing else to indicate its size, does not comply with the statute and the ordinance and assessment are both void.<sup>56</sup> An ordinance for sewer construction, providing that for rock excavation, in addition to the regular price per foot, the contractor shall receive — dollars a cubic yard extra, and such blank was never filled; and which also reserves the right to the commissioners to make changes in the plans and specifications, is invalid.<sup>57</sup>

**429.** Where it appears from the ordinance itself, fixing the starting point of the sewer at the point of connection with another sewer on a certain cross-street, which stops at a point a block away from the point of connection specified, or where it provides for the construction in such a manner that to render it of any use, it must be covered to a depth of several feet, and no data is furnished for an estimate of the cost, in either case the ordinance is void, and no assessment can be levied under it.<sup>58</sup> The requirements as to being sufficiently specific are the same as in ordinances for other public improvements.<sup>59</sup> The construction of extra sewers and the

<sup>56</sup> *Atlanta v. Gabbett*, 93 Ga. 266, 20 S. E. 306.

<sup>57</sup> *L. S. & M. S. R. Co. v. Chicago*, 144 Ill. 391, 33 N. E. 602.

<sup>58</sup> *Gage v. Chicago*, 191 Ill. 210, 60 N. E. 896; *Title Guarantee & Trust Co. v. Chicago*, 162 Ill. 505, 44 N. E. 832.

<sup>59</sup> An ordinance for the construction of a system of sewerage which fails to specify the nature, character, locality and description of the manholes and catch basins, is invalid and cannot be made the basis of a special assessment. *Ogden v. Lake View*, 121 Ill. 422, 13 N. E. 159.

Where an ordinance for a proposed local improvement fails to describe the nature and character thereof, with such certainty as to

furnish data for an intelligent estimate of its costs, and it cannot be gathered from the ordinance itself, whether a sewer is to be built of brick, stone, iron or wood, or its dimensions or capacity, it is insufficient to justify a special assessment. *Kankakee v. Potter*, 119 Ill. 324, 10 N. E. 212.

Provisions in an ordinance for constructing a sewerage and pumping works, that the wells or basins should be located upon a certain lot, "or upon some other suitable lot in the immediate vicinity of the one described;" that the lot described, or "some other suitable lot" in the same vicinity, etc., be purchased, and that there be erected suitable buildings consisting of an engine room, etc., "sub-



putting in of additional catch basins not provided for by the improvement ordinance, is not within the power of the authorities, nor proper subjects to charge to the fund raised by special assessment.<sup>60</sup>

— Delegation of power.

430. Where an ordinance attempts to delegate a power

stantially as the same is delineated upon plans on file in the office of the village engineer," are all objectionable as being insufficient, and failing to comply with the requirements of the statutes. *Hyde Park v. Spencer*, 118 Ill. 446, 8 N. E. 846.

Such ordinance is further defective if it does not specify with sufficient definiteness and certainty the location of the manholes and mantraps, and fails to give any specifications from which the cost of the pumping engines and boilers and their foundations can be estimated. *Id.*

A description of the proposed sewer does not sufficiently show its depth, on the vertical plan of the improvement by stating that it is to commence at a connection with the specified street sewer which measures nine or ten feet vertically from top to bottom, and extends to another specified sewer, without even showing in which direction the frontage is to be. *Alton v. Middleton's Heirs*, 158 Ill. 442, 41 N. E. 926.

An ordinance providing for the reconstruction and deepening of a sewer through a certain block to as great a depth as its connection with another sewer named would admit the grade of bottom to be as thereafter established by the city sur-

veyor, and after fixing its locality, providing that the character of the work should be the same as the then existing sewer, and that the material in the old sewer should be used in the new as far as possible, is fatally defective in failing to give with sufficient certainty the character, nature and description of the proposed reconstruction of the sewer, and that no special assessment based on the same could be enforced. *Kankakee v. Potter*, 119 Ill. 324, 10 N. E. 212.

Where an ordinance for constructing a sewer fixed the starting point and provided that there should be a uniform fall of two-tenths of a foot in every 100 feet in length, which would require the water to run up hill; and it was evident from other sections of the ordinance as well as from the plans and profiles that the word "rise" was intended instead of the word "fall," it was held that the use of the word "fall" should be considered to mean "rise" in order to prevent an absurd consequence. *Steele v. River Forest*, 141 Ill. 302, 30 N. E. 1034.

For an ordinance fatally defective because not showing length of drains, see *Wetmore v. Chicago*, 206 Ill. 367, 69 N. E. 234.

<sup>60</sup> *People v. McWethy*, 177 Ill. 334, 52 N. E. 479.



or discretion belonging exclusively to the council to another body, or to a ministerial officer, such ordinance is void, and goes to the jurisdiction, so it may be shown at any stage of the proceedings.<sup>61</sup> But it is an impossibility that the legislative body should personally supervise all public work, and it may properly vest in another body or officer the power to supervise the work or material, and determine as to its complying with the terms of the ordinance or contract.<sup>62</sup> Thus an ordinance for a street improvement which requires the city engineer to fix the grade, is not rendered invalid thereby, where the cost has been estimated by a committee, and their report approved by the council. It is not a delegation of legislative power to fix cost or extent of improvement.<sup>63</sup> Nor is it invalid because of a clause requiring the work done and materials furnished to be subject to the approval of the city engineer, and in accordance with the plans and specifications furnished by the council. Such provision gives the engineer no power to determine the kind of materials to be used, but only the right to see that the materials required are used, and the work done as directed by the ordinance.<sup>64</sup>

**431.** Under a charter providing that whenever the council shall order certain street work, and shall "deem the performance of the work by contract, to be advantageous," it shall be the duty of the city engineer to advertise for proposals, a subsequent ordinance requiring the engineer to so advertise is equivalent to a finding by the council that such work under contract was advantageous, without a further ordinance in terms directing the work to be so done.<sup>65</sup> And a street grading ordinance which leaves to the discretion of the

<sup>61</sup> *People v. Warneke*, 173 Ill. 40, 50 N. E. 221; *Mayor, etc. v. Scharf*, 54 Md. 499. The latter case was overruled in *Mayor, etc. v. Johns Hopkins Hospital*, 56 Md. 1, by a 3 to 2 opinion. The dissenting opinion is a very strong one, and, to the author's mind, unanswerable.

<sup>62</sup> *Bradford v. Pontiac*, 165 Ill. 612, 46 N. E. 794; *Gross v. People*, 172 Ill. 571, 50 N. E. 334.

<sup>63</sup> *Lake v. Decatur*, 91 Ill. 596.

<sup>64</sup> *Jacksonville R. Co. v. Jacksonville*, 114 Ill. 562, 2 N. E. 478.

<sup>65</sup> *Kiley v. Forsee*, 57 Mo. 390.



engineer the nature of the filling to be used after the grading has been done and the surface rolled, refers only to depressions thereafter occurring, and does not enable the engineer to vary the character of the work to be done to such an extent as in any way to change the cost.<sup>66</sup>

### Evidence, and burden of proof.

**432.** In an attempt to declare an ordinance void and to enjoin its enforcement upon a ground not specifically alleged in the bill, it is for the plaintiffs to show affirmatively wherein any essential requisite to its legal adoption has been omitted, and not for the city to show that the antecedent proceedings were regular in every particular.<sup>67</sup> But where the statute authorizes an ordinance for constructing a sidewalk to be paid for by special taxation to require a special tax list to be prepared and filed with the city clerk, it is incumbent on the city, upon application for judgment, to show compliance with such provisions of the ordinance.<sup>68</sup> And if such an ordinance refers to the established grade, it is incumbent on the city to prove in the first place that the grades of all portions of the streets sought to be improved have been established by ordinance.<sup>69</sup> The production of a duly certified copy of a city ordinance is *prima facie* evidence that every step has been taken with reference to it to make it a valid ordinance,<sup>70</sup> and a special taxation ordinance, with the assessment roll thereunder, are *prima facie* sufficient to support a judgment of confirmation entered by default, though no reference to the question of benefits is made in the ordinance.<sup>71</sup> Where

<sup>66</sup> Guyer v. Rock Island, 215 Ill. 144, 74 N. E. 105.

<sup>67</sup> Beaumont v. Wilkesbarre, 142 Pa. St. 198, 21 Atl. 888.

<sup>68</sup> People v. Record, 212 Ill. 62, 72 N. E. 7; Hoover v. People, 171 Ill. 182, 49 N. E. 367; Jeffries v. Cash, 207 Ill. 405, 69 N. E. 904; and the making and filing of such a tax list is jurisdictional. People v. Record, *supra*, Biggins' Est.

v. People, 193 Ill. 601, 61 N. E. 1124; Craig v. Pepole, 193 Ill. 199, 61 N. E. 1072; Holland v. People, 189 Ill. 348, 59 N. E. 753.

<sup>69</sup> Brewster v. Peru, 180 Ill. 124, 54 N. E. 233.

<sup>70</sup> Lindsay v. Chicago, 115 Ill. 120, 3 N. E. 443.

<sup>71</sup> Pfeiffer v. People, 170 Ill. 347, 48 N. E. 979.



the original ordinance has been destroyed by fire, parol proof is admissible to show that it had been signed by the mayor, although the record of the ordinance in the ordinance book fails to show his signature.<sup>72</sup> But evidence of an ordinance requiring a railroad company to pave between its tracks is not admissible in a hearing before a jury upon the question of benefits.<sup>73</sup>

**When "may" means "must."**

**433.** The word "may" in an ordinance providing that notice to build a sidewalk "may" be personally served on the property owner should be construed as "must," and is mandatory.<sup>74</sup> So, too, where the statute provides that an ordinance passed thereunder "may" require lot owners to build their sidewalks within thirty days, the word "may" means "must."<sup>75</sup>

**Publication of.**

**434.** A statutory prohibition against passing an ordinance until two days after the publication required shall have been made, is a limitation upon the power of the council to make assessments, and a requirement that the ordinance or resolution shall be published in *all* the papers employed by the city, is mandatory.<sup>76</sup> But a single publication thereof two days before the passage of the resolution is sufficient.<sup>77</sup> Requirements for publication of ordinances and notices are generally mandatory, requiring a strict compliance with the provisions of the ordinance or statute, and an ordinance not published as required by statute cannot form the basis of a proceeding to levy and a special tax or assessment.<sup>78</sup>

<sup>72</sup> *Seattle v. Doran*, 5 Wash. 482, 32 Pac. 105, 1002.

<sup>73</sup> *Wells v. Chicago*, 202 Ill. 448, 66 N. E. 1056.

<sup>74</sup> *Doane v. Omaha*, 58 Neb. 815, 80 N. W. 54; *Yates v. Omaha*, 58 Neb. 817, 80 N. W. 1134.

<sup>75</sup> *Pierson v. People*, 204 Ill.

456, 67 N. E. 383; *Mercy Hospital v. Chicago*, 187 Ill. 404, 58 N. E. 353.

<sup>76</sup> *In re Douglass*, 46 N. Y. 42; *In re Astor*, 50 N. Y. 363.

<sup>77</sup> *In re Bassford*, 50 N. Y. 509.

<sup>78</sup> *Weld v. People*, 149 Ill. 257, 36 N. E. 1006.



*"Two weeks time shall elapse."*

Fehler v. Gosnell, 99 Ky. 380, 35 S. W. 1125; Louisville v. Selvage, 106 Ky. 730, 51 S. W. 447, 52 S. W. 809; Pittelkow v. Milwaukee, 94 Wis. 651, 69 N. W. 803.

*Miscellaneous decisions on subject.*

*Payment in installments.*

An ordinance authorizing a public improvement to be paid for by a special assessment may properly provide for payment in installments. Sumner v. Milford, 214 Ill. 388, 73 N. E. 742.

*Assessing cost of work, disregarding benefits.*

An ordinance requiring a railway company to make safe and proper crossings for a street extended over its property, without regard to benefits (there being nothing in the company's charter imposing such duty, or any such duty imposed by general law when the company was created is unconstitutional. I. C. R. R. Co. v. Bloomington, 76 Ill. 447.

*Material to be used—Notice to owners—Jurisdiction.*

The provisions of an ordinance that it shall be the duty of the mayor and council to give property owners thirty days from the approval and publication of a street improvement ordinance to designate by petition the material to be used for paving, are mandatory, and unless waived, the lack of such notice will prevent the council from acquiring jurisdiction to levy a tax to pay for the improvement. Eddy v. Omaha (Neb.), 101 N. W. 25; Morse v. Omaha, 67 Neb. 426, 93 N. W. 739.

*Pleading "duly passed."*

In pleading that a city ordinance was duly passed, it is nec-

essarily implied that all essential antecedent acts, requisite to the legal enactment of the ordinance, were done. Becker v. Washington, 94 Mo. 375, 7 S. W. 291.

*Effect of amending law under which passed.*

Where an ordinance for a street improvement was valid when passed, an amendment to the law, by which the cost of making and collecting the assessment is not to be added, does not invalidate the ordinance as a whole. Gage v. People, 207 Ill. 377, 69 N. E. 840.

*Publication on Sunday—Proof.*

A street assessment is not invalidated because the ordinance creating the taxing district was published on Sunday. Denver v. Dumars, 33 Colo. 94, 80 Pac. 114; Denver v. Hallett, 33 Colo. 94, 80 Pac. 114; Denver v. Londoner, 33 Colo. 104, 80 Pac. 117. See Pierson v. People, 204 Ill. 456, 68 N. E. 383.

*Inaccuracies in description.*

Local improvement ordinances are not void for mere inaccuracies of description, but merely defective, and to an extent justifying refusal of judgment of confirmation. Chicago v. Hulbert, 205 Ill. 346, 68 N. E. 786; Kuester v. Chicago, 187 Ill. 21, 58 N. E. 307.

But if judgment of confirmation be rendered, it cannot be collaterally attacked in the ground that the ordinance is defective, although the rule is otherwise when the ordinance is void. Chicago v. Hulbert *supra*. Blount v. People, 188 Ill. 538, 59 N. E. 241; Foster v. Alton, 173 Ill. 587, 51 N. E. 76; Gross v. People, 172 Ill. 571, 50 N. E. 334; Rich v. Chicago, 187 Ill. 396, 58 N. E. 306.



*When judicial in character — Notice.*

A paving ordinance which includes a determination that the costs shall be assessed upon the property benefited is judicial in its character, and notice is required upon general principles of justice, irrespective of charter require-

ments. *Sears v. Atlantic City* (N. J.), 60 Atl. 1093.

*Assessability of non-abutting property.*

*Felt v. Ballard*, 38 Wash, 300, 80 Pac. 532.

*New ordinance to remedy defects.*

*Chicago v. Hulbert*, 205 Ill. 346, 68. N. E. 786.



## CHAPTER VIII.

### OF THE PROCEEDINGS NECESSARY TO ACQUIRE AND RETAIN JURISDICTION.

Jurisdiction — In general, 435, 436.

Acquiring jurisdiction by publication, 437.

Collateral attack, 438.

Powers of council — In general, 439.

Discretion of council, 440, 441.

What council may do, 442.

What council may not do, 443.

Delegation of authority, 444.

Ministerial powers, 445-447.

The contract — In general, 448.

Bids and bidders, 449.

Lowest bidder, 450.

Powers of council in letting, 451.

Provisions tending to increase cost, 452.

Guarantee of work for a term of years, 453.

Performance of contract, 454, 455.

Description of work, 456.

Time for completion, 457.

Extra work, day labor, 458.

Patented articles — Monopoly, 459.

Assignment of contract, 460.

Construction of contract, 461.

Liability of city on contract, 462.

Abandonment of proceedings, 463.

Presumptions, 464.

Apportionment — Fixing the taxing district, 465-469.

Benefits, 470.

Conflicting decisions, 471-474.

Rule for assessment of benefits, 475-476.

Benefits a question of facts, 477-479.

What must affirmatively appear, 480.

Front foot assessments — Compliance with statute, 481.

Future benefits not to be considered, 482.

Offsetting benefits and damages, 483.

Objections to assessment — When made, 484.

Special taxation, 485.

Assessment in excess of value of property, 486.

Georgia, 487.

Iowa, 488.

Kentucky, 489.

Maryland, 490.

Nebraska, 491.

New Jersey, 492.

Ohio, 493.

Pennsylvania, 494.

Miscellaneous rulings, 495.

Benefit assessments held valid, 496.

Benefit assessments held valid, 497-499.

The front foot rule — In general, 500.

Front foot rule as a principle, 501.



Front foot rule as a convenience,  
502, 503.

How frontage determined, 504,  
505.

Assessments valid under the  
front foot rule, 506.

Frontage assessments held in-  
valid, 507, 508.

### Jurisdiction — In general.

**435.** Jurisdiction is the authority to hear and determine the cause in question, and does not depend upon the correctness of the decision made.<sup>1</sup> That the right of making special assessment requires legislative sanction, and that the statute is to be strictly construed, we have already seen.<sup>2</sup> It follows as a necessary corollary that unless the statutory directions are strictly complied with, no jurisdiction is obtained by the local authorities, although the jurisdiction of the proper board or officers, once acquired, extends through all subsequent proceedings,<sup>3</sup> unless they afterwards do some act which divests them of the jurisdiction already acquired, for after they have once acquired jurisdiction to act, they must still exercise their power in the mode prescribed by law.<sup>4</sup>

<sup>1</sup> *People v. Talmadge*, 194 Ill. 67, 61 N. E. 1049; *Burke v. Kansas City*, 118 Mo. 309, 24 S. W. 48. *Requisite for "due process of law."*

"The one essential to due process of law in the exercise of the power of taxation is that, at some stage of the proceedings, the parties concerned shall have notice and an opportunity to interpose any defense they may have as to either the validity or amount of the tax." *Duluth v. Dibblee*, 62 Minn. 18, 63 N. W. 1117, by Mitchell, J.

*Jurisdictional defects.*

"The use of the term 'jurisdictional defects' is rather confusing than helpful. It has frequently been said, in substance, that special proceedings are in their nature harsh and should be construed

strictly, and that any material omission or failure to follow the provisions of law in the proceedings will deprive the taxing officers of jurisdiction and invalidate the tax; but it was not to be claimed that defects in the assessment proceedings proper, as distinguished from the proceedings for making the improvement, though jurisdictional in the sense just referred to, could not be cured under the provisions of a proper reassessment law. So the fact that a defect may be properly termed jurisdictional is by no means a test." *Schintgen v. La Crosse*, 117 Wis. 158, 94 N. W. 84.

<sup>2</sup> Secs. 186-189.

<sup>3</sup> *Dougherty v. Miller*, 36 Cal. 83.

<sup>4</sup> *Chambers v. Satterlee*, 40 Cal. 497.



**436.** After the council has acquired jurisdiction to order a street improvement, it may take such further action as may be necessary and proper for causing the work to be done and to pay the expense of doing it.<sup>5</sup> So, too, where the boundaries of a city have been extended, it has power to improve a highway falling within its new limits which had been opened as a country road.<sup>6</sup> The preliminary proceedings required by statute to be taken before the passage of a special assessment ordinance are jurisdictional, without which no valid ordinance can be passed nor valid assessment made.<sup>7</sup> If the statute requires the corporate authorities, before proceeding with a street improvement, to determine first that it is "consistent with the public good," failure to make such determination divests them of power to proceed.<sup>8</sup> Where a charter provides a distinct act shall be done, or a specific finding made before proceeding with the assessment, such requirements are generally mandatory and jurisdictional.<sup>9</sup>

<sup>5</sup> Reynolds v. Schweinefuss, 27 Ohio St. 311.

<sup>6</sup> Vancouver v. Wintler, 8 Wash. 578, 36 Pac. 278, 685.

<sup>7</sup> Chicago v. Nodeck, 202 Ill. 257, 67 N. E. 39; Bickerdike v. Chicago, 203 Ill. 636, 68 N. E. 161.

<sup>8</sup> Mayor, etc., v. Porter, 18 Md. 284, 79 Am. Dec. 686.

*Requiring assent of a certain proportion of property owners.*

<sup>9</sup> Ogden City v. Armstrong, 168 U. S. 224, 42 L. ed. 444, 18 Sup. Ct. Rep. 98.

*Requiring petition of majority of land owners within the district.*

People v. Brooklyn, 71 N. Y. 495.

A charter provision that all resolutions creating a charge against any city fund, shall be referred to the appropriate committee, and not acted on until a meeting at some later date. Gilman v.

Milwaukee, 61 Wis. 588, 21 N. W. 640. That the declaration of necessity for the improvement is a distinct act from, and precedes the order for making the improvement. Hoyt v. E. Saginaw, 19 Mich. 39, 2 Am. Rep. 76. Failure to deposit with the register a statement showing in detail the cost of the improvement in front of each parcel, or to place in the hands of the collector a list of persons taxed, or failure of the collector to give the requisite notice. Lyon v. Alley, 130 U. S. 177, 32 L. ed. 899, 9 Sup. Ct. Rep. 480.

Where the charter of a city provides that streets may be paved only upon a petition therefor by the owners of a majority of the lineal feet fronting such street, and does not expressly authorize the common council to determine that this prerequisite has been fulfilled



An objection to an assessment which goes to the jurisdiction may be urged upon application for judgment; <sup>10</sup> but if it goes merely to the form in which the case is brought, and not to the judicial power of the tribunal, it is too late after a general appearance and plea in bar.<sup>11</sup> Although the Illinois statute makes the inclusion of the engineer's itemized estimate in the improvement resolution a jurisdictional matter, the further provision that when application is made for a judgment of sale on an installment of an assessment payable in that manner, all questions as to jurisdiction must be raised and determined, is controlling, and unless so raised, the plaintiff is concluded by the judgment.<sup>12</sup> And where the law requires benefits and damages both to be assessed, a disregard of this requirement renders all the proceedings *coram non judice*.<sup>13</sup>

The adoption by the common council of a resolution to improve a street, or part of a street, does not confer jurisdiction to improve only a portion of the street embraced in the resolution.<sup>14</sup>

and the owners of the required frontage do not sign the petition, a decision of the common council that the majority did sign it is not a judicial determination of the fact; and a subsequent ordering of the pavement is unauthorized, and an assessment made therefor is void for want of jurisdiction. *Miller v. Amsterdam*, 149 N. Y. 288, 43 N. E. 632.

Where a charter gives a city power to improve a street without petition whenever any street shall be in such condition as to be unsafe or dangerous, this is a jurisdictional matter, and the findings of the council are not conclusive. Unless the street in fact is in such condition, the city is without power or jurisdiction in the premises, and its proceedings are void. *Smith v. Minto*, 30 Or. 351, 48

Pac. 166; *Shannon v. Portland*, 38 Or. 382, 62 Pac. 50.

<sup>10</sup> *Chicago v. Wright*, 32 Ill. 192.

An objection that the ordinance is void may be made at any time, being jurisdictional. *O'Neil v. People*, 166 Ill. 561, 46 N. E. 1096; *Cass v. People*, 166 Ill. 126, 46 N. E. 729.

<sup>11</sup> *Schenley v. Commonwealth*, 36 Pa. St. 29, 78 Am. Dec. 359.

<sup>12</sup> *Treat v. Chicago*, 125 Fed. 644.

<sup>13</sup> *Mayor, etc., v. Porter*, 18 Md. 284, 79 Am. Dec. 686.

<sup>14</sup> *Stockton v. Whitmore*, 50 Cal. 554.

Acceptance and user by park commissioners of a viaduct built by a city and a railroad company, over the tracks of the latter and part of a street previously designated by an ordinance of such com-



**Acquiring jurisdiction by publication.**

**437.** To obtain jurisdiction by publication it must affirmatively appear that the statute has been strictly pursued, and its provisions complied with, and no presumptions as to accuracy will be indulged in.<sup>15</sup> But where jurisdiction to grade a street has been acquired by publication of notice, such jurisdiction will not be disturbed by the nonexercise of the

missioners to be improved, is not such a relinquishment to jurisdiction to the city as deprives the commissioners of power to subsequently specially assess for the cost of such improvement. *W. Chi. Park Com'rs v. Sweet*, 167 Ill. 326, 47 N. E. 728.

***Street Grading — Statute limitations.***

Where a street has been graded, and the cost ascertained and assessed against the abutting property, although irregularly done, such irregularity does not affect the jurisdiction of the city, nor bar the running of the statute of limitations. *Wahlgren v. Kansas City*, 42 Kan. 243, 21 Pac. 1068.

***Irregularities between contract and ordinance.***

Where the statute permits a recovery on a special assessment for street work "notwithstanding any informality, irregularity, or defect," the fact that a contract let for such improvement does not conform exactly to the ordinance or advertisement for bids is not jurisdictional, and the variance will be disregarded where not prejudicial to property owners. *Ottumwa B. & C. Co. v. Ainley*, 109 Iowa, 386, 80 N. W. 570.

***Common Council as tribunal.***

Where the common council is constituted by the legislature as

the tribunal for the determination of all questions of irregularities in making a special assessment, resort must be had to it for the correction of all errors, irregularities or inequalities of assessment, in the absence of fraud, or such showing as would deprive it of the right to act at all. Where it has such jurisdiction, and the plaintiff had such notice of the assessment as the statute provides, although defective, all errors are waived by failure to appear or object to the assessment. *Owens v. Marion*, 127 Iowa, 469, 103 N. W. 381.

***Necessity for improvement — Un-safety.***

Where a charter gives a city power to improve a street without petition whenever any street shall be in such condition as to be unsafe or dangerous, this is a jurisdictional matter, and the findings of the council are not conclusive. Unless the street in fact is in such condition the city is without power or jurisdiction in the premises, and its proceedings are void. *Smith v. Minto*, 30 Or. 351, 48 Pac. 166; *Shannon v. Portland*, 38 Or. 382, 62 Pac. 50.

<sup>15</sup> *McChesney v. People*, 145 Ill. 614, 34 N. E. 431; *Payson v. People*, 175 Ill. 267, 51 N. E. 588; *Yaggy v. Chicago*, 194 Ill. 88, 62 N. E. 316.



further privilege given the court by statute to direct a personal service upon interested resident property holders.<sup>16</sup> If the statute, or charter, or ordinance, requires proof of publication to be made by affidavit or certificate, and have it filed with the record, such making and filing is a condition precedent.<sup>17</sup>

<sup>16</sup> *Kansas City v. Duncan*, 135 Mo. 571, 37 S. W. 513.

<sup>17</sup> In the absence of a sufficient certificate of publication of the required notice, the court is without jurisdiction to enter judgment confirming a special assessment. *Kearney v. Chicago*, 163 Ill. 293, 45 N. E. 224.

Where the statute requires the commissioners of assessment to make an assessment roll, prescribing its contents, requiring notice of final hearing thereon to be mailed to each owner of premises whose name and place is known to them, in the form prescribed; to give notice by posting the same in at least four public places in the neighborhood; to publish such notice, in the form given, for five successive days in a daily paper, and to file an affidavit of the mailing of the notices, an affidavit that they were posted as required therein, and to file a certificate of the publication of the notice—the mailing, publication and posting of such notice are jurisdictional, or judgment of confirmation cannot be entered. *McChesney v. People*, 145 Ill. 614, 34 N. E. 431.

A certificate of publication of the notice of making a special assessment, or of application for confirmation thereof, is fatally defective if it fail to state the date of the last publication, or some-

thing equivalent thereto, and such defect is jurisdictional. *Butler v. Chicago*, 56 Ill. 341.

An affidavit of mailing a notice which contains all that is required by statute, confers jurisdiction on the court, though it contain an imperfect and unnecessary copy of the notice sent, such copy being treated as surplusage. *Gordon v. People*, 154 Ill. 664, 39 N. E. 560. *Resolution, or notice of intention.*

The resolution of intention is the usual step by which alone the board acquires jurisdiction to order the work done, and it must so describe it as to convey an intelligent idea of the improvement and its nature and expense. *McDonnell v. Gillon*, 134 Cal. 329, 66 Pac. 314.

A notice of intention to make a public improvement, although it is the means by which the council acquires jurisdiction is not process in the same sense that a summons is process, and the same strictness in proving publication is not required. Thus, where proof of publication of a proposed street improvement is defective, parol evidence is admissible to supply the defects. *Clinton v. Portland*, 26 Or. 410, 38 Pac. 407.

Where due notice of intention to improve a certain extent of street is given, the property owner cannot complain of want of no-



**Collateral attack.**

**438.** Where the existence of a fact is necessary before the officers of a municipal corporation can act and no provision is made by statute for the determination of that fact, no author-

tice by reason of the fact that subsequently another notice is published covering an improvement for which the former notice was given and a continuation of such improvement, although the subsequent publication may not afford notice for such length of time as the law requires. *Felker v. New Whatcom*, 16 Wash. 178, 47 Pac. 505.

Where a valid ordinance directs that the improvement of streets shall be ordered by resolution describing the streets and improvements, and that notice shall be given by publication of the resolution, such a provision is mandatory. *Starr v. Burlington*, 45 Iowa, 87.

Where a charter requires a two-thirds vote of the council before the adoption of a resolution, it must appear by the records, or by proof aliunde, that two-thirds of the members voted for it, and there is no presumption that the resolution received the requisite vote, and the defect is jurisdictional. *In re City of Buffalo*, 78 N. Y. 362.

When resolution to improve street insufficient, see *Buckley v. Tacoma*, 9 Wash. 253, 37 Pac. 441. *Certificate of assessor.*

The certificate of the assessor of the levying of the special assessment for the cost of constructing a sewer, being a jurisdictional document in proceedings under which titles may be diverted, cannot be

permitted to speak in doubtful terms; and the reasons requiring such certificate to be definite and distinct, are more imperative in the case of special and exceptional taxes than in the case of general taxes. *Warren v Grand Haven*, 30 Mich. 24.

*Amendment of law.*

When, pending proceedings for an alley improvement, the law is so changed as to confer on another board the making of such improvements, such amendment does not work a discontinuance of the pending proceedings, but they should be completed by the board that adopted the resolution, unless the statute otherwise directs. *Cincinnati v. Davis*, 58 Ohio St. 225, 50 N. E. 918.

*Conclusiveness in second trial between same parties.*

In an action brought against commissioners of a road improvement to test their jurisdiction in the matter, it was determined in a trial upon the merits that they had such jurisdiction, and this decision was conclusive upon the same parties in a second action under the same assessment, but for a reason not stated in the first one. *Martin v. Roney*, 41 Ohio St. 141. *Assessment made without notice.*

After a property owner succeeds in having its property omitted by the commissioners from their report of assessments, it was not bound to take further notice of the proceedings, and a notice of the



ity to ascertain it is implied; their decision that it exists is not a judicial determination and may be inquired into collaterally when they take subsequent action upon the assumption that the fact existed.<sup>18</sup> Where the court has jurisdiction to enter a judgment of confirmation, objections to the sufficiency of the ordinance, not going to its validity, cannot be made collaterally, on application for judgment of sale.<sup>19</sup> Parties to a judgment are concluded by defects and irregularities in the proceedings, but such is not the rule where the judgment is void for want of jurisdiction.<sup>20</sup> But where lack of jurisdiction is conclusively established, any judgment in such case may be collaterally attacked, either in the trial or in the appellate court.<sup>21</sup>

### **Powers of council — In general.**

**439.** Although the power of special assessment exists only by exclusive legislative grant, it is a necessity that a sub-

meeting of the council to consider the assessment is not a notice to such owner on which to base an assessment on its property not included in the assessment report of the commissioners, and the council is without jurisdiction to make such assessment. *Spring Steel, etc., Co. v. Anderson*, 32 Ind. App. 138, 69 N. E. 404.

#### *Omission to find performance.*

An error in determining whether a street contract has been fulfilled is not a jurisdictional defect which vitiates an assessment levied to pay for work in front of a lot. *Emery v. Bradford*, 29 Cal. 75.

#### *Requisites for jurisdiction.*

When the passage and publication of a resolution of intention to do work are acts by which the board acquires jurisdiction to make such improvements as they describe in the resolution, they cannot law-

fully cause to be performed work other than that described, or enter into a valid contract therefor. *Partridge v. Lucas*, 99 Cal. 519, 33 Pac. 1082.

<sup>18</sup> *Miller v. Amsterdam*, 149 N. Y. 288, 43 N. E. 632.

<sup>19</sup> *Steenberg v. People*, 164 Ill. 478, 45 N. E. 970.

<sup>20</sup> *Hawkins v. Horton*, 91 Minn. 285, 97 N. W. 1053.

<sup>21</sup> *Keeler v. People*, 160 Ill. 179, 43 N. E. 342; *Cass v. People*, 166 Ill. 126, 46 N. E. 729; *O'Neil v. People*, 166 Ill. 561, 46 N. E. 1096; *Johnson v. People*, 177 Ill. 64, 52 N. E. 308; *Blount v. People*, 188 Ill. 538, 59 N. E. 241; *Johnson v. People*, 189 Ill. 83, 59 N. E. 515; *Johnson v. People*, 202 Ill. 306, 66 N. E. 1081.

Objections which might have been urged at confirmation are not available on application for sale



stantial modicum of discretionary power be vested in some local authority, and this is almost universally bestowed upon the city council, or other similar legislative board. The powers possessed by municipal corporations are susceptible of very exact limitation,<sup>22</sup> but the discretion of the legislative branch of a city government is somewhat more difficult of exact definition, but its powers, whatever they may be, cannot be delegated. The functions of a city council in ordering a street improvement are to determine the nature and general character of the work, and to describe the improvement or work to be constructed, and this function cannot be delegated. But it does not involve the necessity of determining and describing the details of construction when that task is devolved by law on the city engineer. The function of the council is that of supervision as to these details, and of ultimately determining the cost of the work and the amount of the tax to be assessed.<sup>23</sup> But it is not only within the power, but it is

unless they go to the jurisdiction of the court to confirm the assessment. But an objection that the ordinance is void as being unauthorized by statute, or failure to comply with some statute, goes to the jurisdiction and is available on application for sale. *Walker v. People*, 202 Ill. 34, 66 N. E. 827. *Park Commissioners*.

Park commissioners whose jurisdiction over certain streets has been established by long unquestioned user under a city's statutory consent, do not have to establish the regularity of their jurisdiction in a special assessment proceeding, as such jurisdiction can only be questioned in a direct proceeding. *W. Chicago Park Com'rs v. Sweet*, 167 Ill. 326, 47 N. E. 728.

<sup>22</sup> "A municipal corporation possesses and can exercise the fol-

lowing powers and no others: First, those granted in express words; second, those necessarily implied or necessarily incident to the powers expressly granted; third, those absolutely essential to the declared objects and purposes of the corporation—not simply convenient but indispensable; fourth, any fair doubt as to the existence of a power is resolved by the courts against the corporation—against the existence of the power." *Dillon, C. J., in Merriam v. Moody's Ex'rs*, 25 Iowa, 163.

This was the first statement of Judge Dillon's now famous declaration as to the powers of municipal corporation, and which has been quoted approvingly by nearly every court of last resort in this country.

<sup>23</sup> *Haughwout v. Hubbard*. 131



the imperative duty of common councils to adjust assessments presented for review so as to conform them to the actual benefits accruing to each of the abutting property owners, under a statute authorizing a review and alteration of a *prima facie* assessment.<sup>24</sup>

— Discretion of council.

440. The necessity for making local improvements is a matter for the exclusive determination of the council, when the statute so directs; and when they act within the limits of the power conferred, their determination, fairly made, without fraud or oppression, cannot be interfered with by the courts. They are the judges of its utility, whether it shall be treated as a local improvement in raising funds to pay for it; and have the right to declare what is a public improvement, although they cannot make such a declaration arbitrarily or unreasonably without reference to benefit.<sup>25</sup> The question of benefit is one of fact, and may be tested in a direct proceeding.<sup>26</sup> The right to determine the necessity includes the minor rights of determination as to route, extent, cost and other details, and such discretion, when honestly and reasonably exercised, without oppression, will not be reviewed by the courts.<sup>27</sup> In making street improvements, gas light

Cal. 675, 63 Pac. 1078; *Davies v. Saginaw*, 87 Mich. 439, 49 N. W. 667.

<sup>24</sup> *Adams v. Shelbyville*, 154 Ind. 467, 49 L. R. A. 797, 77 Am. St. Rep. 484, 57 N. E. 114.

<sup>25</sup> *Dewey v. Des Moines*, 101 Iowa 416, 70 N. W. 605.

When the ordinance provides for an improvement complete in itself, it does not follow that it will be void because the utility of the improvement might be enhanced by the addition of something which the council have seen fit to omit. *Vane v. Evanston*, 150 Ill. 616, 37 N. E. 901; Ill. Cent. R. Co. v. Decatur, 154 Ill.

173, 38 N. E. 626; *Pike v. Chicago*, 155 Ill. 656, 40 N. E. 567, *Harris v. People*, 218 Ill. 439, 75 N. E. 1012; *In re Westlake Ave.* (Wash.), 82 Pac. 279; *Johnson v. Tacoma* (Wash.), 82 Pac. 1092.

<sup>26</sup> *Hewes v. Glos*, 170 Ill. 436, 48 N. E. 922.

*Colorado.*

<sup>27</sup> *Denver v. Campbell*, 33 Colo. 162, 80 Pac. 142.

*Illinois.*

The question as to the necessity for a local improvement is for the council, and evidence thereof is incompetent, but its admission is not reversible error where it could have had no prejudicial ef-



fect. *C. & N. P. R. R. Co. v. Chicago*, 172 Ill. 66, 49 N. E. 1006.

Where the statute vests in the corporate authority the power to open streets, the courts will not interfere with their discretion. *Dunlap v. Mount Sterling*, 14 Ill. 251; *Curry v. Mount Sterling*, 15 Ill. 320.

In the passage of an ordinance providing for a local improvement the city council is clothed with power to determine what local improvement is required, its nature and character, when it shall be made, and the manner of its construction. These are matters resting in the discretion of the city council, and that discretion, when honestly and reasonably exercised, can not be reviewed in the courts. *Dunham v. Hyde Park*, 75 Ill. 371; *Fagan v. Chicago*, 84 Ill. 231.

The opening of the streets of a city, and the nature and character of the street improvement are matters resting solely in the discretion of the municipal authorities, when they have proposed no plan of improvement and have done nothing to estop them from dealing with the streets according to their discretion. *Washington Ice Co. v. Chicago*, 147 Ill. 327, 37 Am. St. Rep. 222, 35 N. E. 378.

In the passage of an ordinance providing for a local improvement, the city council is clothed with power to determine what improvement is required; its nature and character, when it shall be made and the manner of its construction. These are matters resting in the discretion of the council, and

that discretion when honestly and reasonably exercised, cannot be reviewed by the court. *English v. Danville*, 50 Ill. 92, 36 N. E. 994.

It is for the city council to determine the necessity for making a public improvement. Courts will interfere only when ordinance is unreasonable. *McChesney v. Chicago*, 171 Ill. 253, 49 N. E. 548.

An objection to the confirmation of a special tax for water and sewer connections that the city paid too much for the connections, will not be entertained where there are no allegations of favoritism, fraud or gross abuse of the council's discretion. *Palmer v. Danville*, 166 Ill. 42, 46 N. E. 629.

The construction of a sidewalk under an ordinance passed by a city in strict pursuance of a valid statute, will not be enjoined upon the sole ground that there is no necessity for such improvement, unless it clearly appears that the ordinance is oppressive. The fact that no pressing judgment for the sidewalk exists, and that it might be in the end better to wait until the population of the village increases, does not make the construction of a sidewalk so oppressive as to call for equitable interference. *Walker v. Morgan Park*, 175 Ill. 570, 51 N. E. 636. *Indiana*.

The selection of the location of a local improvement, as the route for a ditch, is a matter of discretion vested in the inferior tribunal or corporate authorities, which discretion cannot be reviewed on appeal, except for abuse. Selection of the line of a former ditch



is not such an abuse. *Sample v. Carroll*, 132 Ind. 496, 32 N. E. 220.

*Maryland.*

Where a city has power to improve streets the courts will not inquire as to the necessity of the exercise of the power, or the refusal to exercise it, or the method of its exercise. *Alberger v. Mayor, etc.*, 64 Md. 1, 20 Atl. 988.

In the absence of fraud or manifest invasion of private rights courts cannot review the exercise of the discretion vested in the common council in determining the necessity of repaving a street at the expense of the abutting owners. *Mayor, etc., of Baltimore v. Stewart*, 92 Md. 535.

*Minnesota.*

It is competent for the legislature to vest in the common council the determination of the question as to whether a local improvement shall be made without subjecting the property benefited to taxation in excess of the special benefits, as well as the whole matter of determining whether the improvement shall be made, and that their determination, except for fraud or mistake, shall be final and conclusive. *Rogers v. St. Paul*, 22 Minn. 494; *Carpenter v. St. Paul*, 23 Minn. 232.

*Missouri.*

A property owner cannot refuse to pay a street improvement tax because only the center of the street was improved, and the improvement does not extend to the sidewalk. The local authorities are vested with discretion in such matter. *Moran v. Lindell*, 52 Mo. 229.

*Montana.*

Where the legislature has designated the council as the proper body to make the assessment, has clothed it with discretion in the matter and authorized it to act upon its own judgment, its determination is conclusive in the absence of fraud or such gross mistake as to preclude the exercise of sound judgment. *Danforth v. Livingston*, 23 Mont. 558, 59 Pac. 916; *Beck v. Holland*, 29 Mont. 234, 74 Pac. 410.

*New York.*

Under a general legislative grant to make and lay out streets, etc., the authority conferred upon the municipality to pave streets and lay assessments upon property benefited gives the council full discretion, save as curtailed or controlled by legislative action, and this discretion is an important and valuable constituent of the power conferred, is in the public interest, and will not be deemed revoked by implication or doubtful inference. *In re Dugro*, 50 N. Y. 513.

*Wisconsin.*

General powers granted to municipal authorities to direct the construction of new sidewalks implies the power to direct as to the material of which they shall be constructed and the width and manner of construction; and the discretion of the authorities in that manner cannot be interfered with by the courts unless such discretion is exercised in such a way as to be clearly unjust and unnecessarily oppressive to the lot-owners. *Benson v. Waukesha*, 74 Wis. 31, 41 N. W. 1017.



companies may be compelled by the council to remove the location of their pipes, if necessary, and without compensation for the expense incurred.<sup>28</sup> Although a charter makes the expense of improving streets and sidewalks chargeable to abutting property, and not against the city or ward, yet such work is public work, and the officers of the city act as public agents in letting the contract.<sup>29</sup> But such a provision authorizing the council to fix taxing districts, to determine whether the whole or a portion of the cost of a public improvement shall be assessed on the lands benefited, and the proportionate amount to each on account of benefits, does not mean that the whole amount, justly or unjustly, may be so laid, nor does it confer an arbitrary power on the council; but such form of taxation has been repeatedly held void, and the council is properly vested with such discretionary power.<sup>30</sup>

**441.** Where the council is vested with power to decide all questions of error or irregularity in making a special assessment, objections that the notice was not given for the required length of time, or that the resolution did not state the kind of asphalt to be used, and was silent as to curbing and guttering, are matters of irregularity merely, and do not go to the validity of the proceedings, and are waived by failure to appear before the council, or object.<sup>31</sup> The method of connecting a sewer with the premises of a property owner is very largely within the discretion of the common council, which is not open to judicial review when properly exercised.<sup>32</sup> The necessity for the paving of a street is not to be determined solely by the question of benefit to abutting property, but from all the circumstances, including the use made of the street by the public generally,<sup>33</sup> and the power of the legislature to regu-

<sup>28</sup> *In re Deering*, 93 N. Y. 361.

<sup>29</sup> *Mitchell v. Milwaukee*, 18 Wis. 99.

<sup>30</sup> *Beecher v. Detroit*, 92 Mich. 268, 52 N. W. 731.

<sup>31</sup> *Owen v. Marion*, 127 Iowa, 469, 103 N. W. 381.

<sup>32</sup> *Boyce v. Tuhey*, 163 Ind. 202, 70 N. E. 531.

<sup>33</sup> *Dewey v. Des Moines*, 101 Iowa, 416, 70 N. W. 605.



late the construction of public works cannot be foreclosed by any contracts of a municipal corporation.<sup>34</sup>

— What council may do.

**442.** It may order gravel in one street for the use of paving another, it not appearing that the contract price was thereby increased; <sup>35</sup> its right to consider the report of assessments and adjust the same according to the benefits received, is a *quasi* judicial power, and their judgment, fair on its face, cannot be collaterally attacked if the council has jurisdiction; <sup>36</sup> power delegated to it to construct sewers by special assessment invests it with authority, in its discretion, to provide for all necessary appurtenances in connection therewith; <sup>37</sup> it may cause sidewalks to be constructed under a grant of power to cause streets to be paved, graded or macadamized; <sup>38</sup> its act in ordering a street paved is not rendered fraudulent merely because there were but few houses on the part of the street covered by the order, that the abutting owners objected, nor because an inducement to ordering the work was the fact that the street was the main thoroughfare to the State fair grounds, and as such used during the holding of the fairs by a large number of people, both residents of the city, and others,<sup>39</sup> and it has been held that where the charter leaves to it the power to fix an assessment district, its judgment as to the lands benefited is conclusive; <sup>40</sup> it may suspend, defer or postpone the work on a public improvement which it has resolved to cause to be done, and to resume it as well, the exercise of such power being entirely within discre-

<sup>34</sup> *In re N. Y. Prot. Ep. School*, 46 N. Y. 178.

<sup>35</sup> *Shimmons v. Saginaw*, 104 Mich. 511, 62 N. W. 725.

<sup>36</sup> *Shank v. Smith*, 157 Ind. 401, 55 L. R. A. 564, 61 N. E. 932.

<sup>37</sup> *Boyce v. Tuhey*, 163 Ind. 202, 70 N. E. 531.

<sup>38</sup> *Burlington & M. R. Co. v. Spearman*, 12 Iowa, 112.

<sup>39</sup> *Dewey v. Des Moines*, 101 Iowa, 416, 70 N. W. 605.

But from the facts stated, it would seem that the ordinance was unreasonable and oppressive.

<sup>40</sup> *Brown v. Saginaw*, 107 Mich. 643, 65 N. W. 601.

This is a necessary deduction from the false premises of legislative omnipotence.



tion, without reference to the reason which leads to such postponement or resumption; <sup>41</sup> it may reconsider a resolution fixing an assessment district, and enlarge the district by subsequent action; <sup>42</sup> at a subsequent meeting reconsider its previous action rejecting all bids, and award the contract for the street improvement to one of the original bidders without re-advertising; <sup>43</sup> its judgment upon a question of parliamentary practise will not be disturbed by the courts; <sup>44</sup> and it is no objection to the validity of the assessment that the order levying it did not receive two separate readings as required by the council. <sup>45</sup> Where a charter requires a two-thirds vote of the council to pass a street improvement resolution over a remonstrance, the journal must show that two-thirds of the council actually voted to order such improvement, and no presumption of compliance with the charter can be drawn from the passage of the resolution by a *viva voce* vote. <sup>46</sup> In matters involving the discretion or judgment of the council, where no bad faith or fraud is alleged, parties cannot go behind the recorded vote to show either want of knowledge or good judgment. <sup>47</sup>

— What council may not do.

**443.** Where a street was well paved with macadam, little worn and in good condition, and good for many years' service in the outskirts of the city, where it was, and which had been laid by municipal authority and paid for by special assess-

<sup>41</sup> *Davies v. Saginaw*, 87 Mich. 439, 49 N. W. 667.

A work may be let under an original contract, even after re-advertising for new bids.

<sup>42</sup> *Trowbridge v. Detroit*, 99 Mich. 443, 58 N. W. 368.

<sup>43</sup> *Ross v. Stackhouse*, 114 Ind. 200, 16 N. E. 501.

<sup>44</sup> *Davies v. Saginaw*, 87 Mich. 439, 49 N. W. 667.

<sup>45</sup> *Holt v. Somerville*, 127 Mass. 408.

<sup>46</sup> *Buckley v. Tacoma*, 9 Wash. 269, 37 Pac. 446.

The board of public works cannot proceed until the council first passes a resolution reciting the fact of the remonstrance, and then ordering the board to proceed notwithstanding.

<sup>47</sup> *Davies v. Saginaw*, 87 Mich. 439, 49 N. W. 667.

For construction of charter of Olympia, see *McNair v. Ostrander*, 1 Wash. 110, 23 Pac. 414.



ments, the laying of an asphalt pavement only four or five years subsequent is unreasonable and oppressive, and a special assessment to pay the same is void.<sup>48</sup> Their decision as to whether or not an improvement is local is subject to review by the courts, and the local authorities cannot arbitrarily determine that an improvement general in character shall be treated as local.<sup>49</sup> They are invested with power to accept an improvement when completed, but not to accept a different improvement from the one for which the assessment was levied,<sup>50</sup> nor can they set aside an assessment of benefits which has been paid, unless by special statutory authority.<sup>51</sup> Where the charter requires the joint action of the mayor and the council in ordering street work, the action of the council alone, in grading a street, is a nullity; but the city is not liable for damages caused thereby, although the councilmen might be liable as trespassers.<sup>52</sup> It can act only by written resolutions or by-laws, duly adopted, as the proceedings cannot be left in parol.<sup>53</sup> A charter requirement for a record of vote in certain cases is not complied with by a record showing the resolution "was adopted unanimously on call," as the ayes and noes must be entered at large on the minutes.<sup>54</sup> A street superintendent has no power to impose conditions in a street contract not authorized by the council, such as excluding Chinese laborers, fixing hours of work, etc.<sup>55</sup> The laying out and opening of streets by the common council of a city is the exercise of its legislative functions, and any contract made by the city with an individual or corporation, by which it agrees that it will not in the future open or extend a street in any particular place or part of the city, is an abnegation

<sup>48</sup> *Field v. Barber Asphalt Paving Co.*, 117 Fed. 925.

<sup>49</sup> *Hewes v. Glos*, 170 Ill. 436, 48 N. E. 922.

<sup>50</sup> *Gage v. People*, 200 Ill. 432, 65 N. E. 1084.

<sup>51</sup> *Campion v. Elizabeth*, 41 N. J. L. 355.

<sup>52</sup> *Thomson v. Boonville*, 61 Mo. 282.

<sup>53</sup> *Moser v. White*, 29 Mich. 59; *Powers' Appeal*, 29 Mich. 504.

<sup>54</sup> *Steckert v. E. Saginaw*, 22 Mich. 104.

<sup>55</sup> *Hellman v. Shoulters*, 114 Cal. 136, 44 Pac. 915, 45 Pac. 1057.



of its legislative powers, unauthorized by its charter, and may be alike destructive of the convenience and prosperity of the municipality, and is void.<sup>56</sup>

#### — Delegation of authority.

**444.** The legislature may delegate to municipal corporations the power to open, improve and pave streets; and in the exercise of such powers by such corporations, its discretion within the legitimate sphere of its authority is proportionately as wide as is the like discretion possessed by the legislature of a state, and is not subject to judicial revision or reversal.<sup>57</sup> But the municipal government cannot in turn delegate to officers or boards any of the discretionary powers vested in them, although it is competent to vest them with ministerial powers, and the courts will scrutinize any attempted departure from the rule with much care.<sup>58</sup>

#### — Ministerial powers.

**445.** It is competent for a city to delegate to a committee the requisite authority to construct a sidewalk after passing an ordinance requiring its construction; <sup>59</sup> or to make the measurement of the assessment where the basis thereof is fixed by statute; <sup>60</sup> where the charter provides that street work shall be superintended by a certain city official, who, under the common council shall prescribe the manner in which the work shall be done, a street may be properly regulated without the establishment of a fixed grade.<sup>61</sup> A resolu-

<sup>56</sup> *Matter of First Street*, 66 Mich. 42, 33 N. W. 15.

<sup>57</sup> *Barber Asphalt Paving Co. v. French*, 158 Mo. 534, 54 L. R. A. 492, 58 S. W. 934.

<sup>58</sup> "It is fortunate for the rights of the people when a case occurs causing the courts to pause and to retrace the boundaries of delegated power. Thus the stealthy steps of invasion may be detected and the power denied, ere it be

too late and a precedent become fixed beyond judicial control." *Agnew, C. J. in Seely v. Pittsburgh*, 82 Pa. St. 364, 22 Am. Rep. 760.

<sup>59</sup> *Brewster v. Davenport*, 51 Iowa, 427, 1 N. W. 737.

<sup>60</sup> *Dancer v. Mannington*, 50 W. Va. 322, 40 S. E. 475.

<sup>61</sup> *State v. New Brunswick*, 30 N. J. L. 395.



tion adopted by the city council of the city of Omaha, directing that certain permanent sidewalks shall be constructed "of stone or artificial stone," is a compliance with the provisions of an ordinance in force in that city, requiring the mayor and council to designate the kind of material with which permanent sidewalks shall be constructed, and does not amount to a delegation of the authority to determine of what material permanent walks shall be constructed,<sup>62</sup> and one directing the city clerk to publish the legal notice, which was done, is not such a delegation to another of a material discretionary power as must be solely and wholly exercised by the council in order to prevent its subsequent acts from being void, and was at most an irregularity, cured by the provisions of the charter, under which the proceedings are upheld as valid and effectual;<sup>63</sup> where the charter prohibited the municipality from paving a street, in which gas and water mains were located without first requiring the connections to be made and pipes run to the curb lines, the common council, having taken the required steps preliminary to ordering the work to be done at the cost of the property fronting on the street, including a formal resolution for paving the street and directing the preparation of plans and specifications for water and gas service and connections, had authority by recorded vote to delegate to the board of public works the mere executive duty of giving the notice and causing the work to be done, in the event of the property owners failing to do it within the time limited.<sup>64</sup>

An attempt to vest discretionary power in a council committee and the city engineer with reference to an improvement, is unauthorized and void, whether attempted by the terms of the ordinance, or at the instance of a mass-meeting of citizens.<sup>65</sup>

<sup>62</sup> Richardson v. Omaha (Neb.),  
104 N. W. 172.

<sup>63</sup> Gilmore v. Utica, 131 N. Y.  
26, 29 N. E. 841.

<sup>64</sup> Gleason v. Waukesha Co., 103  
Wis. 225, 79 N. W. 249.

<sup>65</sup> People v. McWethy, 177 Ill.  
334, 52 N. E. 479.



**446.** A council cannot, by contract or otherwise, delegate to the city engineer the authority to establish sewers and to provide plans and means for their construction, nor the power to terminate a contract for the construction of a sewer.<sup>66</sup> Nor delegate to two or more of its members authority to give notice to such citizens as they want to select, to construct foot pavements in front of their lots;<sup>67</sup> or to the city engineer or other official the legislative function of establishing a street grade;<sup>68</sup> or the necessity for making a street improvement.<sup>69</sup>

**447.** A contract for a street improvement which gives to the superintendent of streets the power to increase or diminish the cost of the improvement, after the contract has been entered into, by requiring a greater or less amount of material for its completion as he shall determine, renders the assessment invalid,<sup>70</sup> and a clause in the specifications for a public improvement that a certain official shall direct the time and manner of beginning and carrying on the improvement does not vest such officer with legislative discretion.<sup>71</sup> Nor can the discretion vested in a common council be delegated to a street superintendent and city engineer. And where the specifications leave it to their determination as to whether more or less concrete is to be used, and the cost thus increased or decreased indefinitely, so the property owner may not know the ultimate cost, the proceedings are invalid.<sup>72</sup>

<sup>66</sup> Neill v. Gates, 152 Mo. 585.

<sup>67</sup> Whyte v. Mayor, 2 Swan, 364.

<sup>68</sup> De Witt Co. v. Clinton, 194 Ill. 521, 62 N. E. 780.

<sup>69</sup> Murray v. Tucker, 10 Bush, 240.

<sup>70</sup> Bolton v. Gilleran, 105 Cal. 244, 45 Am. St. Rep. 33, 38 Pac. 881; Stansbury v. White, 121 Cal. 433, 53 Pac. 940; Chase v. Los Angeles, 122 Cal. 540, 54 Pac. 414; California Imp. Co. v. Reynolds, 123 Cal. 88, 55 Pac. 802.

<sup>71</sup> McChesney v. Chicago, 152 Ill. 543, 38 N. E. 767.

<sup>72</sup> N. P. Perrine, etc., Co. v. Pasadena, 116 Cal. 6, 47 Pac. 777.

As to a delegation of authority within narrow limits, which was held valid, see Mayor, etc., v. Stewart, 92 Md. 535, 48 Atl. 165. *Public Purpose. Jury Trial.*

Under a charter authorizing a city to levy a special tax for building piers and breakwaters to protect the lake shore within the



### The contract — In general.

**448.** The making of a valid contract for doing public work, in those states where such work is to be paid for by special assessment, is a jurisdictional prerequisite to the establishment of a valid charge against property liable for the cost of the improvement, and the intent of the statutory provisions requiring such contracts to be founded on sealed proposals and awarded to the lowest or best bidder, is to require competition on all important items of contemplated work.<sup>73</sup> A written proposal by the authorities for the requisite work, a written bid to do the proposed work, and a written acceptance of the bid by such authorities together constitute a binding contract, into which all oral negotiations between the parties are merged, and parol evidence is inadmissible to vary its

city limits, and providing for a jury of six to assess the benefits, their proceeding is not a jury trial, but a special proceeding in the nature of a commission for a public purpose, and the votes of a majority control. *Soens v. Racine*, 10 Wis. 271.

But where there is a delegation of power for a private purpose, all must concur, unless otherwise provided in the act delegating the power. *Id*; *Walker v. Rogan*, 1 Wis. 597; *Beaver Dam v. Frings*, 17 Wis. 404.

#### *Improvement by owner.*

An abutting property owner cannot, by voluntarily making an improvement in a street, preclude the corporate authorities from improving it in a manner authorized by statute, and required by the wants of the public and others upon the same street. *Parsons v. Columbus*, 50 Ohio St. 460, 34 N. E. 677.

#### *Council control over funds.*

Special assessments funds are

not included in a charter provision that the surplus of all funds shall be transferred to the general fund, and be under the control of the common council. *Thayer v. Grand Rapids*, 82 Mich. 298, 46 N. W. 228.

#### *Ordering improvement — Two-thirds vote.*

A statute providing street improvements may be ordered by a two-thirds vote of the city council, is sufficiently complied with where the council adopted the motion to enter into the contract, and the assessment was confirmed by the requisite vote, although less than two-thirds voted for the original resolution, so that the judgment cannot be collaterally attacked in an action for the foreclosure of the assessment lien. *Brown v. Central Bermudez Co.*, 162 Ind. 452, 69 N. E. 150.

<sup>73</sup> *Allen v. Davenport*, 65 C. C. A. 641, 132 Fed. 209; *In re Merriam*, 84 N. Y. 596.



terms.<sup>74</sup> Single contracts for single improvements are the rule, and several or separate contracts for one improvement are invalid, and confer no authority to impose an assessment, unless specially empowered by statute.<sup>75</sup> A contract made before the passage of the assessment ordinance is invalid, and cannot be validated by the subsequent passage of an ordinance confirming it;<sup>76</sup> but an assessment is not vitiated because the contract was let for the paving before the assessment was made.<sup>77</sup> It is a matter of statutory regulation. Contracts for an entire improvement which is to be borne partly by the public and partly by the owners of property assessed, should contain data from which the actual cost of the part constructed by special assessment, can be ascertained, as private owners are entitled to a rebate of the amount of the assessment exceeding the actual cost.<sup>78</sup> And when the written contract, required by statute, does not describe the work to be done, nor refer to the specifications, there is no valid contract, and therefore no valid lien for a street assessment, even if the work be done strictly in accordance with the specifications;<sup>79</sup> but it need not follow the precise language of the statute if by fair and reasonable construction it contains its essential conditions.<sup>80</sup>

#### — Bids and bidders.

**449.** It is a material and important right of a property owner assessed for a local improvement that there shall be free competition in bidding, unrestricted by illegal conditions, the natural tendency of which is to increase the amount of the bids; and where a property owner complains that there was an illegal restraint of competition in bidding, he must

<sup>74</sup> *McDonald v. Poole*, 113 Cal. 437, 45 Pac. 702; *Wiles v. Hoss*, 114 Ind. 371, 16 N. E. 800.

<sup>75</sup> *Treaner v. Houghton*, 103 Cal. 53, 36 Pac. 1081.

<sup>76</sup> *Paxton v. Bogardus*, 201 Ill. 628, 66 N. E. 853.

<sup>77</sup> *Lefevre v. Detroit*, 2 Mich. 586.

<sup>78</sup> *Thaler v. West Chicago Park Com'rs*, 174 Ill. 211, 52 N. E. 116.

<sup>79</sup> *Schwiesau v. Mahon*, 110 Cal. 543, 42 Pac. 1065.

<sup>80</sup> *Taylor v. Palmer*, 31 Cal. 240.



show that it was injurious to the public, and actually entered into the competition in some way, but he need not show that it actually increased the cost of the work.<sup>81</sup> The bid of the lowest responsible bidder, may be rejected if it be shown to have resulted from a combination between bidders, or from the acts of the successful bidder to limit the number of bidders or increase the contract price.<sup>82</sup> A city council has power to advertise for bids and contract for paving a street, before passing an ordinance for doing the work, if such steps were taken by proper resolution.<sup>83</sup>

— **Lowest bidder.**

**450.** Where neither charter nor general ordinance provides that the council shall advertise for proposals, or let street improvement contracts to the lowest bidder, the council may in its discretion omit either or both without rendering the contract void, the general statute providing that "when such work shall by the board of aldermen be ordered to be done, the same shall be done in the manner and with the materials to be designated in such ordinance."<sup>84</sup> But where a charter provides that a contract shall be let to the lowest bidder, after advertisement, and provides that a bond must be given to secure the city, failure to comply with the terms of the statute makes the contract voidable, and creates no obligation that can be enforced against either party.<sup>85</sup> A violation

<sup>81</sup> *McChesney v. People*, 200 Ill. 146, 65 N. E. 626.

*Opening bids.*

Under an advertisement calling for sealed proposals for work to be received at the office of the board of public works until a certain hour, an ordinance providing that bids for public work shall specify a time and place where they shall be opened is sufficiently complied with, the bids being opened in public by the board at their office at the hour fixed for

the closing of bids, in accordance with custom. *Cass Farm Co. v. Detroit*, 124 Mich. 433, 83 N. W. 108.

<sup>82</sup> *Givins v. People*, 194 Ill. 150, 88 Am. St. Rep. 143, 62 N. E. 534.

<sup>83</sup> *Springfield v. Weaver*, 137 Mo. 650, 37 S. W. 509, 39 S. W. 276.

<sup>84</sup> *Warren v. Barber Asphalt Pav. Co.*, 115 Mo. 572, 22 S. W. 490.

<sup>85</sup> *Allen v. Davenport*, 65 C. C. A. 641, 132 Fed. 209.



of such provisions will be regarded as *prima facie* affecting the substantial justice of the special tax levied to pay for the work.<sup>86</sup> But a mere averment that a certain contract for street work was not let to the lowest bidder shows no violation of law in that respect, unless accompanied by further averments showing said lower bid to have been made in such form, and accompanied by such guarantee, as were lawfully required by the municipal authorities,<sup>87</sup> and evidence that the contract was awarded to one who was not the lowest bidder is receivable without showing fraudulent collusion.<sup>88</sup> It has been held that where the charter requires the contract to be awarded on the most "favorable" proposal, the lowest bidder is not entitled to it as a matter of law. The presumption of official integrity attaches to the council, and mere proof that there was a lower bid than the one accepted is not alone sufficient to impugn its action.<sup>89</sup> An alleged mistake in the lowest bid does not authorize the council to permit it to be withdrawn, and then award the contract to the next lowest bidder, without re-advertising.<sup>90</sup> The right to reject any and all bids is, however, usually reserved to the municipal authorities, and it is in their discretion to reject all proposals, and readvertise.<sup>91</sup>

<sup>86</sup> Wells v. Burnham, 20 Wis. 113.

<sup>87</sup> Dean v. Borschenius, 30 Wis. 236.

<sup>88</sup> Brady v. Mayor, 20 N. Y. 312.

<sup>89</sup> Gilmore v. Utica, 131 N. Y. 26, 29 N. E. 841.

<sup>90</sup> Such action was illegal, as the council were without power to take such action in the premises, and deprive the parties to be assessed of the benefit of a letting to the lowest bidder. Twiss v. Port Huron, 63 Mich. 528, 30 N. W. 177.

<sup>91</sup> Walsh v. Mayor, 113 N. Y. 142, 20 N. E. 825; American, etc.,

Co. v. Wagner, 139 Pa. St. 623, 21 Atl. 160.

*Conflict between statute and ordinance.*

Where the statute provides that all contracts for public improvements amounting to over \$500 shall be let to the lowest responsible bidder, an ordinance for a street improvement, wherein is reserved to the board the right to reject any proposal, is in conflict therewith, and void. L. S. & M. S. R. Co. v. Chicago, 144 Ill. 391, 33 N. E. 602.

*Information should be furnished bidders.*

Under a charter requiring all



— Powers of council in letting.

**451.** With the discretionary powers as to letting contracts vested by the legislature in the common council, the courts are extremely loath to interfere, it being presumed that the council acts wisely and in good faith, and for the best interests of the city and the property owner.<sup>92</sup> But they have no power to materially change a contract after opening the bids for doing the work, and award it to one of the original bidders without re-advertising, or to insert therein items or terms not in the accepted bid.<sup>93</sup> In providing for street improvements and letting contracts therefor the board of aldermen do not act in a legislative capacity, but in an administrative or business capacity, and as such subject to review by the courts on charges of fraud or corruption,<sup>94</sup> but under a statute authorizing the rejection of the lowest bid for doing public work for the reasons therein specified, its determination as to such

street work to be let by contract to the lowest bidder, bidders should be informed before bidding, either by the notice of the letting or by the specifications in the proper office to which it refers, of the terms of the contract as to quantity or amount of work, the time within which to be finished, and quality of materials to be furnished, if any. *Kneeland v. Furlong*, 20 Wis. 438.

*Division of contract — Invalidity of certificate.*

And where the street commissioners, who let the contract, attempt to "reserve the right to divide the work" after the bids are received, such attempt is illegal, and the certificate for work done under the contract is invalid. Such division must be made before the bids are received, so that the proposals may be made with reference thereto. *Id.*

*Patented article.*

A city empowered by its charter to improve streets at the expense of adjoining lot owners, but required to let all such work to the lowest bidder, can not contract for laying a *patented* pavement, owned by one person, at the expense of such lot owners. Nor would the fact that such right for said locality was freely offered for sale secure the required freedom of competition. *Id.* *Dean v. Charlton*, 23 Wis. 590, 99 Am. Dec. 205.

<sup>92</sup> *Boyd v. Murphy*, 127 Ind. 174, 25 N. E. 702.

<sup>93</sup> *Pells v. Paxton*, 176 Ill. 318, 52 N. E. 64; *Smith v. Portland*, 25 Or. 297, 35 Pac. 665.

<sup>94</sup> *Field v. Barber Asphalt Pav. Co.*, 117 Fed. 925; *Weston v. Syracuse*, 158 N. Y. 274, 43 L. R. A. 678, 70 Am. St. Rep. 472, 53 N. E. 12.



fact is as conclusive as the verdict of a jury as to facts within its jurisdiction.<sup>95</sup> Under statutes authorizing the common council to order the whole or any portion of the streets of the municipality macadamized, the council has power to let the work of macadamizing separate portions of the street in one contract,<sup>96</sup> but it is the agent of the law in making contracts for street improvements which shall be a charge upon abutting property, and it has no power to accept part performance so as to make abutting owners liable for the work actually done.<sup>97</sup> After bids are received, the council may choose between bidders, and let the contract to the highest, upon condition that he perform extra street improvement work not specified in the ordinance or advertisement for bids, even though such extra work was never ordered by the council, by any resolution or ordinance, and may assess abutting property according to the rate imposed upon it by said bid.<sup>98</sup>

<sup>95</sup> *Givin v. Simon*, 116 Cal. 604, 48 Pac. 720.

<sup>96</sup> *Alameda, etc., Co. v. Williams*, 70 Cal. 534, 12 Pac. 530.

<sup>97</sup> *Henderson v. Lambert*, 14 Bush. 24.

<sup>98</sup> *Boyd v. Murphy*, 127 Ind. 174, 25 N. E. 702.

Note.—It seems difficult to reconcile this case with the numerous cases holding the contrary doctrine. It arose from a very peculiar state of facts, and being an appeal from a precept, no question of fact could, under the Indiana statute, be considered; but the court decided the case on principle, and not upon the statute.

*Cost of work outside contract.*

Under the authority given a city council for "the opening, extending, widening, straightening up in whole or in part of any street," etc., no authority is given to include in the assessment the

cost of grading and gravelling the lands taken for the widening of the street, and an assessment therefor is illegal and creates no lien upon land in the assessment district. *Wilcoxon v. San Luis Obispo*, 101 Cal. 508, 35 Pac. 988.

*Improper performance.—Modification to conform.*

When by the charter of a city all details of sewer construction are left to the council, and not made the basis of consent by the property owners, it is within the power of the council to waive performance of a sewer contract so far as the work done is not in conformity with the plans and specifications and to modify the contract to the extent of conforming with the work already done. *Weston v. Syracuse*, 158 N. Y. 274, 43 L. R. A. 678, 70 Am. St. Rep. 472, 53 N. E. 12.



— Provisions tending to increase cost.

**452.** As the very purpose of inviting proposals for public work is to give the property owner the benefit of the lowest price which may be obtained by free and unrestricted bidding, it follows that conditions in the specifications or contract which restrict bidding or tend to increase the cost of the work, will vitiate the entire proceedings. Where contracts for local improvements are required by law to be awarded to the responsible bidder offering to do the work for the lowest sum, any provision in the specifications tending to increase the cost and make the bids less favorable to the property owners is illegal and void.<sup>99</sup> Such provisions are commonly restrictive of the hours of daily labor that men employed by the contractor may work, or forbidding the employment of Chinese or alien labor, or fixing the minimum rate of wages. Whatever form this restriction assumes will be disregarded by the courts, if the conditions increase the cost of the work to the taxpayers.<sup>1</sup> The courts will not presume that the

*Jurisdiction — Remonstrance.*

Where the charter provides that no further steps shall be taken in a public improvement after the presentation of a remonstrance signed by a majority of the property holders affected, the presentation of such remonstrance deprives the authorities of all jurisdiction to proceed further. *State v. Jersey City*, 42 N. J. L. 575.

*Additional Requirements — Patented drain.*

Where it appears to the satisfaction of those superintending a street improvement on the part of a city that additional requirements, not provided in the ordinance or contract, are necessary to making the improvement satisfactory — such as putting in a patented drain or increasing the width of the improvement — the

city may authorize the contractor to make such changes and additions, and assess the amount upon abutting owners, and without additional notice or further letting. *Hastings v. Columbus*, 42 Ohio St. 585.

<sup>99</sup> *McChesney v. People*, 200 Ill. 146, 65 N. E. 626.

<sup>1</sup> *Atlanta v. Stein*, 111 Ga. 789, 51 L. R. A. 335, 36 S. E. 932; *Adams v. Brennan*, 177 Ill. 194, 42 L. R. A. 718, 69 Am. St. Rep. 222, 52 N. E. 314; *Holden v. Alden*, 179 Ill. 319, 53 N. E. 556; *Fiske v. People*, 188 Ill. 206, 52 Am. St. Rep. 291, 58 N. E. 985; *Treat v. People*, 195 Ill. 196, 62 N. E. 891; *McChesney v. People*, 200 Ill. 146, 65 N. E. 626; *Glover v. People*, 201 Ill. 545, 66 N. E. 820; *Cleveland v. Clements, etc., Co.*, 67 Ohio St. 197, 59 L. R.



specifications referred to in the proposal upon which bids for public work are invited contain illegal provisions restricting the right of contract, even though such provisions appear in the specifications set forth in the contract,<sup>2</sup> nor will they invalidate the contract where it is made to appear, even by evidence aliunde, that the provisions which are on their face obnoxious are in fact actually innocuous. Although a contract with the specifications as well as advertisement for bids, contained the so-called eight hour and alien labor clause, which would presumptively increase the cost, yet evidence to rebut the presumption may be introduced, to the effect that since the Supreme Court had held such clause invalid, all contractors engaged in public improvement work had considered them inoperative, and that they have been invariably disregarded both by the city and the contractors.<sup>3</sup> Nor is a contract for doing street work rendered invalid by provisions

A. 775, 93 Am. St. Rep. 670, 65 N. E. 885.

A statute fixing the minimum rate of wages to be paid unskilled labor employed on public work, is unconstitutional. *Street v. Varney Elec. Sup. Co.*, 160 Ind. 338, 61 L. R. A. 154, 98 Am. St. Rep. 325, 66 N. E. 895.

When a statute prohibits the employment of Chinese laborers on the public streets, and declares null and void a contract by a contractor who violates it, such contract is forfeited by the contractor on the doing of the unlawful act, and the city may disregard the contract without resorting to a court of equity to annul it. *Portland v. Baker*, 8 Or. 356.

<sup>2</sup> *De Wolf v. People*, 202 Ill. 73, 66 N. E. 868.

<sup>3</sup> *Gage v. People*, 207 Ill. 61, 69 N. E. 635; *Doyle v. People*, 207 Ill. 75, 69 N. E. 639; *Thomp-*

*son v. People*, 207 Ill. 334, 69 N. E. 843.

*Restrictive clause not in ordinance, and bidders ignorant of its existence.*

*Hamilton v. People*, 194 Ill. 133, 62 N. E. 533; *Givins v. People*, 194 Ill. 150, 88 Am. St. Rep. 143, 62 N. E. 534; *Treat v. People*, 195 Ill. 196, 62 N. E. 891.

*Not a part of specifications, and did not affect bidding.*

*De Wolf v. People*, 202 Ill. 73, 66 N. E. 868.

*Objections not available on application for sale, unless damage shown.*

*McChesney v. People*, 200 Ill. 146, 65 N. E. 626; *Wells v. People*, 201 Ill. 435, 66 N. E. 210.

*Unconstitutional statute.*

The failure of the city or the contractor on a public improvement to observe the provisions of a statute prohibiting under pen-



therein requiring the contractor to meet all loss or damage arising out of the nature of the work done; to repair or replace, and to leave in as good condition as when found, all permanent sidewalks, streets and alleys; to indemnify the city from all suits or claims growing out of injury or damage to person or property by reason of the work to be done; to pay for all injuries done to water, gas and sewer pipes; or even as to what laborers shall be hired, or where material shall be purchased, where it is shown in the last two cases that the price of the work has not been increased thereby, and that plaintiff made no objection until the work was done, and the benefits been derived.<sup>4</sup>

— Guaranty of work for a term of years.

**453.** The work of grading, paving and otherwise improving streets and highways is ordinarily paid for by laying an assessment upon the property in the improvement district, to an amount in excess neither of the cost incurred nor the benefit accruing. Such work involves the idea of permanency, as compared with repairs of such work, which are by comparison temporary in their nature, and should be, and usually are, payable out of the general fund. Whether or not the provisions contained in specifications and contracts in recent years guaranteeing the work for a term of years, tend to increase the cost of the work as including necessary repairs; or whether it is a mere guaranty of the quality of the work and its permanency, without increasing the cost, is another of those questions in special assessment proceedings upon which the courts are in apparently hopeless conflict. Numerically, the authorities holding a guaranty to keep a pavement in repair for a certain stipulated length of time is a guaranty of workmanship and material, and not a general obligation to make repairs, are in the majority.<sup>5</sup> If, however, the perma-

alty the employment of alien labor, does not invalidate the contract, the statute being unconstitutional. *Chicago v. Hulbert*, 205 Ill. 346, 68 N. E. 786.

<sup>4</sup> *Dever v. Keokuk, etc., Bank*, 126 Iowa, 691, 102 N. W. 542. *Illinois*.

<sup>5</sup> *Latham v. Wilmette*, 168 Ill. 153, 48 N. E. 311.



nency of the improvement is necessary to authorize a special assessment, and for benefits only, it would seem as

The increased price for guaranty and repair will not vitiate the special assessment. This case stands alone in so holding. *Graham v. Chicago*, 187 Ill. 411, 58 N. E. 393.

An ordinance for a street lighting system which provides that the contractor shall guarantee the cable system for five years, and then stand a certain test, supports the assessment. *Halsey v. Lake View*, 188 Ill. 540, 59 N. E. 234. *Indiana*.

Retention of percentage of contract price a guaranty for repairs to be made by the contractor. *Shank v. Smith*, 157 Ind. 401, 55 L. R. A. 564, 61 N. E. 932.

*Iowa*.

Contract for paving requiring contractor to replace "defective work," under penalty, does not provide for an expenditure for street repairs, which charter requires to be paid by city from general fund, and is merely a guaranty or warranty of the quality of the work. *Osborn v. Lyons*, 104 Iowa, 160, 73 N. W. 650; *Allen v. Davenport*, 107 Iowa, 90, 77 N. W. 532; *Driver v. Keokuk*, etc., Bank, 126 Iowa, 691, 102 N. W. 542.

*Kansas*.

Such contract is not illegal as imposing upon abutting owners payment for future repairs, in the absence of evidence that the contractor's bid was increased in amount. *Kansas City v. Hanson*, 60 Kan. 833, 58 Pac. 474.

*Kentucky*.

Stipulation to keep street in re-

pair for six months construed to mean the contractor is to make good during that time such work as was defectively done. *Louisville v. Henderson*, 5 Bush. 515.

*Missouri*.

The statute authorizes special levy for street repairs. *Morse v. West Port*, 110 Mo. 502, 19 S. W. 831; *Barber Asphalt Paving Co. v. Ullman*, 137 Mo. 543, 38 S. W. 458. *Seaboard Nat. Bank v. Woesten*, 147 Mo. 467, 48 L. R. A. 279, 48 S. W. 939, distinguishing last case, and *Verdin's case*, 131 Mo. 26, 33 S. W. 480, 36 S. W. 52. See, also, *Barber Asphalt Pav. Co. v. Hezel*, 155 Mo. 391, 48 L. R. A. 285, 56 S. W. 449.

Under the very broad and general powers granted to St. Louis by its charter, it has the right to require of a contractor any guaranties that a private person might take in order to secure the perfection of work done for him. *Seaboard Nat. Bank v. Woesten*, 147 Mo. 467, 48 L. R. A. 279, 48 S. W. 939.

*New York*.

*Schenectady v. Union College*, 66 Hun 179, 21 N. Y. Supp. 147.

Note.—The contract reads: "The party of the second part hereby covenants and agrees that it will do all the work required by such ordinance, and this contract, in such good and substantial manner that no repairs thereto shall be required for the term of five years after its completion."

*Oregon*.

Contract reads, that the pavement "shall be guaranteed for five



if those courts that hold the contrary doctrine, that repairs are not a subject for special assessment, in the absence of immediate need and express statutory permission, were supported by the better reason.<sup>6</sup> It is begging the question to argue that a five or ten year guaranty does not increase the

years from the date when it is opened to traffic, and during said period all defects in the pavement due to its proper use as a roadway shall be repaired and made good by the contractor at his own expense." Held, merely a guaranty. *Allen v. Portland*, 35 Or. 420, 58 Pac. 509. But see, also, *Portland v. Bituminous Pav. Co.*, 33 Or. 307, 44 L. R. A. 527, 72 Am. St. Rep. 713, 52 Pac. 28, holding a contract conditioned somewhat differently, is one to keep in repair. *California*.

<sup>6</sup> Requirement to keep street in repair for five years. *Brown v. Jenks*, 98 Cal. 10, 32 Pac. 701; *Alameda Macadamizing Co. v. Pringle*, 130 Cal. 226, 52 L. R. A. 264, 80 Am. St. Rep. 124, 62 Pac. 394.

*Kentucky.*

Contract to keep street in repair for five years necessarily increases the burden of property holders by adding cost of repairs. *Fehler v. Gosnell*, 99 Ky. 380, 35 S. W. 1125. See, also, *Gosnell v. Louisville*, 104 Ky. 201, 46 S. W. 722.

*Missouri.*

A charter provision that paving shall be done at the expense of abutting owners, while repairs are to be paid from the general fund, renders void a contract entered into pursuant to an ordinance providing for the letting

in one contract the work of constructing a pavement, and of reconstruction, or keeping in repair for a term of years, and tax bills issued to pay for such work are wholly void. *Verdin v. St. Louis*, 131 Mo. 26, 33 S. W. 480, 36 S. W. 52.

But where the construction and repair may both be paid from the general fund, there is no such objection. *Id.*

The main question decided above is squarely reversed by the decision in *Seaboard Nat. Bank v. Woesten*, 176 Mo. 491, 75 S. W. 464, that it is lawful to advertise for and let together in one contract and to the same contractor, a contract for the reconstruction of a street and its maintenance for a number of years. The decision of this question, which the court considers is final, goes upon the ground that the contract is merely one of guaranty for good work and material, and not for repairs. *New York*.

*People v. Maher*, 56 Hun 81, 9 N. Y. Supp. 94.

*Nebraska.*

A contract for street paving under which the contractor is bound to bear the expense for ten years of "all repairs which may, from any imperfection in the said work or material, become necessary within that time," does not include "ordinary repairs," and



cost of the work. A mere casual observation of modern methods of street paving, with and without such guaranty, is evidence sufficient to satisfy anyone that a pavement guaranteed for ten years costs more than one which has no time guaranty. In cases where the amount chargeable for the item of repairs is capable of exact ascertainment, the excess may be deducted, and the assessment enforced as to the balance,<sup>7</sup> but if the contract itself be illegal, the assessment is void.<sup>8</sup>

### — Performance of contract.

**454.** Contracts for public work lawfully made at the discretion of the municipal authorities are binding upon the land owners charged with paying the price of the work, though injudiciously made, and acceptance of the work by the city is *prima facie* evidence of its proper completion, in the absence of proof of fraud. The corporate authorities are the sole judges of the manner of execution and character of public work, and when accepted by them the adjacent owners

such stipulation in the contract does not contravene the charter provision requiring "ordinary repairs" to be paid for by the city. *Robertson v. Omaha*, 55 Neb. 718, 44 L. R. A. 534, 76 N. W. 442. *Oregon*.

Where a city is authorized to repair its streets at the cost of abutting property, the repairs contemplated are those whose present necessity exists in the opinion of the council, and there cannot be inserted in a contract for street paving, to be paid for by special assessment, a provision requiring the contractor to keep the paving in repair for a designated term of years. *Portland v. Bituminous Pav. Co.*, 33 Or. 307,

44 L. R. A. 527, 72 Am. St. Rep. 713, 52 Pac. 28.

*Washington*.

*McAllister v. Tacoma*, 9 Wash. 272, 37 Pac. 447, 658.

A contract for future repairs of street is invalid. *Young v. Tacoma*, 31 Wash. 153, 71 Pac. 742. *Wisconsin*.

*Boyd v. Milwaukee*, 92 Wis. 456, 66 N. W. 603.

<sup>7</sup> *Fehler v. Gosnell*, 99 Ky. 380, 35 S. W. 1125; *Louisville v. Clark*, 105 Ky. 392, 49 S. W. 18; *Southern, etc., Co. v. Mayor* (Tenn. Ch. App.), 48 S. W. 92; *Wells v. Western P. & S. Co.*, 96 Wis. 116.

<sup>8</sup> *Portland v. Bituminous Pav. Co.*, 33 Or. 307, 44 L. R. A. 527, 72 Am. St. Rep. 713, 52 Pac. 28.



cannot resist the collection of the cost thereof on the ground of defective execution; but they are entitled to have such contracts performed substantially in all things according to their terms, and the authorities are without power to dispense with such performance to the gain of the contractor.<sup>9</sup> If, after letting a contract to the lowest bidder, as required by charter, the amount of work is increased without inviting further bids, the private contract so made is without authority, and void.<sup>10</sup>

**455.** Slight deviations from the provisions of the contract, or the details of the plans and specifications, but which do not increase the cost to the property assessed to pay for the improvement will not ordinarily invalidate the assessment;<sup>11</sup> nor will a reservation in a sewer contract of the right to the

<sup>9</sup> *Murray v. Tucker*, 10 *Bush*. 240; *Municipality No. Two v. Guillothe*, 14 *La. An.* 295; *Chance v. Portland*, 26 *Or.* 286, 38 *Pac.* 68; *Pepper v. Philadelphia*, 114 *Pa. St.* 96, 6 *Atl.* 899; *Elma v. Carney*, 9 *Wash.* 466, 37 *Pac.* 707.

<sup>10</sup> *Ely v. Grand Rapids*, 84 *Mich.* 336, 47 *N. W.* 447. But see, *State v. Jersey City*, 29 *N. J. L.* 441, which holds that an allowance for extra work does not relieve the assessed parties from liability.

*Failure of Contractor — Completing work without readvertising.*

Where a contract for a sewer was duly let and partly performed, and the contractor then abandoned the contract, and the work was completed, without advertising, at fair prices, but at an expense considerably exceeding the contract price, the assessment was not reduced or vacated, and the court held that the failure to readvertise, after such abandonment, is not of itself sufficient to establish

that the expense was illegally increased. *In re Leeds*, 53 *N. Y.* 400.

<sup>11</sup> Matters of detail in repaving a street under a patent process, not material or substantial variations or departures from the patent. *Mayor, etc., v. Rayms*, 68 *Md.* 569, 13 *Atl.* 383.

Making a public drain wider than fixed by contract, but the expense not being increased. *Angell v. Cortright*, 111 *Mich.* 223, 69 *N. W.* 486.

Changing grade of street at slightly increased cost, which was payable out of general fund. *In re Mutual Life Ins. Co.*, 89 *N. Y.* 530.

As a substantial performance of a contract is necessary to a recovery thereon, a contract to furnish two by six oak subsills for a sidewalk is not performed by furnishing two by four pine subsills, and there can be no recovery for the sidewalk under such contract; and there being no accept-



commissioner of public works to increase or diminish the gross length of the work, or certain other items, in the absence of proof of fraud.<sup>12</sup> A street improvement contract made by the authority of the council cannot be varied by the city engineer, or other corporate officer or agent, nor would a ratification by the council of a variation so made create an obligation on the part of the lot owner, although it be to his advantage.<sup>13</sup> Where work done under a contract is accepted by the authorities, although defectively performed, the contract is the basis for determining the amount to be recovered, and not the benefit to the property assessed.<sup>14</sup> Under a statute providing that the board of public works "shall accept any work done or improvement made when completed according to contract, the acceptance must be in good faith, and there must be a substantial compliance with the terms of the contract. But where there has been a substantial departure from the contract terms, and the property owners interested have made complaints to the authorities, and the contractor also notified, such owners have the right to maintain a suit in equity to enjoin the collection of the assessment."<sup>15</sup> A stipulation in a

ance of the sidewalks, or waiver of performance by the city, there can be no recovery on *quantum meruit*. Denton v. Atchison, 34 Kan. 438, 8 Pac. 750.

<sup>12</sup> In re Merriam, 84 N. Y. 596.

<sup>13</sup> Murray v. Tucker, 10 Bush. 240.

<sup>14</sup> Corry v. Campbell, 25 Ohio St. 134.

<sup>15</sup> McCain v. Des Moines (Iowa), 103 N. W. 979; Bond v. Newark, 19 N. J. Eq. 376; Schumm v. Seymour, 24 N. J. Eq. 149; Lake v. Trustees, 4 Denio, 523; Pepper v. Philadelphia, 114 Pa. St. 96, 6 Atl. 899; Cooley on Taxation (3d Ed.); Elliott on Roads and Streets (2d Ed.), Sec. 586.

Where a contract for street im-

provement required two layers of sand, one of 4 inches and the other of 1, that the first layer should be wet and thoroughly rammed, and the sub-grade rolled with a roller of stated weight; that the brick was to be laid upon one inch of clean river sand, and upon which was to be spread another layer of clean, dry sand, sufficient to fill the joints, but the work as actually constructed had but one layer of foundation sand less than 4 inches thick, and rarely wet, the subgrade not rolled with a roller of sufficient weight, and without ramming, and instead of dry river sand, a mixture of loam, gravel and pebbles was used — there was not a substantial compliance with



contract for building a sewer that the engineer shall be the arbiter as to all questions regarding compliance with the contract, and amount to be paid, is valid, and his action final, in the absence of fraud or gross mistake.<sup>16</sup>

the contract, and the interested property owners were entitled to enjoin the collection of the assessment. *McCain v. Des Moines* (Iowa), 103 N. W. 979.

Where a street paving contractor has performed his contract so imperfectly that there is "a substantial defect in the improvement," within the meaning of the statute, a property owner may, after the authorities have taken the necessary steps to sell the lots for the assessment, enjoin such sale, unless it be inequitable so to do. *Stone v. Viele*, 38 Ohio St. 314.

Where a street has been paved at the expense of owners benefited thereby, and the pavement is so far perfected as to be taken possession of by the corporate authorities, no mere imperfection not affecting its usefulness, can be interposed to prevent a recovery, subject to a deduction for damages in consequence of the imperfections complained of; but this indulgence will not cover fraud, gross negligence or refusal to fulfill the whole engagement. *Pepper v. Philadelphia*, 114 Pa. St. 96, 6 Atl. 899.

<sup>16</sup> *Guild v. Andrews*, 137 Fed. 369.

#### *Readvertising.*

A resolution to re-advertise for bids for street work because of the lowest previous bid being in excess of the estimate, being one which affects the interests of the

city, must be approved by the mayor, or passed over his veto, in order to be valid. *State v. Bayonne*, 56 N. J. L. 268, 28 Atl. 381.

#### *When, may be let in separate parts.*

When the board of public works is unable to obtain satisfactory bids for the whole of a proposed improvement, it may let the contract for a part of the work at one time and another contract for the remainder at another time. *Wright v. Forrestal*, 65 Wis. 341, 27 N. W. 52.

#### *Separate Contracts — Earth excavated in one street to fill another.*

Where separate streets are graded under separate and distinct contracts, the expense of the work may be estimated under the provisions of each particular contract, without reference to the existence of the others, although material excavated in one street may be used in filling another. *Schenley v. Commonwealth*, 36 Pa. St. 64.

#### *Compliance with statutory requirements.*

A contract for street work is invalid where the statutory requirements to vest the assessing board with jurisdiction to do the work, have not been complied with. *Daly v. San Francisco*, 72 Cal. 154, 13 Pac. 321.

#### *Work not included in contract.*

An assessment for street work



### — Description of work.

**456.** In Illinois, the statute requires the ordinance to be specific as to “the nature, character, locality and description of the improvement,”<sup>17</sup> and an accurate general plan of the work to be performed, accompanied by detailed specifications, is necessary for the information of bidders, as well as in estimating the cost of the work. If there be a statutory requirement that the work to be done shall conform to some general plan or pre-established grade, a strict conformance to such requirements is a jurisdictional pre-requisite.<sup>18</sup> When

done under a valid contract is not void, because it purports to include the expenses of work not performed under the contract. In such a case the remedy is by appeal. *Blair v. Luring*, 76 Cal. 134, 18 Pac. 153.

#### *Objections to mode of construction.*

The rule that objections to the mode in which an improvement was constructed cannot be entertained on application for sale, does not obtain where the improvement authorized is changed for another; or the city has accepted an improvement different from the one assessed for. The rule is confined to cases of an imperfect construction of an authorized improvement. *Gage v. People*, 193 Ill. 316, 61 N. E. 1045, 56 L. R. A. 916.

#### *Failure of Contractor—Finishing work at increased cost.*

Where the city has let a contract for a local improvement, and the contractor has given a sufficient bond for its performance, and the bond becomes forfeited by nonperformance of the contract, and the contract is relet at increased cost, it is the duty of the

authorities, before imposing an assessment for the work, to enforce the bond and to apply the amount collected thereon in diminution of the assessment; and an action may be maintained against the city to compel a discharge of this duty, where an assessment has been imposed in disregard of it. *Eno v. Mayor*, 68 N. Y. 214.

#### *Proper Performance—How compelled.*

The rule is that while the honest fulfillment of a contract for public work may be enforced by those who are assessed to pay for it, it must be by a proceeding to enforce the duty owing by the city to the assessed owners to see that the contract is performed according to its terms. *People v. Whidden*, 191 Ill. 374, 56 L. R. A. 905, 61 N. E. 133.

<sup>17</sup> A substantial compliance with the statute is sufficient. *Vane v. Evanston*, 150 Ill. 616, 37 N. E. 901.

<sup>18</sup> *Allen v. Davenport*, 107 Iowa, 90, 77 N. W. 532; *Meyer v. Fromm*, 108 Ind. 208, 9 N. E. 84; *State v. District Court*, 51 Minn. 539, 53 N. W. 800, 55 N. W. 122.



bids for paving and grading a street, and excavating the rock found, if any, are called for, and the specifications give no estimate of the amount of rock excavation, a contract awarded thereon is illegal and void, as the lowest bidder is incapable of ascertainment.<sup>19</sup> A contract referring to specifications declared to be annexed, when in fact none were ever shown to be annexed, or even prepared, is invalid.<sup>20</sup> When the city engineer is required to draw up plans and specifications for street improvements, but has no authority to determine the materials to be used, a contract which leaves such determination to the engineer is void.<sup>21</sup> But a resolution calling for grading and macadamizing a street previously graded and macadamized, instead of re-grading and re-macadamizing, is sufficient.<sup>22</sup>

<sup>19</sup> *Brady v. Mayor*, 20 N. Y. 312.

<sup>20</sup> *Gray v. Richardson*, 124 Cal. 460, 57 Pac. 385.

<sup>21</sup> *Bluffton v. Miller*, 33 Ind. App. 521, 70 N. E. 980.

<sup>22</sup> *Wells v. Wood*, 114 Cal. 225, 46 Pac. 96.

A contract to macadamize a street and to use such materials as the street superintendent may require, "according to the specifications hereto annexed," is sufficiently complied with by furnishing the materials provided for in the specifications. *Emery v. San Francisco Gas Co.*, 28 Cal. 345; *Palmer v. Taylor*, 31 Cal. 240.

The fact that the specifications upon which bids for grading a street were based embraced another street as well as the one in question, is immaterial, it appearing that profile maps showing the amount and kind of excavation and filling required in each street were separately made and filed with the specifications. *Tingue v.*

*Port Chester*, 101 N. Y. 294, 4 N. E. 625.

Where a city advertises for proposals for building certain sidewalks according to plans and specifications on file, and a contractor proposed to do the work accordingly at a definite price, and his proposal was duly accepted, the plans and specifications became a definite part of the contract. *Denton v. Atchison*, 34 Kan. 438, 8 Pac. 750.

#### *Absence of plan.*

Where a city charter provides that before letting contracts for sewer construction a plan and specifications shall be made and filed, and the manner and style of work, and materials are not accurately set out in the plans and specifications on which bids are invited, and in the contract, the charter provision is violated, there being too much left to the discretion or oral direction of the street commissioners. *Wells v. Burnham*, 20 Wis. 113.



— Time for completion.

**457.** Where time is made by statute, the act of parties or the contract itself, of the essence of the contract, any extension of time by order of the authorities makes the contract absolutely void, both as to abutting owners and the liability of the city to pay for the work.<sup>23</sup> But where time is not of the

*Invalidity of tax.*

And in an action to set aside the tax levied for such work, proof of the allegation that "no plans for said sewer had ever been made, and the specifications did not show the grade of the proposed sewer, nor the depth of the excavations of the trench, nor the manner and style of construction of the manholes therein," avoids the contract and makes the tax invalid. *Id.*

*Omission to describe materials.*

A resolution, which though sufficiently describing the proposed street grading and macadamizing, and containing a reference to specifications as to the proposed culverts, macadamizing a cross walk, yet neither intelligibly describes nor refers to any description of the materials for the proposed curbs and gutters included in the assessment, is void and cannot support any contract or assessment. *Bay Rock v. Bell*, 133 Cal. 150, 65 Pac. 299.

*Insufficient description.*

A resolution to construct certain sewers with cribbing and manholes and a flush tank, and which fully fails to describe the dimensions of the flush tank, the materials to be used in construction, how it is to be connected with any of the sewers, or to show whether one flush tank would

serve for all of them, and which is not aided in description by any specifications therefor, fails to describe a material part of the work which vitiates the resolution and renders void a bid and contract to the work thereunder. *McDonnell v. Gillon*, 134 Cal. 329, 66 Pac. 314.

*Sufficient description.*

An order for doing certain street work between two cross streets, "where not already done," gives jurisdiction to order the improvement, and is not a delegation of power, as the extent of the work is capable of exact ascertainment, and leaves nothing to discretion. *Williams v. Bergin*, 116 Cal. 56, 47 Pac. 877; *Edwards v. Berlin*, 123 Cal. 544, 56 Pac. 432.

A resolution to construct sewers in certain streets, which does not prescribe the material, the number of branch sewers, or the details of the "automatic flushing apparatus" required, does not sufficiently describe the work to be done, and the assessment therefor is void. *Williamson v. Joyce*, 137 Cal. 107, 69 Pac. 854.

<sup>23</sup> *Raisch v. San Francisco*, 80 Cal. 1, 22 Pac. 22; *Beveridge v. Livingstone*, 54 Cal. 54; *Mahoney v. Braverman*, 54 Cal. 565; *McVerry v. Boyd*, 89 Cal. 304, 26 Pac. 885; *Brock v. Luning*, 89 Cal. 316, 26 Pac. 972.



essence of the contract, and if after the time named in a contract for completing the work the contractor is permitted to go on and expend his time and money in completing the work, and it is accepted and paid for as a full performance of the contract, such action constitutes a waiver.<sup>24</sup> In the absence of a mandatory statute, prohibiting such action, it would seem that the city, as one of the contracting parties, might waive strict compliance with the provisions of a contract inserted therein by its authority, and for its own benefit, and such is the opinion of the Michigan court, in a recent case, in which it holds that the collection of an assessment cannot be defeated because of non-compliance with a contract provision for completion by a day certain under a specified penalty for each day's delay, and a showing that nothing was deducted from the contract. The penalty clause has no relation to the contract, and was not intended for the benefit of abutting owners.<sup>25</sup>

#### — Extra work, day labor.

**458.** It frequently happens that the most carefully drawn plans and specifications prove inadequate, and that extra

Where a contract for sewer construction is let under an ordinance requiring its completion within 90 days from the time the contract takes effect, time being of the essence of the contract, and a penalty of ten dollars a day to be deducted from the contract price unless completed as agreed, if the work is not completed within the time stated, the tax bills issued for its payment are void; and an ordinance extending the time for completing the work, passed after the forfeiture of the contract, does not vitalize the forfeited contract. *Neill v. Gates*, 152 *Mc.* 585, 54 *S. W.* 460.

<sup>24</sup> Where in a contract for street

improvement work it is stipulated that the work be commenced by a certain day, and the city reserves the right of forfeiture in case of failure to commence by that time, or to cause the work to be done by others at the cost of the contractor, and the contract is in part performed, the city is vested with a discretion, in case of such failure, to waive default or exact complete performance. *Hubbard v. Norton*, 28 *Ohio St.* 116.

<sup>25</sup> *Cass Farm Co. v. Detroit*, 124 *Mich.* 433, 83 *N. W.* 108.

As the time within which the work is to be completed affects the price on account of the expense of daily inspection, the price to



work or material may prove necessary to its proper completion. The authority to order it furnished is usually conferred by statute on some municipal board or officer, and aside from such legislation it is believed the local authorities may contract for such extra or additional work or material, in the same manner as the original contract was let. But this power would not authorize them to let the work by day's labor, or to fix a specified price at which certain work shall be done, and where work is required to be done by contract, having it done by day's labor renders the assessment therefor void.<sup>26</sup> The fact that a special tax bill is made to include work done by one who had no contract therefor with the city does not invalidate the whole bill and prevent all recovery thereon, when the excess can be definitely determined.<sup>27</sup>

be paid may be graduated according to the time allotted for completing the work. *Matter of Eager*, 46 N. Y. 100.

<sup>26</sup> *In re Robbins*, 82 N. Y. 141; *In re Blodgett*, 91 N. Y. 117; *In re Manhattan R. R. Co.*, 102 N. Y. 301, 6 N. E. 590.

Where an ordinance providing for a street improvement directed the work should be done in such manner as the commissioner of public works "may deem expedient and for the best interests of the city and property owners," and the work was done by days' work, without a contract, the assessment laid therefor was declared invalid, the clause attempting to delegate to the commissioner the method of doing the work being unauthorized, and the doing of the work other than by contract being contrary to charter provisions. *In re Emigrant Ind. Sav. Bank*, 75 N. Y. 388.

Where in an advertisement for

proposals for constructing a sewer, a price is fixed for the rock excavation which constitutes a large portion of the work, the charter provision requiring contracts to be let to the lowest bidder on sealed proposals, is violated, and an assessment for the work *pro tanto* void. *In re Merriam*, 84 N. Y. 596.

Where a contract substantially follows the resolution for work to be done, and in addition the contractor laid a sidewalk not authorized by the resolution, the assessment for the authorized work is not vitiated by a separate assessment for such sidewalk, but a judgment foreclosing the entire lien should be modified by deducting the amount included for the sidewalk. *McDonald v. Mezes*, 107 Cal. 492, 40 Pac. 808.

<sup>27</sup> *First Nat. Bank v. Arnoldia*, 63 Mo. 229; *First Nat. Bank v. Nelson*, 64 Mo. 418.



— Patented articles — Monopoly.

**459.** Another question regarding special assessments upon which the courts are hopelessly divided is upon the right to pave a street by a patented process, or one held by a monopoly, and assess the cost against the abutting proprietors. If such a process be used, the element of competition in public work, out of which grows much of its vitality, is largely eliminated. One court distinguishes between an absolute monopoly and the right to use a patented process and holds that a charter requiring upon an advertisement the letting of work to the lowest responsible bidder prevents the city from letting a contract for paving with asphalt from the island of Trinidad, when it appears that one corporation has, by virtue of a contract with the government of the island, a monopoly of furnishing such material.<sup>28</sup> But a federal court has held that specifications calling for Trinidad Lake asphalt are not objectionable as fostering a monopoly,<sup>29</sup> and if the statute permit a patented pavement to be laid upon a street after petition therefor by a majority of the owners, a contract let without that petition is void.<sup>30</sup>

<sup>28</sup> Verdin v. St. Louis, 131 Mo. 26, 33 S. W. 480, 36 S. W. 52; Barber Asphalt Pav. Co. v. Hunt, 100 Mo. 22, 8 L. R. A. 110, 18 Am. St. Rep. 530, 13 S. W. 98.

<sup>29</sup> Field v. Barber Asphalt Pav. Co., 117 Fed. 925.

<sup>30</sup> Nichalson, etc., Co. v. Painter, 35 Cal. 699.

*Patented pavement authorized.*

Where there is a legislative grant of power to a municipality to improve streets, the common council is not prohibited from paving a street in a manner and with a material not admitting of competitive bids by the provisions of a subsequent act requiring all work to be done by contract, where the amount exceeds \$1,000, and let,

after advertisement, to the lowest bidder. In re Dugro, 50 N. Y. 513.

*Separate proposals.*

Where an improvement is ordered, which embraces several kinds of work, capable of being separately performed by different parties, some of which works are patented, and others not patented, separate proposals should be invited for that part of the work which is not patented, and for which there can be no competition. Matter of Eager, 46 N. Y. 106.

*City may secure right to use before letting.*

The fact that a street pavement was to be made with a patented



— Assignment of the contract.

**460.** The assignment by the contractor of a contract with a municipal corporation for work, is not against public policy so long as the corporation retains the personal obligation of the original contractor and his sureties; and in the absence of anything in the statute which authorized the work prohibiting it, such an assignment is valid. It does not terminate the contract or authorize the city to repudiate it.<sup>31</sup> A suit to recover upon such contract, when duly assigned, may be maintained by the assignee, but he will be held personally bound by its terms and conditions.<sup>32</sup> But where the statute, or the contract itself, prohibits such assignment except by the consent of the city council, such provision is binding, and an assignee cannot recover without proof of his compliance with such requirement.<sup>33</sup>

— Construction of contract.

**461.** City charters are public acts of which courts are bound to take judicial notice.<sup>34</sup> Contracts for municipal work are to be construed according to the provisions of the charter or the general statute, or ordinance passed thereunder.<sup>35</sup> After contracts have been completed, it is too

article, is immaterial, if the city secured the right to use the article before the letting, so that any bidder on this particular work had the right to use it. *Hastings v. Columbus*, 42 Ohio St. 585.

*Unauthorized use will not avoid assessment.*

The use of patented materials for street work, even if unauthorized, will not avoid the assessment therefor, it not being shown that the contract either required or prohibited the use of patented material. *Dunne v. Altschul*, 57 Cal. 472.

As to whether a city may not let a contract for a patented arti-

cle, see *Yarnold v. Lawrence*, 15 Kan. 126.

<sup>31</sup> *Devlin v. Mayor*, 63 N. Y. 8; *Sims v. Hines*, 121 Ind. 534, 23 N. E. 515; *Burnham v. Milwaukee*, 69 Wis. 379, 34 N. W. 389.

<sup>32</sup> *Ernst v. Kunkle*, 5 Ohio St. 520; *Campbell v. District of Columbia*, 117 U. S. 615, 29 L. ed. 1007, 6 Sup. Ct. Rep. 922.

<sup>33</sup> *Deffenbaugh v. Foster*, 40 Ind. 382.

<sup>34</sup> *Janesville v. M. & M. R. Co.*, 7 Wis. 484; *Terry v. Milwaukee*, 15 Wis. 490; *Alexander v. Milwaukee*, 16 Wis. 248; *State ex rel. Cothren v. Lean*, 9 Wis. 279.

<sup>35</sup> *New Albany v. Sweeney*, 13



late to raise questions of alleged irregularities in letting them on other grounds of invalidity. The city authorities could doubtless have been compelled to proceed properly, by appropriate action in apt time.<sup>36</sup> The legislature has power to ratify a contract entered into for a municipal purpose, which is *ultra vires*; and thus ratified it is valid and binding.<sup>37</sup> Municipal contracts are to be construed generally by the same broad rules of reason and legal interpretation as other contracts, subject to the restrictions upon the powers of municipal authorities to enter into them, of which limitations the contractor is chargeable with knowledge.<sup>38</sup>

— Liability of city on contract.

**462.** This subject has been thoroughly discussed else-

Ind. 245; *State v. Michigan City*, 138 Ind. 455, 37 N. E. 1041.

<sup>36</sup> *Spalding v. Denver*, 33 Colo. 172, 80 Pac. 126.

<sup>37</sup> *Brown v. Mayor*, 63 N. Y. 239.

<sup>38</sup> *Murphy v. Louisville*, 9 Bush. 189.

CONTRACTS HELD VALID.

*California.*

*Relieving officer from statutory liability.*

A contract in which there is a clause relieving the street superintendent from statutory liability, may be void between the parties thereto as against public policy; but does not affect the rights of the property owner, nor render it void as to him, nor prevent a recovery against him for the amount of the assessment, the unauthorized clause not being in the proposal or influencing the bids. *McDonald v. Mezes*, 107 Cal. 492, 40 Pac. 808.

*Agreement with contractor to accept less.*

An agreement between a street

improvement contractor and abutting owners by which he agreed to accept less than the amount of the assessment, is not ground of avoiding the assessment at the suit of one who has not been prejudiced by such agreement. *Duncan v. Ramish*, 142 Cal. 686, 76 Pac. 661. But see *Brady v. Bartlett*, *infra*.

*Illinois.*

*Not let in time.*

Objections to the validity of a contract for sewer construction as not being let within the time limited by statute, there being nothing in the record to show the objector was in any way injured, comes too late after application for sale on the unpaid installment. *Gage v. People*, 213 Ill. 468, 72 N. E. 1108.

*Kansas.*

*Interest of member of council in.*

Where a partnership enters into a contract with a city to build sidewalks, and a member of the firm thereafter becomes a member of the council, a lot-owner whose



lot has been sold for the non-payment of the special assessment against it to pay for such sidewalk is not on that account entitled to have the sale set aside, or the issue of a tax deed enjoined. The contract was valid when made, and neither party without the consent of the other can avoid the agreement. *Lawrence v. Killam*, 11 Kan. 499.

*Louisiana.*

*Unavoidable abridgment of work.*

The fact that the full extent of the work contemplated by ordinance was unavoidably abridged does not invalidate the contract so that the contractor loses the entire benefit of the work done, the general purpose being accomplished. But the abutting owners may claim a proportionate reduction. *Kelly v. Chadwick*, 104 La. 719, 29 So. 295.

*Minnesota.*

*Failure to require bond of contractor.*

The failure of a city to require a bond from a contractor to pave streets under an entire agreement, void because in excess of the authorized limit of municipal indebtedness, does not render the city liable under chapter 321, p. 535, Laws 1901, for that neglect to a person furnishing materials under a subcontract. Section 9, c. 382, p. 695, Laws 1903, validating such contracts and authorizing the payment of evidences of indebtedness already issued, does not impose liability on the part of the city to such subcontractor. *Kettle River Quarries Co. v. E. Grand Forks (Minn.)*, 104 N. W. 1077.

*New York.*

*Purchase of pipe from city.*

A requirement in an advertisement for proposals for sewer work that the contractor purchase the required pipe from the city, is valid, the pipe having been purchased by the city under a contract let after a public bidding, and furnished by it at contract price, is proper and lawful. In *re Merriam*, 84 N. Y. 596.

*Ohio.*

*Contractor appropriating material to his own use.*

Where a contractor, by consent of the city, appropriated to his own use an old Nicholson pavement in the street to be improved, the reasonable value thereof should be ascertained and deducted from the amount to be assessed against the property owners in favor of the contractor. *Hastings v. Columbus*, 42 Ohio St. 585.

*Oregon.*

*Limit of indebtedness reached.*

Though the limit of a municipal indebtedness has been reached, a contract for street improvements, providing for payment out of a fund to be raised by assessment of the locality improved, is valid, since no present indebtedness is incurred thereby. *Little v. Portland*, 26 Or. 235, 37 Pac. 911.

*Washington.*

*Different methods of payment on one street.*

The fact that one portion of a street was improved by contract and another portion under direction of the town authorities, and the latter portion paid for out of the general fund would not render one assessment for the whole



street void, nor show an intent on part of the town to assess only the portion of property abutting the improvement under the contract, when the resolution for the improvement in express terms created the whole street an assessment district for purposes of improvement. *Tumwater v. Pix*, 18 Wash. 153, 51 Pac. 353.

#### CONTRACTS HELD INVALID.

##### *California.*

##### *Method of payment changed by statute.*

Where a contract for street improvement work provided for payment to the contractor by an assessment to be levied upon adjacent lots in proportion to their respective values, and before the completion of the work a legislative enactment provided for assessments in payment of such contracts according to street frontage, the provisions of the contract govern the assessment, they being in accordance with existing law when made. *Houston v. McKenna*, 22 Cal. 550.

##### *Macadamizing does not include curbing.*

A contract for street improvement is valid only for such improvements as are named in the resolution. If the resolution provide only for macadamizing, it should not also include curbing, made by statute a different kind of improvement. *Beaudry v. Valdez*, 32 Cal. 269.

##### *Nor sidewalks.*

Where by statute macadamizing a street and constructing sidewalks are different kinds of work, under a contract for macadamizing a street only the roadway is to be improved. *Himmelmann v.*

*Satterlee*, 50 Cal. 68; *Dyer v. Chase*, 52 Cal. 440.

##### *Private agreement by contractor.*

Where it appears that the successful contractor for street work has previously made a private contract with owners of land to be assessed that he would do the work at a specified rate in lieu of that provided by contract, it was held to be a fraud on the other owners, and rendered the assessment a nullity. *Brady v. Bartlett*, 56 Cal. 350.

##### *Indiana.*

##### *Authority of mayor to contract.*

If a city council authorized the mayor to enter into a contract with a bidder for a street improvement, such contract is binding only in so far as it is within the power conferred by the council, and the ordinance directing such improvement constitutes a part of such contract. *State v. Michigan City*, 138 Ind. 455, 37 N. E. 1041.

##### *Iowa.*

##### *Effect of repealing act on ordinance.*

Where an ordinance for street work was passed Apr. 15, and nothing further done until June, the passing of a legislative act Apr. 17 repealing the act under which the work was ordered takes away the authority to order the work after the date of the act. *Wardens, etc., v. Burlington*, 39 Iowa, 224.

##### *Kentucky.*

##### *Must be properly executed.*

Where a contract for street work is not executed according to the statute, it is null and void, and the city is not liable for value of the work, by reason of any



implied promise to pay, upon the idea that the city derived a benefit from it. *Murphy v. Louisville*, 9 Bush. 189; *Craycraft v. Selva*, 10 Bush. 696.

*Reference to council committee.*

Where a charter requires that all contracts for street improvements shall be referred to a committee of the council, non-compliance therewith prevents the city from compelling a lot owner to pay the cost of the improvement. *Worthington v. Covington*, 82 Ky. 265.

*Michigan.*

*Paving contract — Distance not specified.*

An advertisement asked for bids for paving a street for a specified distance, bids were received thereunder, and a contract awarded for paving a portion of the distance named, "or farther if ordered"; subsequently the contractors were directed to complete the work for the original specified distance. The action of the council was not the letting of a new contract calling for new bids, and the objection to the right of the council to advertise for bids for more work than they intended to have immediately done, is peculiarly susceptible to fraud and abuse, is untenable. *Brevoort v. Detroit*, 24 Mich. 322.

*Missouri.*

*Liability of abutting owner.*

Where a street improvement contract is void for lack of charter authority in the city to make it, the owners of abutting property cannot be held liable for any part of the work done against their will and protest. *Verdin v.*

*St. Louis*, 131 Mo. 26, 33 S. W. 480, 36 S. W. 52.

*New York.*

*Omitting lots from assessment — Fraud.*

Under an ordinance for curbing, guttering and flagging a certain street, bids were called for, and the one which was accepted proposed to do the large amount of flagging for nothing, while the price bid for curbing and guttering was largely in excess of the price of other bidders, and intended to cover compensation for the flagging. In making the assessment, the board omitted all lots in front of which only flagging was done, and the assessment was held void. *In re N. Y. Prot. Ep. School*, 75 N. Y. 324. For facts constituting fraud and collusion, see *in re Anderson*, 109 N. Y. 554, 17 N. E. 209.

*Oregon.*

*Bond — Ultra vires contract.*

A bond to a city given for the performance of a contract, is void and incapable of enforcement when the contract is *ultra vires*, and would cause an illegal application of the funds of the city. *Portland v. Bituminous P. Co.*, 33 Or. 307, 44 L. R. A. 527, 72 Am. St. Rep. 713, 52 Pac. 28.

*Wisconsin.*

*Contract let without notice — Appeal unnecessary.*

Where a street commissioner improperly let a contract without giving proper notice, the contract itself and the assessment upon a lot for work done under it, are void; and it is not necessary for the lot owner to appeal from the action of the commissioner in such reletting. *Mitchell v. Milwaukee*, 18 Wis. 93.



where,<sup>39</sup> and reference is made here to a few cases where the question of liability under the provisions of the contract has been decided. It has been held that a contractor acquires no right of action against the city to recover the contract price after the assessment therefor has been finally adjudged invalid, unless the contract under which the work was done is valid and binding on such city.<sup>40</sup> But the weight of authority is to the contrary, and the courts are gradually assuming the position that it is the duty of a city to make a valid assessment, and if it fails to do so, to hold it liable as upon an implied agreement to give to the contractor a valid certificate. But as to whether the remedy of the contractor is to compel the authorities to make a reassessment, where it is permitted by statute to be made, or to commence direct proceedings for recovery, there is lack of harmony, with apparently the better reason for assumption of the first method. There is, however, both strong authority and strong reason to sustain the proposition that when a city contracts for work which it has authority to do, but is without authority to make it a charge on the abutting property, it is liable to the contractor for the price of his work, it being such work as the city has power to contract and pay for from the general fund.<sup>41</sup>

<sup>39</sup> See *Personal Liability*, Ch. XII.

<sup>40</sup> *Daly v. San Francisco*, 72 Cal. 154, 13 Pac. 321.

<sup>41</sup> When one has made a valid and binding contract with a corporation through its agents, and has suffered loss by the neglect of the corporation to perform some act or discharge some duty with reference to the contract of which the contracting party is not required to take notice, the corporation is liable, or where such a contract has been violated by the corporation, the right of the contract-

ing party injured by this non-compliance to recover damages is unquestioned. *Murphy v. Louisville*, 9 Bush. 189; *Louisville v. Nevin*, 10 Bush. 549, 19 Am. Rep. 78; *Brecroft v. Council Bluffs*, 63 Iowa, 646, 19 N. W. 807; *Scofield v. Council Bluffs*, 68 Iowa, 695, 28 N. W. 20; *Polk Co. Savings Bank v. State*, 69 Iowa, 24, 28 N. W. 416.

*Pay from proceeds of special assessment.*

Where a contractor agrees to receive pay for street work from the proceeds of a special assessment,



**Abandonment of proceedings.**

**463.** In the absence of statutory prohibition, a city may repeal an ordinance providing for public improvements at any time before the parties assessed with the benefits shall have paid the amount so assessed, and to make void by such repeal the judgment for compensation and benefits; and when the city has exercised that authority it is not estopped in its suit in condemnation under an ordinance subsequently passed for the same improvement, from having a new assessment to ascertain the value of the property taken thereunder, by the fact that under the repealed ordinance an award has been made to the same property-owner therefor; nor can the property owner demand, on the ground that such ordinance was not repealed in good faith, that the former award be taken as the true value of his property. If the city can claim no benefit under the first award, neither can the property-owner.<sup>42</sup> The city incurs no liability by abandoning a contemplated improvement, to persons who invested on the strength of the completion of the work.<sup>43</sup> The proceeding will be regarded as abandoned unless within a reasonable time the damages are paid, and possession taken of the condemned property.<sup>44</sup> While the completion of an entire

and it proves illegal, and the contractor has completed the improvement, it is the duty of the city to make another assessment, or any number of them, to raise money enough to pay the contract price. *Morgan Park v. Gahan*, 136 Ill. 515, 26 N. E. 1089.

<sup>42</sup> *Chicago v. Barbian*, 80 Ill. 482; *Chicago & N. W. R. Co. v. Chicago*, 148 Ill. 141, 35 N. E. 881; *Simpson v. Kansas City*, 111 Mo. 237, 20 S. W. 38; *Kansas City v. Mulkey*, 176 Mo. 229, 75 S. W. 973; *Clinton v. Portland*, 26 Or. 410, 38 Pac. 407.

As the city has the absolute right to dismiss a petition for a

street improvement, notice to land owners of notice of motion therefor is unnecessary. *Pearson v. Chicago*, 162 Ill. 383, 44 N. E. 739.

<sup>43</sup> *Peake v. New Orleans*, 139 U. S. 342, 35 L. ed. 131, 11 Sup. Ct. Rep. 541.

<sup>44</sup> *Chicago v. Barbian*, 80 Ill. 482.

To relieve a city from the payment of a compensation and damages in the proceeding to condemn land for a street, on the ground of abandonment, there must be an abandonment in good faith in the improvement contemplated, or a change of location or route, or an abandonment of the design of tak-



street improvement as ordered may be beneficial to all the property assessed therefor, the completion of less than all may not only be of no benefit to any, but an injury to some or all of such property. The improvement is an entirety, and abandonment of part is fatal to the whole proceeding, for a special assessment cannot be levied to pay for part of an improvement, nor to pay for the whole after a part has been abandoned.<sup>45</sup> Where proceedings to condemn property for opening a street are set aside and abandoned as to a part of it, the original assessment should be set aside.<sup>46</sup> A city which has obtained the confirmation of a special assessment is without power to vacate it of its own motion, pass a new ordinance for the same improvement and cause a new assessment to be confirmed against the same property, but the first judgment remains in full force and effect.<sup>47</sup> In statutory proceedings to vacate an assessment for frauds therein, only lands described in the proceedings are affected, and the vacation of the assessment as to those lands does not operate to render the whole assessment invalid.<sup>48</sup>

### Presumptions.

**464.** In the absence of evidence to the contrary, it is always presumed that public officers discharge their duties

ing the particular property involved for public use. *C. R. I. & P. R. Co. v. Chicago*, 143 Ill. 641, 32 N. E. 178.

<sup>45</sup> *St. John v. East St. Louis*, 136 Ill. 207, 27 N. E. 543; *Cincinnati v. C. & S. G. Ave. Co.*, 26 Ohio St. 345; *Welty on Assessments*, Sec. 298.

<sup>46</sup> *Pardridge v. Hyde Park*, 131 Ill. 537, 23 N. E. 345.

<sup>47</sup> *Berry v. People*, 200 Ill. 231.

<sup>48</sup> *In re Delancey*, 52 N. Y. 80. *What not an abandonment.*

Proceedings for the improvement of a street are not abandoned by omission to file the mandate of

the appellate court reversing the judgment affirming a previous assessment within two years after date of decision. *P. & R. C. & I. Co. v. Chicago*, 158 Ill. 9, 41 N. E. 1102; *Pearson v. Chicago*, 162 Ill. 383, 44 N. E. 739.

*When owner may recover back.*

Where an assessment for opening of a street was confirmed on Sept. 2, the land sold on the January following for non-payment of the special tax, and in the following June, the land owner paid the amount for which his land was charged to the city treasurer, and the city in the meantime had



faithfully, and in the manner prescribed by law.<sup>49</sup> When public officers act within the scope of their powers, and the record contains no evidence of fraud, corrupt motive or intentional favoritism, the presumption is that, in making the taxing district and the assessment they acted in good faith, and have correctly and faithfully exercised the discretion reposed in them, which presumption must be rebutted by showing affirmatively that something was omitted or improperly done, by one charging them with irregularity.<sup>50</sup> It has been held that in proceedings to vacate an assessment for a local improvement the burden of proof is upon the petitioner, and that every presumption is in favor of the validity of the assessment.<sup>51</sup> But this seems like a very harsh rule, and contrary to that usually appertaining to proceedings *in invitum*. It is a recognized rule of construction, especially applicable to special assessment cases, that those things which the law regards as the substance of the proceeding cannot by the courts be treated as immaterial, that the record must show affirmatively a compliance with all the conditions essential to a valid exercise of the taxing power, and that their omission will not be supplied by presumptions.<sup>52</sup> It is probable, however, the actual difference between the courts is less in the

abandoned the opening, the owner was entitled to recover from the city the full amount paid by him as upon a failure of consideration. *Valentine v. St. Paul*, 34 Minn. 446, 26 N. W. 457.

<sup>49</sup> *People v. Walsh*, 96 Ill. 232, 36 Am. Rep. 135; *Shimmons v. Saginaw*, 104 Mich. 511, 62 N. W. 725; *St. Joseph v. Farrell*, 106 Mo. 437, 17 S. W. 497; *Barber Asphalt Pav. Co. v. Ullman*, 137 Mo. 543, 38 S. W. 458; *Beck v. Holland*, 29 Mont. 234, 74 Pac. 410.

<sup>50</sup> *Powers v. Grand Rapids*, 98

Mich. 393, 57 N. W. 250; *McAuley v. Chicago*, 22 Ill. 564.

Under a charter requiring the city council to review a special assessment roll, consider the objections, and when satisfied with the same, confirm it by resolution, it will be presumed, under a resolution accepting and adopting such a roll that the council did its full duty. *Auditor General v. Hoffman*, 132 Mich. 198, 93 N. W. 259.

<sup>51</sup> *In re Brady*, 85 N. Y. 268; *In re Voorhis*, 90 N. Y. 668.

<sup>52</sup> *Smith v. Omaha*, 49 Neb. 883, 69 N. W. 402.



rule itself, than in the manner of stating it. Where the proceedings in a special assessment matter show upon their face merely that the aggregate amount of the assessment is placed upon benefited property, it will not be conclusively presumed that the assessment is limited to the special benefits conferred, or that it has been properly made.<sup>53</sup> The failure of the record to show all the steps required by statute to be taken will not be aided by presumptions.<sup>54</sup>

### Apportionment — Fixing the taxing district.

**465.** The general principles which govern in a legal apportionment have been discussed at length in a former chap-

<sup>53</sup> Chamberlain v. Cleveland, 34 Ohio St. 551.

<sup>54</sup> Morse v. Omaha, 67 Neb. 426, 93 N. W. 734.

When a city applies to take lands for widening a street, the city must show that all the prescribed requisites to the exercise of such power have been met, and there is no presumption that they have been observed and conformed to. In re City of Buffalo, 78 N. Y. 362.

#### *None from signing petition.*

The mere fact that a property owner signs a petition for street paving affords no grounds for the presumption that the petitioner assents to irregular or void proceedings of the city council in the performance of such duties as may devolve upon it after the work is completed. Wakeley v. Omaha, 58 Neb. 245, 78 N. W. 511.

#### *Use of patented material.*

Even though the use of patented materials are unauthorized in a contract for street work, the circumstance that materials were used which were marked "patented," does not raise a presumption

that they were patented, where the superintendent of streets certifies that the work was properly done. Dunne v. Altschul, 57 Cal. 472.

#### *As to benefits.*

An order laying an assessment for alteration of a street on the estates named in a schedule annexed, and entitled, "schedule of assessments upon the estates that were benefited by the alteration," imports that the schedule includes all the abutting estates which were benefited. Jones v. Boston, 104 Mass. 461.

#### *That public office is kept open at proper time.*

It is a legal presumption that when a city council, acting as a board of equalization, meets at the office of the city clerk at a time fixed by notice and statute, and takes a recess subject to the call of the chairman after part of the business is completed, but not all of it, the city clerk remains present at his office during the remainder of the time fixed by notice, to receive complaints and give information. John v. Connell, 98 N. W. (Neb.), 457.



ter,<sup>55</sup> but some more specific details remain to be included. Within the limitation as to benefits conferred, the power of the legislature to fix the limits of the taxing district, and the proportions in which the cost shall be divided between real property in such district, and the municipality at large, is almost unlimited. It may create a special taxing district without regard to the boundaries of counties, townships, or municipalities,<sup>56</sup> but the power of establishing such districts within cities and villages is usually vested in the city council or village board by charter or statute, subject to the rules therein provided; and where such rule is so made, the council is without power to change it, or to enforce an assessment when the contract makes an assessment district which is not in conformity with the ordinance authorizing the improvement.<sup>57</sup> When the limits are within the discretion of the council, they are still subject to the requirement that the improvement shall be so far single that some benefit will presumptively flow to the property subjected to taxation.<sup>58</sup>

**466.** The extent of the assessment district must depend upon the facts of each case; but where, in any case, it is made clearly to appear that through fraud or mistake property is improperly included or excluded, the court may interfere to vacate or set aside an assessment, although they will not interfere where the local board exercises its discretion except to correct a clear abuse thereof,<sup>59</sup> and although

*That preliminary report was properly made.*

The proceedings of the council showing that the preliminary report and recommendation had been made to it, and that it thereupon proceeded to make the improvement so recommended, are presumptive evidence that such report and recommendation were properly made. *Reynolds v. Schweinefuss*, 27 Ohio St. 311.

<sup>55</sup> Ch. III.

<sup>56</sup> *Commissioners v. Harrell*, 147 Ind. 500, 46 N. E. 124.

<sup>57</sup> *Cooper v. Nevin*, 90 Ky. 85, 13 S. W. 841; *Haisch v. Seattle*, 10 Wash. 435, 38 Pac. 1131.

<sup>58</sup> *Davis v. Litchfield*, 145 Ill. 313, 21 L. R. A. 563, 33 N. E. 888.

<sup>59</sup> *State v. District Court*, 33 Minn. 295, 23 N. W. 222; *Davis v. Litchfield*, *supra*; *State v. District Court (Minn.)*, 103 N. W. 744.



the court may declare a taxing district to be unreasonable, it is utterly without power to establish a new one.<sup>60</sup> It has been held that fixing the limits of a taxing district in advance of a hearing upon the question of benefits and damages, renders the proceedings invalid; but this is contrary to all the principles which logically underlie the subject of apportionment, for it is manifest that the assessment cannot be actually made until the limits of the district are prescribed, and the case as authority should be limited to a strict construction of the word "hearing."<sup>61</sup> Another case holds that whether the improvement will benefit the particular district, is left to the judgment of the corporate authorities, and that their determination is final and conclusive, where there is no statutory provision for appeal from that decision, and that there is no power in the courts to review such determination at the instance of the property owners who are specially taxed.<sup>62</sup> But as an authority this case is entirely discredited, and it is beyond doubt that a court of equity would interfere upon a proper showing.

**467.** Although the power to create taxing districts originates in the legislature, that body cannot of itself make the levy of the tax. Accordingly, where an act in relation to a swamp land reclamation district requires the trustees to estimate the cost of the work "based upon the books and vouchers thereof," and the amount so reported was to be assessed upon the lands, such act is unconstitutional as being a levy by the legislature in a local district.<sup>63</sup> Fixing a taxing district by certain city blocks, giving their numbers, sufficiently describes the district.<sup>64</sup> A district of some kind, fixed by some specific rule or authority, is essential to a valid tax,<sup>65</sup> but it is not a valid objection that the assessors acted on an

<sup>60</sup> *Kansas City v. Morton*, 117 Mo. 446, 23 S. W. 127.

<sup>61</sup> *State v. Otis*, 53 Minn. 318, 55 N. W. 143.

<sup>62</sup> *Mayor, etc., v. Johns Hopkins Hospital*, 56 Md. 1.

<sup>63</sup> *People v. Houston*, 54 Cal. 536.

<sup>64</sup> *St. Louis v. Koch*, 169 Mo. 587, 70 S. W. 143.

<sup>65</sup> An act for improving a street, which neither fixes the assessment



erroneous principle, where it is a matter of judgment on their part,<sup>66</sup> while a certificate that they assessed the cost of the improvement equitably upon the property fronting on the street, is fatally defective, as not showing that any legal rule of apportionment was applied in making it.<sup>67</sup> Whatever the rule may be, it must be applied in good faith, and the rule and method of its application must appear on the face of the proceedings.<sup>68</sup> It is immaterial, as affecting the constitutionality of an act, that the apportionment thereunder has been fair, as the act is to be tested by what may be done under it, and not by what has been done.<sup>69</sup> The provision of a city charter which declares that the board of assessors shall assess the amount ordered to be assessed for local improvements upon the parcels of land benefited by the improvement, in proportion to such benefit, has the effect of making such board the proper body to fix the assessment district.<sup>70</sup>

**468.** It will be presumed that the city authorities, in making special assessments, did so with reference alone to the special benefits accruing to the property assessed; and when they have, in good faith, endeavored to apportion to each tract or parcel of land in the district its proper share of the expense of construction, as measured by the special benefits accruing, their action will not be annulled unless it is affirmatively shown that the result of the apportionment was not according to benefits. In making such an appor-

district, or vests in the assessing board such a power, is impracticable, as every freeholder in the city must have an interest to decide his own property is not benefited, and such act makes three of such freeholders the assessing board. *Montgomery Avenue case*, 54 Cal. 579.

<sup>66</sup> *Re Cruger*, 84 N. Y. 619.

<sup>67</sup> *State v. Paterson*, 37 N. J. L. 412.

<sup>68</sup> Where the statute so provides the court to whom the report of assessment is made can refer the same back to the assessors, so they may certify as to the basis upon which the assessment was made. *State v. Hotaling*, 44 N. J. L. 347.

<sup>69</sup> *Stuart v. Palmer*, 74 N. Y. 183, 30 Am. Rep. 289.

<sup>70</sup> *People v. Buffalo*, 147 N. Y. 675, 42 N. E. 344.



tionment absolute equality is not to be expected.<sup>71</sup> But where the commissioners were directed to assess all the real estate in a certain designated district "in proportion, as nearly as may be, to the advantage which each shall be deemed to acquire by the making of said improvement," and they divided the territory designated into two districts, one of which they decided would receive special benefits from the improvement, and the other only general benefits, and adopting in the latter a totally different rule from the one used in the former, the assessment was void, the effect being to contract the area of special benefit fixed by the council.<sup>72</sup> Where an apportionment is reported to the council by

<sup>71</sup> *Denver v. Kennedy* (Colo.), 80 Pac. 122; *Medland v. Linton*, 60 Neb. 249, 82 N. W. 866.

*Benefit to property outside of district.*

It is not an abuse of discretion for the council to fix an assessment district as 300 feet in width on each side of a street, and the whole length through which it is to be opened, although property outside such district may be specially benefited, nor will the courts review such action of the council unless it appears they acted fraudulently or in bad faith. *Power v. Detroit* (Mich.), 102 N. W. 288; *Brown v. Grand Rapids*, 83 Mich. 101, 47 N. W. 117; *Davies v. Saginaw*, 87 Mich. 439, 449, 49 N. W. 667, 669.

*Determination of benefits.*

The resolution of the common council fixing the assessment district and declaring the amount to be assessed thereon for a special improvement is a legal determination that the benefit conferred upon that district is equal to said amount, and the spread-

ing of such sum upon the assessment role, and the confirmation of the role by the council, determines that the proportion of the aggregate benefit received by each parcel is equal to the burden imposed and in the absence of fraud, oppression or manifest mistake, such determinations are conclusive. *Davies v. Saginaw*, 87 Mich. 439, 49 N. W. 667.

<sup>72</sup> *Ellwood v. Rochester*, 122 N. Y. 229, 25 N. E. 238.

Where commissioners of assessment apportion the money to be raised for widening a street, into two parts, one on the property on the street widened, and the other on the property fronting on cross streets determined to be benefited, and no complaint is made of the correctness of this apportionment, the owners of lots on the widened street cannot afterwards be heard to complain of the manner in which the part apportioned to the cross streets is afterwards apportioned among the property owners therein, nor *vice versa*. *Piper's Appeal*, 32 Cal. 530.



the city engineer and adopted, it then becomes the act of the council to the same extent as if the council had itself made the apportionment.<sup>73</sup> And bearing in mind that the levying of an assessment is an exercise of the taxing power, the legislature is at liberty in its discretion, to impose the whole burden of the cost of the proposed improvement upon the neighboring proprietors to be benefited thereby; and so it might, in its discretion, limit or extend the district to be taxed, and thus increase or diminish the sum to be paid by any particular proprietor. The imposition of not exceeding one tenth of the tax upon the city at large is to that extent a relief to the adjoining property-owners, and not a hardship furnishing grounds of complaint.<sup>74</sup> That an assessment was ordered only on property fronting, abutting and adjacent to a certain street for improvements thereon, does not, as a matter of law, unduly limit the district benefited, in the absence of proof that there was any outside of that limit which would be benefited,<sup>75</sup> nor does the recital in a resolution of intention of the words describing the proposed work as "of more than local and ordinary public benefit," make it mandatory upon the council to establish a district of larger area than the lots fronting on the street.<sup>76</sup>

**469.** An objection that the area of assessment for benefits is too small is unavailing, as is one that a paving improvement terminates in the middle of a block, and makes an assessment district which divides a block, these being matters confided to the discretion of the local authorities.<sup>77</sup> In case the apportionment for a drainage assessment be made by the

<sup>73</sup> *Nevin v. Roach*, 86 Ky. 492, 5 S. W. 546.

A statute requiring the council to designate the lots constituting the assessment district is complied with by their instructing the city engineer to prepare such map, and then adopting it. *Auditor General v. Calkins*, 136 Mich. 1, 98 N. W. 742.

<sup>74</sup> *Uhrig v. St. Louis*, 44 Mo. 458; *State v. St. Louis*, 52 Mo. 574.

<sup>75</sup> *Hennessy v. Douglas Co.*, 99 Wis. 129, 74 N. W. 983.

<sup>76</sup> *O'Dea v. Mitchell*, 144 Cal. 374, 77 Pac. 1020.

<sup>77</sup> *Brevoort v. Detroit*, 24 Mich. 322; *In re Cruger*, 84 N. Y. 619.



acre, instead of according to benefits as required by the statute, the assessment is void.<sup>78</sup> A resolution referring to the electors the question as to issuing bonds for improving a certain street, stating that the owners of property abutting a certain part of the street were to pay a specified portion of the cost, is not invalidated on the ground that it was left to the people to fix the district. The question submitted to the people was the issue of bonds, and not the size of the district.<sup>79</sup> And where an appeal was taken eight years after the determination of commissioners, by one party on the question of who was benefited or how much, the question was opened as to the successful appellant only.<sup>80</sup> The excess of cost of the improvement over the benefit assessed must be

<sup>78</sup> *People v. County Court*, 55 N. Y. 604.

Where the charter authorizes the levying of an assessment for street improvements "by foot frontage, according to benefits, or by land values, as the council shall determine," an assessment based on the value of each parcel "exclusive of improvements," is void. *Walker v. Ann Arbor*, 118 Mich. 251, 76 N. W. 394.

On the theory that all damages resulting from the opening of a street must be paid by assessment for benefits upon the property fronting such street, a mathematical apportionment of the increased damages obtained on appeal, among the properties benefited, *pro rata*, according as originally assessed, is illegal. In *re Opening of Park Avenue*, 83 Pa. St. 167.

<sup>79</sup> *Boehme v. Monroe*, 106 Mich. 401, 64 N. W. 204.

<sup>80</sup> *County Commissioners of Hampshire*, 143 Mass. 424, 9 N. E. 756.

*Apportioning constituent parts of improvement.*

Power to "grade, pave, macadamize or otherwise improve any portion of the width of any street" contemplates each as a separate improvement, and the apportionment made as indicated. *Savannah v. Weed*, 96 Ga. 670, 23 S. C. 900.

*Length of street.*

Where the statute provides that when a street more than one mile long is opened, only half the cost shall be assessed on abutting owners, and if the street, when laid out, is a perfect street by itself, less than a mile in length, the owners of property benefited must bear the whole burden. *Mayor v. Tiffany*, 68 Hun 158, 22 N. Y. Supp. 604.

*Apportionment between remainderman and tenant by courtesy.*

The cost of the reconstruction of a worn out sidewalk is not to be apportioned between the tenant by the courtesy and the remainderman, but the entire cost is to



paid out of the general or ward fund,<sup>81</sup> and in cases of grading or paving a street, which is to be paid for by an assessment against abutting property, it is essential that the lots on both sides of the street be assessed, as an assessment against one side only will be void.<sup>82</sup>

### Benefits.

**470.** For the expenses of local improvements, it is competent for the legislature to provide, either by general taxation upon the property of all the inhabitants of the municipality, or by assessment upon adjacent property which is specially benefited by reason of the improvement.<sup>83</sup> This liability of lands to assessments for local improvements springs from the construction only of an authorized public work which confers a special benefit upon lands. It arises when the work is performed, and the assessment proceeding is merely the determination of the amount which, within the limit of said imparted value, shall be returned to the public.<sup>84</sup> The term "general benefits," and like expressions,

be borne by the former. *Hackworth v. Louisville, etc., Co.*, 106 Ky. 234, 50 S. W. 33.

In Buffalo, board of assessors make apportionment.

*Smith v. Buffalo*, 159 N. Y. 427, 54 N. E. 62.

<sup>81</sup> *Walters v. Lake*, 129 Ill. 23, 21 N. E. 556; *Kimble v. Peoria*, 140 Ill. 157, 29 N. E. 723; *Newman v. Chicago*, 153 Ill. 469, 38 N. E. 1053; *Adams v. Shelbyville*, 154 Ind. 467, 49 L. R. A. 797, 77 Am. St. Rep. 484, 57 N. E. 114.

<sup>82</sup> *San Diego Inv. Co. v. Shaw*, 129 Cal. 273, 61 Pac. 1082; *Drake v. Grout*, 21 Ind. App. 534, 52 N. E. 775.

*What is not a levy.*

The legislative discretion as to how an apportionment on a paving assessment is to be made is not

objectionable as the levy of a tax, it being merely the adoption of a rule. *Denver v. Londoner*, 33 Colo. 104, 80 Pac. 117.

*Apportionment by area — Relief.*

The rule of apportionment of sewer benefits according to area is prima facie valid; but where any general method employed, though prima facie valid, works injustice, relief in proper circumstances may be granted. *Spalding v. Denver*, 33 Colo. 172, 80 Pac. 126; *Denver v. Dumars*, 33 Colo. 94, 80 Pac. 114; *Denver v. Londoner*, 33 Colo. 104, 80 Pac. 117.

<sup>83</sup> *Burnett v. Sacramento*, 12 Cal. 76, 73 Am. Dec. 518; *Chambers v. Satterlee*, 40 Cal. 497.

<sup>84</sup> In re Commissioners of Elizabeth, 49 N. J. L. 488, 10 Atl. 363.



means those general intangible benefits which are supposed to flow to the general public from a public improvement, while at the same time such improvement confers a "special benefit" upon property in the immediate vicinity, by the present increase in its value.<sup>85</sup> As to the area over which such special benefits, together with the amount, the judgment of the commissioners of assessment will prevail in the absence of convincing evidence against it.<sup>86</sup> A law requiring assessments for these special benefits may restrict the area of assessment to the lands fronting on the proposed street to be improved, but the fact that property outside such district may receive benefits equal to those which are assessed within the district does not affect the validity of such assessment.<sup>87</sup> The entire cost of a local improvement may be laid by special assessment under an ordinance so requiring, even if prior to its passage no steps were taken to ascertain the benefits, when the statute permits a review of the distribution of public and private cost by the court.<sup>88</sup>

<sup>85</sup> Metropolitan W. S. E. R. Co. v. Stickney, 150 Ill. 362, 26 L. R. A. 773, 37 N. E. 1098.

<sup>86</sup> State v. Newark, 48 N. J. L. 101, 2 Atl. 627.

<sup>87</sup> State v. Paterson, 42 N. J. L. 615. In its opinion, the court, speaking by Beasley, C. J., say: "Assessments confined to lands fronting on the improved street are not novelties, but have always been a part of this exceptional system. . . . The practice now in question must be taken to be a recognized part of that ancient and inveterate plan which has been resorted to in taxing the land owner for the special benefit that a public improvement of this kind has imparted to his property. Viewing it in this light, it cannot, at this late day, be discarded."

Kansas City Grading Co. v. Holden, 107 Mo. 305, 17 S. W. 798.

In the absence of constitutional restrictions, municipal authorities have the right, when lawfully authorized, to direct that the expense of a public improvement shall be assessed against the real estate specially benefited thereby. Denver v. Kennedy, 33 Colo. 80, 80 Pac. 122, 467; Palmr v. Way, 6 Colo. 106; Wolff v. Denver, (Colo. App.) 77 Pac. 364.

Under its charter, the common council of Kansas City may define the limits within which private property shall be deemed benefited by the opening of a street, but the assessment of benefits and damages must be left to a jury. Kansas City v. Baird, 98 Mo. 215, 11 S. W. 243, 562.

<sup>88</sup> Graham v. Chicago, 187 Ill. 411, 58 N. E. 393.



— Conflicting decisions.

471. The subject of benefit has been quite thoroughly discussed in a previous chapter,<sup>89</sup> but as it is, in the opinion of the writer, the sole justification for the imposition of the burden of a special assessment, and is the only principle which is so logical as to embrace all cases, and do justice to them all, still further discussion and citation of authorities can not be out of place. It is not claimed that perfect justice and exact equality can be had in all cases by its application. No system of taxation yet evolved by the brain of man has done this. But an honest and careful application of the principle of special benefits to assessment proceedings will afford more substantial justice, with less delusive exactness, than any other principle yet applied.

472. Most courts have accepted this as the foundation principle, although it is frequently evaded in practice. The Court of Appeals of Kentucky has held,<sup>90</sup> that the fact that a lot within the district assessed for street grading was not benefited thereby, *but was in fact injured*, did not exempt it from paying the proportion of cost assessed against it. The court admits that the right to make local assessments is based upon the benefit derived thereby, but say, "It by no means follows that each piece of property within the bounds over which the assessment extends must in fact derive benefit from the improvement. Whether the property in the district, considered as an entirety, will be benefited by the proposed improvement, is a question to be decided primarily by the Legislature . . . and that decision will generally be final and conclusive upon the question of benefits to the district as a whole." The judicial scarecrow of legislative omnipotence has apparently overawed the court, for in a somewhat later case the same court say, "this rule cannot be so extended as to *entirely* take from the citizen his property. It would be spoliation, and not taxation. Under the guise of benefit and taxation, he cannot be thus arbitrarily deprived

<sup>89</sup> Ch. III.

<sup>90</sup> *Pearson v. Zable*, 78 Ky. 170.



of his property.”<sup>91</sup> That is to say, grand larceny will not be permitted but petit larceny will go unnoticed. In a comparatively early case, the Supreme Court of Wisconsin clearly stated the law to be that the benefits must be actual, and not

<sup>91</sup> *Preston v. Rudd*, 84 Ky. 150, 156.

This case is as complete an example as is to be found in the books as to the spoliation and confiscation to which private property might be subject, if the principle of benefits be ignored, and that of legislative omnipotence substituted. It seems remarkable to the author that a court of the acknowledged ability of this court should have “wobbled” on this question to the extent shown by the three following citations:

The legislature has no power to impose a tax upon the land bordering on a country road to pay the entire cost of converting such road into a turnpike. All who are directly benefited by the improvement, or who, by reason of their proximity to the road, will practically derive the benefit, must be required to share the burden in order that there may be such equality and uniformity in the taxation as the constitution requires. The court say, “It is a local tax for a county purpose, a common burden imposed on a few, that violates every principle of just and uniform taxation, and borders on spoliation.” *Graham v. Conger*, 85 Ky. 582, 4 S. W. 327.

In order to make adjacent property liable for the cost of a street improvement it is not necessary that an immediate pecuniary benefit to the owner be shown. *Nevin*

*v. Roach*, 86 Ky. 492, 5 S. W. 546.

Where a contingency arises requiring an expenditure for the improvement of the principal thoroughfare of a city, it was never contemplated that the owner of property bordering on the improvement should incur the expense if it would result in the virtual confiscation of his property or the imposition of an unjust and unequal burden. *Frantz v. Jacob*, 88 Ky. 525, 11 S. W. 654.

In assessing property to pay for street improvements, the municipality having decided that the assessed area or tax district as an entirety will be benefited, by the contemplated improvement, a lot owner may be compelled to pay his proportion of the cost of the improvement unless the absence of benefit and of public need of the improvement make it manifest that the burden amounts to spoliation and not legitimate taxation, in which event the burden cannot be imposed. *Preston v. Rudd*, 84 Ky. 150.

By the improvement in question, three lots belonging to plaintiff had egress from and ingress to them totally cut off, converted into a pond by the raising of the street, and rendered almost worthless. *Id.*

“The power to impose this character of taxation must to some extent, depend upon the fact that the persons taxed are correspond-



constructive or arbitrary; and although the case has since lost some of its weight as authority on other questions involved in the decision, its statement as to the principle of benefits has never been modified.<sup>92</sup> The case of *Norwood v. Baker*,<sup>93</sup> decided by the Supreme Court of the United States in 1897, was long considered the leading authority on this subject of benefits, and probably no decision emanating from the federal Supreme Court for many years was considered at first to be so sweeping, and has proven since to be so imperfectly understood and applied. It is a matter of sincere regret that the highest court in the land has in effect extracted from that decision its virile force. But the great principle laid down in that case that an assessment in substantial excess of the benefits received was a taking without due process of law, is still the law of the land.<sup>94</sup>

ingly benefited by the expenditure thereof. The courts would hesitate to interfere in cases in which it may be a question of doubt as to whether the persons taxed receive commensurate benefits; but where the taxation is so excessive as to render it doubtful whether the property to be benefited will suffice to pay the assessments against it they can no longer be deemed taxation. To enforce their collection would be the exercise of absolute and arbitrary power over the property of the citizen—a power which, under our form of government, does not exist, even in the largest majority. Whenever such a case may arise the courts will be prompt to afford protection.” *Broadway, etc., Church v. McAtee*, 8 Bush. 508, 8 Am. Rep. 480.

<sup>92</sup> In respect to benefits to be assessed, it has finally been decided and followed that such benefits must be *actual* and not con-

structive or arbitrary; and that an assessment which is in excess of such benefits falls within the rule of the constitution as taxation, or, in other words, actual benefits are assessments proper for local improvements, the power over which existed in the legislature, antecedent to the adoption of the constitution, as an inherent municipal power, and to that extent is not affected by the constitution; but all in excess of such actual benefits is a general or public tax, to be borne by the people of the district according to the constitutional rule of uniformity. *Donnelly v. Decker*, 58 Wis. p. 465, 46 Am. Rep. 637, *op.* and 17 N. W. 389.

<sup>93</sup> *Norwood v. Baker*, 172 U. S. 269, 43 L. ed. 443, 19 Sup. Ct. Rep. 187.

<sup>94</sup> “The stake driven by the decision in *Norwood v. Baker* is timely. Judicial expression on the subject was indefinite. There was



**473.** The state which judicially went to the greatest extreme on the question of benefits was Iowa, whose supreme court denied the principle *in toto*.<sup>95</sup> This stand, by logical sequence, brought that court in conflict with the federal supreme court, the former court having held that a non-resident of the state was personally liable for the amount remaining due upon a special assessment, after the sale of the property.<sup>96</sup> The legislature of the state, by statute, has provided that the principle of benefits shall be the guide in future special assessment proceedings.

**474.** To acknowledge the principle of benefits, but deny its application is in effect what some courts have apparently sanctioned when they hold that the amount of benefits is determined by the report of the commissioners, and is not open to inquiry, but is final. It will, however, usually be found upon a careful reading of the cases, that the general statement is broader than the court intended, and that the amount of the assessment may be inquired into for fraud or

a tendency to lose sight of the equitable basis which justifies the assessment upon private property of the cost of public improvements. The arbitrary act of the legislative body was often accepted as final, without regard to its justice. It is to be hoped that the highest court in the land has spoken finally, and will not recede from its position." *State v. Robert P. Lewis Co.*, 82 Minn. 390, 401, 53 L. R. A. 421, 85 N. W. 207, 86 N. W. 611.

<sup>95</sup> Where a city is authorized to make an improvement in a certain district, and assess the cost on all the real estate within such district, the fact that such improvement (building a sewer) will not benefit certain real estate therein is no reason why the tax should not be enforced as to such prop-

erty. *C. M. & St. P. R. Co. v. Phillips*, 111 Iowa, 377, 82 N. W. 787.

Special benefits are not essential to maintain a paving assessment, and the whole question of benefits, general or special, is a matter for legislative discretion. *Hayden v. Atlanta*, 70 Ga. 817.

<sup>96</sup> *Dewey v. Des Moines*, 173 U. S. 193, 43 L. ed. 665, 19 Sup. Ct. Rep. 379.

"The state may provide for the sale of the property upon which the assessment is laid, but it cannot under any guise or pretense proceed farther and impose a personal liability upon a non-resident to pay the assessment or any part of it. To enforce an assessment of such a nature against a non-resident, so far as his personal liability is concerned, would



palpable mistake of fact, or abuse of discretion, if the parties be not estopped by previous conduct, to assert their rights.<sup>97</sup>

— Rule for assessment of benefits.

**475.** The assessment of a proportionate share of the cost of a local improvement by the officers of a municipal corporation, upon parties specially benefited thereby, cannot be made in excess of the value of the benefit conferred; but where the

amount to the taking of property without due process of law, and would be a violation of the Federal Constitution."

*Illinois.*

<sup>97</sup> The benefit to a lot for which a special assessment is charged thereon cannot be contested upon an application for judgment against the land for a delinquent instalment of such assessment. *People v. Ryan*, 156 Ill. 620, 41 N. E. 180.

*Missouri.*

The amount of the benefits is determined by the report of the commissioners, and is not open to fresh inquiry on a suit to recover the special tax bill. The only defense there is the validity of the assessment and levy. *St. Louis v. Ranken*, 96 Mo. 497, 9 S. W. 910; *St. Louis v. Excelsior Br. Co.*, 96 Mo. 677, 10 S. W. 477.

*New Jersey.*

"It was also urged that the lots were not assessed according to the benefits received. The principle which controlled the judgment of the commissioners is not stated by them. If they adopted an arbitrary scale for the whole line of the avenue which came under the improvement, their assessment is manifestly erroneous for that cause. It can hardly be assumed

that in the length of more than a mile of street no lots were benefited more than others, and that the quantity of earth and rock removed from the front of each lot, or of earth placed before it, can be the proper criterion of the estimate of benefit which such lot would receive from so expensive an improvement." *State v. Hudson*, 29 N. J. L. 104.

The transfer by a turnpike company of its franchise to a public road board, confers no special benefit upon adjacent land owners for which an assessment can be made. *Speer v. Essex, etc., Bd.*, 47 N. J. L. 101.

The duty of commissioners in making an assessment for benefits is to take into consideration all property benefited within the area of assessment; but their determination will not be disturbed for an omission of that duty if it clearly appears that, had the duty been fully performed, the assessment upon the persons objected would have been neither increased nor diminished. *Davis v. Newark*, 54 N. J. L. 144, 23 Atl. 276.

*Ohio.*

The principle that the finding of the city council as to benefits conferred by a certain improvement is conclusive on all parties



improvement directly benefits the property of such parties, the question of the extent of the value thereof must be determined by the proper officers of the corporation. The courts will not interfere in such a case, unless the property assessed is so situated as to render it physically impossible for the improvement to benefit it; or where the mode of levying the assessment excludes the consideration of the question of value of the improvements.<sup>98</sup> The true inquiry is, what will the in-

concerned, was laid down by this court in *Chamberlain v. Cleveland*, 34 Ohio St. 551.

*Oregon.*

Where the measure of assessments for street improvements in a city is limited to the amount of benefits derived, and the common council is invested with a discretion in determining the amount, the courts will not review the determination of the council, so long as its discretion is honestly exercised and not abused. *O. & C. R. Co. v. Portland*, 25 Or. 229, 22 L. R. A. 713, 35 Pac. 452.

*Pennsylvania.*

As a general rule, the property owner cannot defend on the ground that his property is not benefited by an improvement, but this has no application to the roadbed of a railroad company. This is the one species of property which the law presumes can derive no possible benefit from street improvements. *Allegheny v. West Penn. R. Co.*, 138 Pa. St. 375, 21 Atl. 763.

This state has a peculiar system. It having been early decided that the front foot system, approved by the supreme court of the state, did not apply to rural districts, legislation was had authorizing cities to make assessments for the first

grading of a street, either by the front foot rule, or according to benefits, for the purpose, say the court, of enabling "a city to grade its streets stretching out into the rural parts of the city and, where the situation of the properties along the street was such as to make it just to do so, to impose the cost of the improvement on the property benefited." *Scranton v. Bush*, 160 Pa. St. 499, 23 Atl. 926.

*Washington.*

In assessing land according to benefits, it is not competent to tax land not fronting on the improvement, or to take into consideration the benefit such portion might derive by improving the street in front of other portions. *Ryan v. Sumner*, 17 Wash. 228, 49 Pac. 487.

*Wisconsin.*

The determination of the body charged with the duty of making an assessment of benefits and damages in a street improvement, that a particular lot is benefited thereby is, when confirmed by the common council, final unless impeached for fraud. *Wright v. Forrestal*, 65 Wis. 341, 27 N. W. 52.

<sup>98</sup> *Paulson v. Portland*, 16 Or. 450, 1 L. R. A. 673, 19 Pac. 450.



fluence of the proposed improvement be upon the market value of the property claimed to be benefited thereby. The jury should consider what the property is then fairly worth, in the market, and what will be the value when the improvement is made.<sup>99</sup> If a piece of property is enhanced in value, the benefits to such property cannot be said to be common to any other piece of property specially enhanced in value, and it is thus specially benefited within itself, and irrespective of the benefit that may be conferred by the improvement upon other properties. A consideration of facts and circumstances tending to show those general benefits supposed to flow to the community at large, or to the public generally, from the construction of the public work, and the effect of which, in determining the injury or benefit to the particular tract of land, can not be otherwise than conjectural or speculative, should be excluded.<sup>1</sup> Under charter provisions authorizing the commissioners to assess benefits for a street improvement on the real estate and against the persons benefited thereby, the assessment is not limited to abutting property, but any real estate within the city limits that is benefited is by that fact alone made liable to assessment.<sup>2</sup> The benefits resulting from street improvements accrue to the owner through his estate in land, whether fee or leasehold, and not to the buildings thereon. The enhancement in value accrues only to the land.<sup>3</sup> And because the increased market value of the

<sup>99</sup> *Kankakee Stone & Lime Co. v. Kankakee*, 128 Ill. 173, 20 N. E. 670.

The situation of the property, the use to which it is devoted and of which it is susceptible, the character and extent of the business to which it is adapted before and after the construction of the public work, and, indeed, every fact and circumstance legitimately tending to show a depreciation or increase of the value of the property, are proper to be considered,

so far as they tend to show the actual value of the land with and without the taking for public use. *W. S. E. R. Co. v. Stickney*, 150 Ill. 362, 26 L. R. A. 773, 37 N. E. 1098; *Chicago Union Traction Co. v. Chicago*, 204 Ill. 363, 68 N. E. 579.

<sup>1</sup> *W. S. E. R. Co. v. Stickney*, 150 Ill. 362, 26 L. R. A. 773, 37 N. E. 1098.

<sup>2</sup> *In re Amsterdam*, 126 N. Y. 158, 27 N. E. 272.

<sup>3</sup> *Piper's Appeal*, 32 Cal. 530;



land by reason of the improvement is the basis for the assessment, the particular use to which the property is put, or what the benefits would be if used for a certain purpose, is not a factor in determining benefits, and evidence thereof is properly excluded.<sup>4</sup> Where the statute prescribes no basis for estimating the cost of an improvement, or the benefits derived therefrom, the appraisers may adopt such basis as will effect a just result.<sup>5</sup>

**476.** It is not erroneous for commissioners appointed to assess benefits resulting from widening a street to assess the same upon the hypothesis that all lots on the street will be benefited in the ratio of their values, if there be evidence warranting such conclusion.<sup>6</sup> The release of land on one side of a street from the public easement, caused in straightening

*Hoffeld v. Buffalo*, 130 N. Y. 387, 29 N. E. 747.

<sup>4</sup> *Chicago Union Tr. Co. v. Chicago*, 204 Ill. 363, 68 N. E. 519; *Jones v. Chicago*, 206 Ill. 374, 69 N. E. 64; *Chicago Union Tr. Co. v. Chicago*, 207 Ill. 607, 69 N. E. 803; *Same v. Same*, 207 Ill. 544, 69 N. E. 849; *Same v. Same*, 215 Ill. 410, 74 N. E. 449. See also, *Kankakee Stone & Lime Co. v. Kankakee*, 128 Ill. 173, 20 N. E. 670.

<sup>5</sup> *Latham v. Wilmette*, 168 Ill. 153, 48 N. E. 311; *Springfield v. Sale*, 127 Ill. 359, 20 N. E. 86; *Pike v. Chicago*, 155 Ill. 656, 40 N. E. 567. Benefits are sole ground for the assessment, *Arnold v. Knoxville (Tenn.)*, 90 S. W. 469; *Stutsman v. Burlington*, 127 Ia. 563, 103 N. W. 800; *Cossitt Land Co. v. Neuscheler (N. J. L.)*, 60 Atl. 1128. The assessment is not invalidated by not being exactly proportionate to benefits in particular instances, *Louisville & N. R. Co. v. Barber Asphalt Pav.*

*Co.*, 197 U. S. 430, 49 L. ed. 819, and see, *Bates v. Adamson (Cal.)*, 84 Pac. 51. Assessments according to area are not violative of the Fourteenth Amendment, *Louisville & N. R. Co. v. Barber Asphalt Pav. Co.*, *supra*. Levee assessments made according to value under a statute are not invalid because not made according to benefits, *Porter v. Waterman (Ark.)*, 91 S. W. 754. For assessment on lots of varying depth, see *Cleneay v. Norwood*, 137 Fed. 962. For an arbitrary assessment for cost of work, see *Berdel v. Chicago*, 217 Ill. 429, 75 N. E. 386. For uniform cost for different kinds of paving and different depths, see *Cossitt Land Co. v. Neuscheler (N. J. L.)*, 60 Atl. 1128. Only property benefited can be assessed, *Naugatuck R. Co. v. Waterbury (Conn.)*, 61 Atl. 474. And proportionate to the benefits, *Johnson v. Tacoma (Wash.)*, 82 Pac. 1092.

<sup>6</sup> *Piper's Appeal*, 32 Cal. 530.



such street, is a benefit to the tract to which such land belongs, and may be considered in ascertaining benefits.<sup>7</sup> Though a tract of land used for farming purposes may not be benefited by an improvement without use as a farm, yet there is a benefit, if its value for any other purpose to which it may be adopted is thereby increased.<sup>8</sup> An unplatted tract of land within city limits is subject to taxation for special benefits received the same as though platted into blocks and lots.<sup>9</sup> The amount assessed upon a tract of land as special benefits cannot exceed the benefits arising thereto by reason of the making of a local improvement. If the amount of benefits equals or exceeds the sum required to be raised, each tract should be assessed its proportionate share of such sum, but if the sum required exceeds the benefits, then each several tract can be assessed only such sum as it is benefited, and the residue must be paid by the city from its corporate funds.<sup>10</sup> Under a charter providing that the commissioners shall assess such part of the expense on the city, and such part locally as they shall deem just, an assessment of the whole burden upon the property benefited is not for that reason unjust.<sup>11</sup> The fact that some of the improvements made on a street are incidentally beneficial to other streets in the city furnishes no reason for a reduction of the assessment against property abutting the street upon which the work was done.<sup>12</sup> Lots damaged by a change of street grade in front of them are chargeable only with the special benefits accruing from such change of grade, and not with any general benefits shared in common with other owners on the street.<sup>13</sup> But

<sup>7</sup> Cook v. Slocum, 27 Minn. 509,  
8 N. W. 755.

<sup>8</sup> People v. Markley, 166 Ill. 48,  
46 N. E. 742; Hutt v. Chicago,  
132 Ill. 352, 22 N. E. 1010. Ed-  
wards v. Chicago, 140 Ill. 440,  
30 N. E. 350, distinguished and ex-  
plained.

<sup>9</sup> Medland v. Linton, 60 Neb.  
249, 82 N. W. 866; Washburn v.

Chicago, 198 Ill. 507, 64 N. E.  
1064.

<sup>10</sup> Goodwillie v. Lake View, 137  
Ill. 51, 27 N. E. 15.

<sup>11</sup> People v. Mayor, 63 N. Y.  
291.

<sup>12</sup> Bacon v. Savannah, 105 Ga.  
62, 31 S. E. 127.

<sup>13</sup> Smith v. St. Joseph, 122 Mo.  
643, 27 S. W. 344.



if the opening of a street makes it practicable to open another contemplated street which could not have been opened before, and this fact of itself specially benefits lots adjacent to the new street, such special benefits may properly be considered in entering the special benefits conferred by the opening of the new street.<sup>14</sup> Where an ordinance for the construction of a sewer contains no provision for allowing its use to property owners beyond its present terminus, their lands cannot be legally assessed to help pay for its construction, as land not specially benefited by a proposed improvement cannot be specially assessed therefor.<sup>15</sup> And a tract that has been once assessed for the full benefits it has received because of the improvement cannot be again assessed because the amount raised by the first assessment was insufficient to pay the expenses.<sup>16</sup> To render an assessment of benefits legal, it must be regularly ascertained that the property assessed is benefited by the improvement to the precise extent of the assessment, beyond the ordinary benefit which the owner as one of the community, receives from such improvement.<sup>17</sup>

— Benefit a question of fact.

**477.** Whether or not property specially assessed for a public improvement is benefited thereby, is a question of fact, depending on the evidence.<sup>18</sup> This implies a hearing before a proper officer or tribunal, and evidence to be presented. To say that the legislature may legally declare that all property in a certain district is benefited by a public improvement therein is to violate every legal rule, and every principle upon which rests the power of special assessment. The maxim, *De minimis non curat lex*, may well be applied to the ordinary and average case; but to deny a hearing on a

<sup>14</sup> Chambers v. Cleveland, 34 Ohio St. 551.

<sup>15</sup> Edwards v. Chicago, 140 Ill. 440, 30 N. E. 350.

<sup>16</sup> Goodwillie v. Lake View, 137 Ill. 51, 27 N. E. 15.

<sup>17</sup> Nichols v. Bridgeport, 23 Conn. 189, 60 Am. Dec. 636.

<sup>18</sup> Chicago, R. I. & P. R. Co. v. Chicago, 139 Ill. 573, 28 N. E. 1108.



question of fact, when a man's property is taken for public use, is such a violent transgression of constitutional principles that it seems remarkable that any court should uphold the doctrine.

**478.** This question of fact has been held to be one for the conclusive determination of the municipal authorities, unless it is entirely clear that some of the property in the district is not benefited, in which case an attempt to charge it with part of the expense may be reviewed by the courts.<sup>19</sup> But this statement is in itself an anachronism, for how can the decision of one authority be conclusive, and yet subject to review by another? To the mind of the author, all these minor difficulties would disappear if the right of appeal or review from an assessment of benefits and damages were given in all cases of public improvements in the same manner and to the same extent as in proceedings under the power of eminent domain.

**479.** The fact that the amounts assessed severally against various lots exactly equals the cost of the improvement thereof, and are in exact proportion to the frontage of the several lots, will not of itself vitiate the assessment, provided it appears that the special benefits are equal to such cost and in proportion to the frontage.<sup>20</sup> If the assessors conclude that the special benefits extend to any lot of land so circumstanced that a reasonable owner would use it, or offer it for

<sup>19</sup> *People v. Brooklyn*, 23 Barb. 166.

"It appears that the assessment upon some of the lots is greater than their value for the purposes of annual taxation; and hence it is claimed that this is confiscation instead of an assessment. The assessment is doubtless large upon the property assessed. The improvements were expensive and extravagant, under a system of legislation the wisdom of which may well be questioned. But we can

furnish no remedy. It does not appear that the assessment upon the property benefited is unequal, and it does not appear how near their true value the lots were valued for annual taxation; nor does it appear that the property was not really benefited to the extent of the assessment." *Earl, J., In re Sackett, etc., Streets*, 74 N. Y. 95.

<sup>20</sup> *Walker v. Aurora*, 140 Ill. 402, 29 N. E. 741



sale only as an entirety, then they should levy the assessment upon the whole lot, although part of it may lie beyond the lines of the district previously established.<sup>21</sup>

— What must affirmatively appear.

**480.** In levying special assessments for benefits received, the record must affirmatively show a compliance with all essential conditions to a valid exercise of the taxing power, that the assessment does not exceed the benefit, and any omission of such facts will not be supplied by presumptions.<sup>22</sup> Where the statute requires property to be assessed to pay for improvements according to the benefits received, it is not sufficient to assess each lot according to its frontage. The commissioners must exercise their judgment as to the amount of benefit each lot receives, and must assess the property accordingly, and the report must show that the assessment has been

<sup>21</sup> *State v. Essex, etc., Board*, 51 N. J. L. 166, 16 Atl. 695.

An assessment of \$2 per front foot on a lot very near a park, and \$50 a front foot on property a mile or more away, is not such self-evident inequality as to be so declared as a matter of law. "Two dollars a foot on a lot in an unimproved and sparsely settled district remote from the center of trade might be in fact a far greater rate *ad valorem* than fifty dollars a front foot on a business lot in the heart of the traffic. *Kansas City v. Bacon*, 157 Mo. 450, 57 S. W. 1045.

<sup>22</sup> *Medland v. Linton*, 60 Neb. 249, 82 N. W. 866; *Skinkel v. Essex, etc., Board*, 47 N. J. L. 93; *Allison Land Co. v. Tenafly*, 68 N. J. L. 205, 52 Atl. 231; *Rosell v. Neptune City*, 68 N. J. L. 509, 53 Atl. 199; *Poulin v.*

*Rutherford*, 65 N. J. L. 538, 47 Atl. 439.

Note.—The statutes under consideration provide that an assessment may be made to the extent of benefits received, and that the commissioners shall make a just and equitable assessment of the damages or benefits with due regard to the rights and interests of all persons concerned, as well as to the value of the lands and real estate taken, damaged or benefited. The court say: "These two sections provide a constitutional mode of making the assessment, but the report of the commissioners is fatally defective in failing to certify that the assessment against the prosecutor is not in excess of the benefits conferred upon his lands. The assessment must therefore be set aside." *Poulin v. Rutherford, supra.*



so made.<sup>23</sup> Under a charter where the cost of street improvements is chargeable to the lots or parcels of land to be assessed “in proportion to the benefits secured thereby,” an assessment according to the frontage of each lot on the street improved is void, unless it affirmatively appears that it was made upon an actual view of the property and a consideration of the benefits actually accruing to each parcel,—even where the charter constitutes the property fronting upon the improvement as the assessment district.<sup>24</sup> It is true there are some authorities which hold that the actions of the taxing officers are presumptively in accordance with the statute, and therefore correct, but the rule does not apply to the assessment of benefits.

— Front foot assessments — Compliance with statute.

**481.** An assessment under the rule of benefits is not necessarily vitiated by an assessment according to frontage.<sup>25</sup> And one court which has most strenuously upheld the doctrine of benefits has held that assessments for benefits by the lineal foot along the frontage are not necessarily wrong, and that there is no rule that condemns such method without proof of its injustice, either apparent on the record or es-

<sup>23</sup> *State v. Hudson*, 29 N. J. L. 104; *Lieberman v. Milwaukee*, 89 Wis. 336, 61 N. W. 1112.

<sup>24</sup> Where the cost of street improvements is chargeable to the lots and parcels of land benefited thereby, an assessment upon the property fronting the improvement only, with nothing to show that the proper officers determined, in the exercise of their judgment, that no other property was benefited, is presumed to be unequal and unjust, and payment by a property owner of his proportion of the assessment is not a condition precedent to his obtaining

equitable relief against the assessment. *Hayes v. Douglas Co.*, 92 Wis. 429, 31 L. R. A. 213, 53 Am. St. Rep. 926, 65 N. W. 482.

The fixing of a special amount of benefits for each lot is not an objectionable method of assessment if it appears that the amount so fixed was determined upon the basis of the peculiar benefit received by each lot from the improvement. *Van Wagoner v. Patterson*, 67 N. J. L. 455, 51 Atl. 922.

<sup>25</sup> *Beck v. Holland*, 29 Mont. 234, 74 Pac. 410.



established by independent testimony.<sup>26</sup> Like all general statements attempted to be condensed in a single sentence, they are either too broad or too narrow, and this one is clearly too broad. A report of the appraisers to the effect that they have assessed the expense of the improvement according to the frontage, without finding that the special benefits are in that proportion, would not be in compliance with the law.<sup>27</sup> That the assessment against objector's lots corresponds in amount with those against other lots in proportion to frontage does not, of itself, overthrow the assessment, where the commissioner testifies that he made the assessment according to benefits.<sup>28</sup> As a general rule, it may be laid down that the principle upon which the assessment was made, the rule adopted, must affirmatively appear in the assessor's report.

— Future benefits not to be considered.

**482.** It is the *present* enhancement in value of the property assessed which authorizes the assessment for benefits; and the future effects of the same improvement or the effect of future contingent improvements, are not to be considered in estimating benefits. Where property cannot be benefited except in case of a subsequent work for which no provision has been made, it cannot be assessed for such improvement.<sup>29</sup> Whatever may be the effect on the market value of property, if the act ordered to be done is a proper subject for consideration, all natural and probable results to flow from the improvement ordered may properly be considered in estimating benefits. But the future action of the city as to

<sup>26</sup> State v. Passaic, 37 N. J. L. 65.

<sup>27</sup> Springfield v. Sale, 127 Ill. 359, 20 N. E. 86.

<sup>28</sup> Sanitary District v. Joliet, 189 Ill. 270, 59 N. E. 566.

<sup>29</sup> Title Guaranty & Trust Co. v. Chicago, 162 Ill. 505, 44 N. E. 832; Hyde Park v. Chicago, 132

Ill. 100, 23 N. E. 590; Hutt v. Chicago, 132 Ill. 352, 23 N. E. 1010; Edwards v. Chicago, 140 Ill. 440, 30 N. E. 350; Washington Ice Co. v. Chicago, 147 Ill. 327, 37 Am. St. Rep. 222, 35 N. E. 378. But see Harris v. Chicago, 162 Ill. 288, 44 N. E. 437.



ordering additional improvements can be regarded neither as a probable or natural consequence to flow from the improvement. Thus, where property is taken for extending a street, the commissioners, in assessing actual benefits, have no right to take into consideration the probability of the city ordering a bridge over the river crossed by the street. Benefits assessed must be confined to the improvement ordered.<sup>30</sup> Nor can an assessment be made upon the prospect of a future connection with a sewer unless a drainage district is created which will drain into it, or some provision be made to eventually ensure such connection; <sup>31</sup> nor upon lands lying beyond the terminus of a proposed sewer for benefits to accrue thereafter by an extension of the sewer.<sup>32</sup> In Wisconsin, the rule appears to be different, and perhaps also in New Jersey.<sup>33</sup>

#### — Offsetting benefits and damages.

**483.** Unless there be some constitutional inhibition against the offsetting of benefits against damages, *pro tanto*, there seems no reason why it should not be permitted. Under the constitution of Illinois, it has been held that supposed benefits to property not taken cannot be set off against the compensation to be paid for land actually taken, but in

<sup>30</sup> Hutt v. Chicago, 132 Ill. 352, 23 N. E. 1010; Holdom v. Chicago, 169 Ill. 109, 48 N. E. 164.

<sup>31</sup> Title Guaranty & Trust Co. v. Chicago, 162 Ill. 505, 44 N. E. 832.

<sup>32</sup> Edwards v. Chicago, 140 Ill. 440, 30 N. E. 350.

<sup>33</sup> Where the opening of a street makes practicable the building of a bridge across a river at that place, which bridge would be a public convenience and almost a necessity, the benefits accruing to such lots from the expectation that such bridge would be built may be considered in assessing the benefits from the opening of such

street. Dickson v. Racine, 65 Wis. 306, 27 N. W. 58.

When the benefit to property accruing from the construction of a trunk sewer is prospective only, depending upon the construction of another and connecting sewer or drain not yet built, the assessment upon such property is to be made at the same time, and together with that made upon property presently benefited thereby, but the lien of said assessment does not come into existence until the connecting sewer or drain is built. Seaman v. Camden, 66 N. J. L. 516, 49 Atl. 977; Vreeland v. Bayonne, 60 N. J. L.



respect of damages to land not taken, special benefits to property damaged may be set off against damages accruing to the property.<sup>34</sup> And in a much earlier case it was held that damages for the taking of land for a public park may be offset by the benefits actually accruing to the remainder of the land of the same owner, to the extent of the benefits.<sup>35</sup> In Louisiana the rule is that resulting benefits cannot be offset against the cost of the property taken.<sup>36</sup> If the charter requires a consideration of both benefits and damages, the omission of the assessment roll to show on its face that the latter were considered, is fatal.<sup>37</sup>

— Objections to assessment — When made.

**484.** The objection that the tax is in excess of the benefit must be made at or before the application for the confirmation of the assessment.<sup>38</sup> And if objections because the assessment was based on the valuation of the property instead of according to benefits received by reason of the improvement were not urged before the city council at the time set for hearing objections, they cannot be urged on foreclosure of the assessment liens.<sup>39</sup> The confirmation by the court of an

<sup>34</sup> *Leopold v. Chicago*, 150 Ill. 568, 37 N. E. 892; *Concordia Cemetery Ass'n v. M. & N. W. R. Co.*, 121 Ill. 199, 12 N. E. 536. 168, 37 Atl. 737.

<sup>35</sup> *People v. Williams*, 51 Ill. 63, *Paterson etc., R. Co. v. Nutley* (N. J. L.), 59 Atl. 1032. *Power v. Detroit* (Mich.), 102 N. W. 288. *Quirk v. Seattle* (Wash.), 80 Pac. 207.

<sup>36</sup> *Charnock v. Fordoche, etc.*, Co., 38 La. Ann. 323.

<sup>37</sup> *Chicago v. Wright*, 32 Ill. 192.

Where a benefit assessment could have been made, but the officials neglected to make one, the actual benefit to the property cannot be used by way of set-off to a claim for damages for taking the prop-

erty. *Atkins v. Boston*, 188 Mass. 77, 74 N. E. 292; *Snow v. Boston*, 188 Mass. 77, 74 N. E. 292.

*Offset — Only difference paid.*

Under a city charter providing that, in condemning lands for street purposes, the compensation and damages on one side are to be offset by the benefits on the other, only the difference between them is to be paid by or to the owner. *Koller v. La Crosse*, 106 Wis. 369, 82 N. W. 341.

<sup>38</sup> *Pfeiffer v. People*, 170 Ill. 347, 48 N. E. 979; *Heath v. McCrea*, 20 Wash. 342, 55 Pac. 432.

<sup>39</sup> *Northwestern, etc., Bank v. Spokane*, 18 Wash. 456, 51 Pac. 1070; *Heath v. McCrea*, *supra*.



assessment for benefits will not be reversed upon a question of fact, upon the application of parties having notice and an opportunity to be heard, when there are facts in the record returned to sustain the finding of the court that the assessment was laid according to the peculiar benefits received from the improvement.<sup>40</sup> In the case of an assessment for building a levee to be levied on the increase in value of land by reason of the improvement, one whose lands, situated in the levee district, are not subject to overflow, cannot object that his lands are assessed, as his liability depends, not upon the fact that the lands are subject to overflow, but upon the fact that they will be benefited by the improvement.<sup>41</sup>

### Special taxation.

**485.** This method of taxation for building sidewalks is peculiar to Illinois, where it has been held that the determination by a city council that sidewalks shall be constructed by special taxation is a determination that the property so specially taxed is benefited to the extent of the special tax, and is final, and the courts have no right to interfere with such determination unless it be arbitrary or unreasonable.<sup>42</sup> This rule has been changed by statute, and a review of the benefits in special taxation proceeding placed upon the same footing as those in special assessments. In an application by a city for judgment on a special tax for the construction of a sidewalk, the existence and filing of the special tax list must be proven.<sup>43</sup> Special taxation differs from the assess-

<sup>40</sup> *Van Wagoner v. Paterson*, 67 N. J. L. 455, 51 Atl. 922.

<sup>41</sup> *Carson v. St. Francis Levee Dist.*, 59 Ark. 513, 537, 27 S. W. 590.

<sup>42</sup> *Chicago & N. W. R. Co. v. Elmhurst*, 165 Ill. 148, 46 N. E. 437; *Peru v. Bartels*, 214 Ill. 515, 73 N. E. 755; *Pierson v. People*, 204 Ill. 456, 68 N. E. 383; *Davis v. Litchfield*, 155 Ill. 384, 40 N. E. 354.

<sup>43</sup> *People v. Record*, 212 Ill. 62, 72 N. E. 7.

*Contiguous property not necessarily benefited.*

The mere fact that certain real estate is contiguous to a street improvement is not conclusive evidence that such property is specially benefited by such improvement. *Holdom v. Chicago*, 169 Ill. 109, 48 N. E. 164.



ment of special benefits, only that in the one the benefits are ascertained in a mode prescribed by law, while in the other they are determined by the municipal authority. In special taxation the imposition of the tax is, of itself, a determination that the benefits to contiguous property will be as great as the burden imposed. Hence, it has been held that when the determination of the city council is arbitrary and unreasonable in the imposition of the tax upon property in no respect benefited, the ordinance for the levy is void.<sup>44</sup> A special assessment, as well as a special tax, may be levied on contiguous property,<sup>45</sup> but they cannot be combined in one improvement.<sup>46</sup> The fact that an ordinance confines an assessment for benefits to contiguous property does not make it a special tax.<sup>47</sup> Where the cost of a local improvement is to be defrayed in whole or in part by special taxation, the ordinance must either fix the amount to be raised, or give data from which it can be ascertained by the commissioners.<sup>48</sup> In Nebraska, a special tax cannot be levied until the report of the appraisers to assess damages has been made and confirmed.<sup>49</sup>

<sup>44</sup> *Davis v. Litchfield*, 145 Ill. 313, 21 L. R. A. 563, 33 N. E. 888.

<sup>45</sup> *West Chi. Park Com'rs v. Farber*, 171 Ill. 146, 49 N. E. 427.

<sup>46</sup> *Kuehner v. Freeport*, 143 Ill. 92, 17 L. R. A. 774, 32 N. E. 372.

<sup>47</sup> *Bass v. South Park Com'rs*, 171 Ill. 370, 49 N. E. 549.

<sup>48</sup> *Kuehner v. Freeport*, *supra*.

Under an ordinance for a special tax to pay for a pavement to be levied, "upon the lots, blocks, tracts and parcels of land contiguous to said improvement," the tax need not be extended upon the streets abutting upon the improvement, as this will not be included unless specifically named.

*Cunningham v. Peoria*, 157 Ill. 499, 41 N. E. 1014.

<sup>49</sup> *Merrill v. Shields*, 57 Neb. 78, 77 N. W. 368.  
*Sidewalks.*

Abutting owners are liable for cost of sidewalks, whether original or reconstruction, under Kentucky Stats., 1903, Sec. 3096. *Mudge v. Walker* (Ky.), 92 S. W. 1046.

*Special taxation.*

This form of levying a special assessment has produced some decisions which are undoubtedly correct as applied to laying sidewalks under the police power, but contrary to the almost unruffled current of authority as applied to special assessments, as well as to the constitution of Illinois. But



**Assessment in excess of value of property.**

**486.** An absurdity to which every system of special assessment is exposed, other than that made on the basis of special benefits, occurs in those cases when the assessment exceeds the value of the property, either before or after the improvement. They usually occur where the "front foot" or "area" rule of assessment is followed, and it is to the honor of the courts which uphold those systems, that they do not let judicial precedent or the principles of *res judicata* stand in the way of prevention of what is in effect a confiscation. The difficulty is that it is only the exceptional and extreme cases which arouse these courts to a realization of the wrongs that may be done by the application of principles which are not only erroneous, but logically and judicially absurd, and leave the great sea of cases where injustice is done, but in a retail way, without remedy. A brief review of some of these cases will give the concrete illustrations for the author's creed.

**— Georgia.**

**487.** A strip of land four hundred feet long, seven feet in width at one end and three feet in width at the other end, extended along one side of a city street which was being paved. Under the front foot rule of assessment that prevailed, it was assessed \$721 for benefits, while its total value, after the completion of the work, was but \$260. A suit in equity was brought by the aggrieved owner, and the collection of the tax upon his property was enjoined. The court, after blandly admitting that "the exact extent of benefit necessary to uphold such an exception is incapable of definition," goes

recent legislation has extracted the sting of these decisions, by substituting the rule of benefits in place of the frontage rule, in apportioning the tax. See *Green v. Springfield*, 130 Ill. 515, 22 N. E. 602, as a sample case.

*Special taxation of right of way.*

A railroad company's right of way contiguous to a street may be specially taxed for its improvement on a basis of frontage. *Palmer v. Danville*, 166 Ill. 42, 46 N. E. 629.



on and states unreservedly that "it may be asserted with perfect confidence, that the present is one of those extreme cases of such doubtful benefit and probable spoliation as will justify the interference of a court of equity in order to prevent the citizen from being arbitrarily deprived of his property."<sup>50</sup> If the court had designated the proceeding as highway robbery, the facts would have justified the application.

— Iowa.

**488.** In the recent case of *Iowa Pipe & Tile Co. v. Callanan*, 101 N. W. 141, lots only 8 feet deep, and 100 feet long, were assessed for benefits the same rate per front foot as adjoining lots of same length, and from 120 feet to 175 feet deep. The court promptly vacated the assessment as manifestly unequal, and in substantial excess of benefits.

— Kentucky.

**489.** The case of *Preston v. Rudd* has already been referred to,<sup>51</sup> and the facts certainly justified the court in discussing the power of the legislature to establish the rule for assessment of benefits, in refusing to sustain the assessment. In a much later case, where again the assessment was greater than the entire value of the property, the same court again takes occasion to uphold the front foot rule adopted by the legislature as wise, just, and ordinarily conclusive, and then goes on to say: "Where the entire property is taken to pay for a public improvement, there is no room for a presumption as to the benefits received, but a case of spoliation is shown."<sup>52</sup>

— Maryland.

**490.** The case of *Moale v. Mayor, etc.*, 61 Md. 224, affords an apt illustration of adopting any other rule of assessment than that of actual benefits. Here a strip of land 120

<sup>50</sup> *Atlantic v. Hamlein*, 96 Ga. 381, 23 S. E. 408.

<sup>52</sup> *Louisville v. Bitzer*, 115 Ky. 359, 61 L. R. A. 434, 73 S. W. 1115.

<sup>51</sup> See *Conflicting Decisions*, this chapter, *supra*.



feet long, 12 feet wide at the base, and tapering to a point, was assessed at \$4.05 a foot, admittedly much in excess of its actual value, and the assessment held to be a personal liability against the owner. A more complete case of confiscation, or of taking private property for public use without just compensation, is difficult to conceive. The court, however, held that

“Where an entire lot was assessed according to the front foot rule, the assessment is not invalid because a part of the lot, if assessed by itself, would present a case of extreme hardship, if not fatal to the rule in such case.”

— **Nebraska.**

**491.** An assessment of \$2,000 against lands where the benefit did not exceed \$300, was set aside, in an action to recover the amount of the tax which had been paid under protest.<sup>53</sup>

— **New Jersey.**

**492.** Sewers, made very expensive because of extensive rock excavation, were laid in a district where lands were cheap, varying in value prior to the improvement from \$350 to \$600 a lot, while the assessment for benefits was upwards of \$200 a lot. The evidence showing that the enhancement in present value of the lots was less than the amount of the assessment, the latter was vacated.<sup>54</sup>

— **Ohio.**

**493.** Upon the admitted facts the naked question was presented as to whether a special assessment for a local improvement could be made, not only in excess of the special benefits conferred, but of the value of the property with the benefits added by the improvement. Although placing its opinion somewhat more on the local Taylor statute, than on general principles, the court promptly reversed the judgment.

<sup>53</sup> *Cain v. Omaha*, 42 Neb. 120,  
60 N. W. 368.

<sup>54</sup> *State v. Mayor, etc.*, 63 N.  
J. L. 202, 42 Atl. 773.



The defendant neither petitioned for the improvement, nor aided in its promotion.<sup>55</sup>

— Pennsylvania.

**494.** Where plaintiff owned a piece of land 405 feet long, abutting a street, and being 31 feet wide at one end, narrowing to a point at the other, and it was assessed \$446.05 for laying of water pipe along the entire front of 405 feet, at the rate of \$1.10 a foot, the court refused to entertain a defense that the assessment exceeded the entire value of the property. The case is so remarkable that the opinion is given at length in the foot-note. It is difficult to conceive a more flagrant case of a taking for public use without compensation, and the fourteenth amendment to the federal constitution is but a ghastly mockery if it does not protect from spoliation the victims of such a judicial wrong.<sup>56</sup>

<sup>55</sup> *Walsh v. Barron*, 61 Ohio St. 15, 55 N. E. 164, 769.

<sup>56</sup> *Per Curiam*:

It may be that the front foot rule is not the best that might be devised for the assessment of street improvements in cities upon abutting property, but for the present it is the only one we have; and, while it has been held that it cannot be applied to farm lands, it has nowhere been decided that it is not applicable to city property. It is perhaps impossible to frame any general rule that would produce exact uniformity and do equal justice in all cases. This arises from the fact that a rule to be valid must be general, and the further conceded fact, that in the application of all general rules there will be cases of individual hardship. This would appear to be one of such cases. The lot against which the assessment was filed . . . is said not to

be worth the amount of the assessment against it. If this be so, it does not affect the validity of the law under which the assessment was filed. As a general rule the hardship may be avoided in such cases by squaring the lot with the owner of the rear, and in this way lessening the front and deepening the remainder. If the objection now made to this assessment were to prevail, it would be very easy for the owner of a valuable lot to convey a narrow strip of the front to a convenient friend, and thus escape altogether. We are of the opinion that the defendant's affidavit does not disclose a sufficient "defense." *Harrisburg v. McCormick*, 129 Pa. St. 213, 18 Atl. 126, following *Michener v. Philadelphia*, 118 Pa. St. 535, 12 Atl. 174; cf. *Mt. Pleasant v. B. & O. R. Co.*, 138 Pa. St. 365, 11 L. R. A. 520, 20 Atl. 1052, and *Allegheny v. West Penn. R.*



## — Miscellaneous rulings.

495. It cannot be ruled as a matter of law that the removal of a pool of water is not of itself a benefit to land near the water but not abutting upon it.<sup>57</sup> Benefits may be assessed against lots in one ward to help pay for land in another ward condemned for a public park, where there are no charter provisions limiting the general power for condemnation of lands for public use.<sup>58</sup> The public at large and the lands of private individuals may both be benefited by a public improvement; and in determining the necessity the jury are not necessarily called upon to determine how much each lot is benefited, and what proportion of damages each lot shall bear.<sup>59</sup> A judgment confirming a special assessment is *in rem* against the land itself, and the benefits assessed cannot be apportioned against the leasehold and the remainder in fee as separate estates and separate judgments be entered as to each, nor can they be assessed in gross upon several contiguous lots, nor recovery had upon a tax bill issued upon such an assessment.<sup>61</sup>

## — Benefit assessments held valid.

496. The reclamation statute of California seems to require assessments according to benefits, but violates no provisions of the federal or state constitutions if not so made.<sup>62</sup>

Co., 138 Pa. St. 375, 21 Atl. 763.

The plea as to conveyance of narrow strip to avoid liability is puerile in view of the decisions on that subject. See *Tit.*, "Conveyances to Avoid Assessment."

<sup>57</sup> *Gilman v. Milwaukee*, 55 Wis. 328, 13 N. W. 266.

<sup>58</sup> *Beecher v. Detroit*, 92 Mich. 268, 52 N. W. 731.

<sup>59</sup> *Chicago Union Tr. Co. v. Chicago*, 204 Ill. 363, 68 N. E. 519.

<sup>61</sup> *St. Louis v. Provenchere*, 92 Mo. 66, 4 S. W. 410.

*Evidence of benefits and damages in street openings, see*

*Mayor, etc., v. Smith & S. Brick Co.*, 80 Md. 458, 31 Atl. 423.

*When benefits assessed against land dedicated for street, see*

*State v. West Hoboken*, 51 N. J. L. 267, 17 Atl. 110.

*Extended report of an approved assessment, see*

*Extension of Hancock Street*, 18 Pa. St. 26.

<sup>62</sup> *Reclamation Dist. v. Hagar*, 6 Sawy. 567, 4 Fed. 366.



When the jury report that "against all property in the benefit district not hereinbefore specifically described and assessed with benefits, we find and assess no benefits," it cannot be said that any property in the benefit district was omitted from assessment.<sup>63</sup> An assessment regularly made under an ordinance providing for assessing damages sustained by any property from a street improvement upon the property benefitted thereby, is conclusive as to the benefit bestowed and amount of damages sustained.<sup>64</sup> It is no valid objection to a public improvement ordinance that it provides for paying the expense thereof wholly by special assessment.<sup>65</sup> Under that portion of the charter of the city of St. Paul authorizing the board of public works to find what property is benefited by a local improvement, and the extent to which the benefit extends, the judgment of that board is final and conclusive, and not reviewable by the courts except for fraud, demonstrable mistake of fact, or upon a showing that in making it the board applied an illegal principle or an erroneous rule of law.<sup>66</sup>

— Benefit assessments held invalid.

**497.** Where the statute under which an assessment is made provides it shall be in the ratio of benefits and damages resulting, it will be void if made in any other manner;<sup>67</sup> a lot not abutting a street which is being paved, but is separated therefrom by a railroad track and freight yard, is not benefited by such paving;<sup>68</sup> where an ordinance provides for widening a street which crosses a railway track, and building a bridge over it, and charging the cost by special taxation against the railway property contiguous, without affording any compensation to the company for such burden, the ordi-

<sup>63</sup> *Kansas City v. Bacon*, 147 Mo. 259, 48 S. W. 860.

<sup>66</sup> *State v. District Court (Minn.)*, 103 N. W. 744.

<sup>64</sup> *Wray v. Pittsburgh*, 46 Pa. St. 365.

<sup>67</sup> *Bibel v. People*, 67 Ill. 172.

<sup>65</sup> *Ricketts v. Hyde Park*, 85 Ill. 110.

<sup>68</sup> *Jones v. Chicago*, 206 Ill. 374,

69 N. E. 64.



nance is not only unreasonable, but clearly in excess of the powers of the council, and therefore void.<sup>69</sup> Where the evidence fails to show that lands within the city limits, but used for agricultural purposes, will not be specially benefited by the construction of a sewer which does not reach the lands, the confirmation of an assessment therefor is erroneous; <sup>70</sup> where gross inequality results from the fact that one side of a street is divided into squares, and the other not, the assessment is invalidated; <sup>71</sup> where the statute requires damages as well as benefits to be assessed, the omission to do so avoids the assessment, and the proceedings are *coram non judice*.<sup>72</sup> Where certain landowners appeared before the assessing board in a street opening proceeding, and consented to its being opened through their land, providing no benefits should be assessed against them, to which the commissioners agreed, the agreement was illegal, as tending to make the assessment as to others unequal and partial, and invalidated the assessment made against the other landowners.<sup>73</sup> It is not proper to pay full value for land taken for a street, with damages to the remainder of the tract, irrespective of the benefits.<sup>74</sup>

**498.** Where a city charter confers no power to exempt from general or special taxation any lots in the city limits, the filing of a plat in the recorder's office, with a stipulation thereon that the dedication is made with the distinct condition that the lots are not to be specially taxed or assessed to pay for the widening or extension of streets without the consent of the owners, the city by accepting the dedication did not agree to the stipulation, being without power to make such an agreement.<sup>75</sup> Where the charter provides that an assessment for a local improvement is to be made on real

<sup>69</sup> *Bloomington v. Chicago & A. R. Co.*, 134 Ill. 451, 26 N. E. 366.

<sup>70</sup> *Edwards v. Chicago*, 140 Ill. 440, 30 N. E. 350.

<sup>71</sup> *Louisville v. Selva*, 106 Ky. 730, 51 S. W. 447, 52 S. W. 809.

<sup>72</sup> *Mayor, etc., v. Porter*, 18 Md. 284, 79 Am. Dec. 686.

<sup>73</sup> *St. Louis v. Meyer*, 77 Mo. 13.

<sup>74</sup> *St. Louis v. Glenwitz*, 148 Mo. 210, 49 S. W. 1000, following *Newbry v. Platte Co.*, 25 Mo. 258.

<sup>75</sup> *Vrana v. St. Louis*, 164 Mo. 146, 64 S. W. 180.



estate specially benefited in proportion to the benefits received, and that no land shall be assessed beyond the actual benefits, a report showing that the entire cost was imposed on lands deemed to be specially benefited, but does not show the assessments were imposed in proportion to, and limited by, the benefits, is fatally defective.<sup>76</sup>

**499.** A uniform assessment arbitrarily imposed by the law on all property affected in the same way by a public improvement, will not be sustained if the advantages to the lots vary.<sup>77</sup> In condemning lands for street purposes, under charter provisions requiring compensation and damages on one side to be offset by the benefits on the other, and only the difference paid to or by the owner, the award is valid or invalid as a whole, and the landowner cannot recover for the former even when the latter are invalid by reason of an error of the commissioners.<sup>78</sup>

<sup>76</sup> State v. West Hoboken, 51 N. J. L. 267, 17 Atl. 110.

<sup>77</sup> State v. Bayonne, 63 N. J. L. 202, 42 Atl. 773; Friedrich v. Milwaukee, 118 Wis. 254, 95 N. W. 126.

Note—In the Bayonne case above there were 144 such lots which were uniformly assessed \$204.75 except the 12 corner lots where the assessment was \$207.93 each. The highest price set as the value of the lots before the building of the sewers was from \$350 to \$600 each according to location, and the court was of the opinion that no reasonable man would construct a sewer for such property at a cost exceeding \$200 a lot.

<sup>78</sup> Koller v. La Crosse, 106 Wis. 369, 82 N. W. 341.

Nor, in such action by the land owner, can the city counterclaim the amount of the benefits assessed.

*Non-assessment of narrow strip between sewer and next proprietor.*

See, Atlanta v. Gabbett, 93 Ga. 266, 20 S. E. 306.

**Notes of some additional decisions on benefits.**

*Validity of Indiana statute.*

The Indiana statute, known as the Barrett law, making it the duty of the common council to adjust the assessment for street and alley improvements, under said act, to conform to the actual special benefits accruing to each of the abutting property owners, is a valid enactment. Adams v. Shelbyville, 154 Ind. 467, 49 L. R. A. 797, 77 Am. St. Rep. 484, 57 N. E. 114; Schaefer v. Werling, 188 U. S. 516, 47 L. ed. 570, 23 Sup. Ct. Rep. 449.

*Validity of Iowa statute.*

The Iowa statute providing that every special assessment shall be in proportion to the special bene-



**The front foot rule — In general.**

**500.** In one of the earlier chapters, the theory of this subject was discussed, and the fact established that the numerical authority for the so-called "front foot rule" is largely in excess of authority to the contrary.<sup>79</sup> A careful analysis of the cases, and the reasoning of the courts upon the question, reveals a clearly defined line of cleavage which splits it into two distinct groups of cases. The first class consists of those cases which adhere strictly to theory of legislative supremacy on the subject, ignoring the principle of benefits entirely; the other class treats the front foot rule, not as a principle, but merely as a practical method of securing the uniformity and equality which all the courts commend. One class holds it valid because of the rule; the other holds it valid notwithstanding the rule.

**— Front foot rule as a principle.**

**501.** In the first class of cases just referred to the front

fits conferred upon the property thereby and not in excess of such benefits, is sufficiently definite, and no rule is necessary to prescribe what shall and what shall not be taken into consideration. *Stutsman v. Burlington*, 127 Iowa, 563, 103 N. W. 800.

***Jurisdiction limited to property benefited.***

Where a charter provides the expenses of constructing sewers shall be assessed and be a lien upon the property to be benefited thereby, in proportion to the benefit, the jurisdiction conferred is limited to the property to be benefited. *People v. Brooklyn*, 23 Barb. 166.

***Assessment must not exceed benefits.***

No assessment shall exceed the special benefit received by the state

assessed. *Cheney v. Beverly*, 188 Mass. 81, 74 N. E. 306.

***Rule of benefits, enhancement in value.***

*Chicago U. T. Co. v. Chicago*, 204 Ill. 363, 68 N. E. 519.

***No benefits, no liability.***

Where there is no legal liability for the grading of a street, there can be recovery for benefits conferred. *Carter v. Cemansky*, 126 Iowa, 506, 102 N. W. 438.

***Excess cost to be borne by public.***

The fair cost of a public improvement is not necessarily the measure of benefit to the property benefited thereby. If the cost exceeds the special benefit the public must bear the excess as a general benefit. *State v. Bayonne*, 63 N. J. L. 202, 42 Atl. 773.

<sup>79</sup> Chapter III.



foot rule is regarded as a principal of the law of taxation by special assessment, the power of the legislature being recognized as sovereign and beyond restraint. The rule established by these cases is to the effect that where the statute provides for assessing the expense of a street improvement upon the abutting lots, each lot must be assessed according to its frontage upon the work, irrespective of its shape, size or depth, and regardless of benefits.<sup>80</sup> In an early case in Michigan, it was held that where the statute authorized the whole expense of grading and paving to the center of the street, to be assessed against the lot fronting the street, making it a lien on the property, a personal charge on the owner, and authorizing a warrant for distress and sale of his goods, cannot be sustained either as an exercise of the taxing power, inasmuch as it wholly disregards apportionment, nor as an exercise of the police power, as parties cannot be compelled to make improvements of this character under that power. *But*, the apportionment may be on a frontage basis, if the legislature so direct, as it necessitates taxing districts, and the apportionment must be made throughout such district.<sup>81</sup> And one of the ablest jurists and writers of the past generation, referring to this case, and others somewhat similar, says: "If anything can be regarded as settled in municipal law in this county, the power of the legislature to permit such assessments and to direct an apportionment of the cost by frontage, should by this time be considered as no longer open to controversy. Writers on constitutional, on municipal law, and on the law of taxation have collected the cases, and have recognized the principle as settled and if the question were new in this state, we might think it important to refer to what they say. But the question is not new; it was settled for us thirty years ago."<sup>82</sup> But notwithstanding the state-

<sup>80</sup> *Jennings v. Le Breton*, 80 Cal. 8, 21 Pac. 1127; *Diggins v. Harts-horne*, 108 Cal. 154, 41 Pac. 283; *Allen v. Davenport*, 107 Iowa, 90, 77 N. W. 532.

<sup>81</sup> *Motz v. Detroit*, 18 Mich. 495.

<sup>82</sup> *Cooley, J., in Sheley v. Detroit*, 45 Mich. 433, 8 N. W. 52. This principle is emphasized in a late case, holding it to be compe-



ment at the close, the authority of the legislature on this proposition is being more and more doubted, the principle of benefits growing and becoming continually more widespread, and as it is the only principle which reconciles all the difficulties in the way of making assessments that are legal, and is logical, practical and just, it must inevitably prevail over the front foot rule as a principle, no matter to what limit the latter may be extended in practice. The decisions of other courts along the same line as those just cited may be read in the accompanying note.<sup>83</sup>

tent for the legislature to assess the cost of paving a street upon abutting property according to frontage. *Kalamazoo v. Francoise*, 115 Mich. 554, 73 N. W. 801.

*Michigan.*

*Ambiguity in certificate.*

<sup>83</sup> In the case where the certificate of an assessor is ambiguous, the fact that the tax has been laid apparently without regard to the value or use of the property, but strictly in proportion to the frontage on the street, raises a strong inference that the requirements of the ordinance have not been observed. *Warren v. Grand Haven*, 30 Mich. 24.

*North Dakota.*

*Legislative supremacy undoubted.*

It is competent for the legislature to direct that all the expense of paving a city street shall be assessed against the abutting property in proportion to frontage. *Rolph v. Fargo*, 7 N. Dak. 640, 42 L. R. A. 646, 76 N. W. 242; *Roberts v. First Nat. Bk.*, 8 N. Dak. 504, 79 N. W. 1049; *Webster v. Fargo*, 9 N. Dak. 208, 56 L. R. A. 156, 82 N. W. 732.

*Ohio.*

*Must operate uniformly.*

The assessment, whether by

front foot or by value, must be uniform, operating upon all lands within the district alike. The fact that one or more tracts have not been benefited does not render the assessment invalid. *Nor. Ind. R. Co. v. Connelly*, 10 Ohio St. 159. *Each lot liable, not exceeding maximum.*

Where a street has been improved and an assessment per front foot of the abutting lots been made to pay therefor, each such lot is separately liable for the amount assessed upon it, not to exceed the maximum allowed by law. *Carry v. Folz*, 29 Ohio St. 320.

In Ohio, the amount of the assessment is usually limited to a certain percentage of the valuation.

*Oregon.*

*Valid, under law authorizing assessment of cost to each lot.*

An assessment by the front foot is valid and constitutional under a charter making each lot or part thereof liable for the cost, as the council may determine, of making a proposed improvement on the half street in front thereof, and that the council may assess upon each lot or part thereof its proportionate share of said costs. The



— Front foot rule as a convenience.

**502.** The second class of cases considers the front foot rule, so called, as a practical means of applying the principle of benefits. The Pennsylvania court accurately expresses it as follows: "The front-foot rule does not express a *principle* of taxation, which might be capable of indefinite expansion over a continually wider area, and upon a continually enlarging class of subjects; but that it is a mere device of convenience, based upon the observed facts that properties similarly situated are usually of a similar value, and are usually affected alike by public improvements along their respective fronts."<sup>84</sup> Many of the cases in this class seem

rule for assessing the expense not having been prescribed, the assessment may be made by the front foot in the discretion of the city authorities, if that mode seems to them most likely to determine the actual cost. *Wilson v. Salem*, 24 Or. 504, 34 Pac. 9, 691.

*As near proportionate as any rule.*

The front foot rule of assessments for street improvements is as near proportionate as any rule that can be devised in a case where the improvement consists of an elevated roadway over slightly uneven ground, and the assessment varies according to the height of the structure in front of the different lots. *King v. Portland*, 38 Or. 402, 55 L. R. A. 812, 63 Pac. 2.

*Pennsylvania.*

*Inequalities of lots insufficient to evade rule.*

Inequalities in surface, or in the situation and depth of the lot, are not sufficient grounds for refusing to apply the front-foot rule in special assessments against city lots. *McKeesport v. Busch*, 166 Pa. St. 46, 31 Atl. 49.

*South Dakota.*

*Not repugnant to organic act of S. Dakota.*

An assessment for improving an avenue apportioned at a fixed sum per front foot, is not repugnant to the Organic Act, and is valid. *W. & St. P. R. Co. v. Watertown*, 1 S. Dak. 46, 44 N. W. 1072.

*Wisconsin.*

*Action of council conclusive.*

Under a charter empowering the city authorities to apportion the entire cost of a sewer and pavement among the several lots fronting on a street according to their respective frontages, the action of the common council in determining what property is benefited thereby and is assessed therefor is conclusive. *Meggett v. Eau Claire*, 81 Wis. 326, 51 N. W. 566.

This case stands practically alone in Wisconsin, where the principle of benefits for pavements is almost exclusively recognized, although the front-foot rule is in vogue as to laying water pipe and constructing sewers.

<sup>84</sup> *Witman v. Reading*, 169 Pa. St. 375, 32 Atl. 576.



to consider the principle of benefits and the front-foot rule as going hand in hand, each being a limitation, or at least a restraint, upon the other, and that an assessment according to frontage is not improper under a statute requiring assessments according to benefits, when the benefits have been actually assessed according to frontage.<sup>85</sup> And a recent decision of the federal supreme court holds that a state statute under which the cost of a public improvement may be assessed upon the abutting property in proportion to frontage does not violate the Federal Constitution where, as construed by the state courts, it requires such assessment to conform to the actual special benefits accruing to each of the abutting owners.<sup>86</sup> Although numerous states have passed laws providing for the validity of the front foot method of assessment for street work, yet if their practical operation is to confiscate property, they are obnoxious to the Fourteenth Amendment, and for that reason it is the duty of the courts to declare them void.<sup>87</sup> Such an assessment is to be treated as *prima facie* correct, but is not exclusive of the right to

Assessments on individual properties for public improvements can only be made to the extent of the local and special benefit received therefrom, and the system of assessment by the front foot rule has only been sustained on the ground that in cities and large towns where population is dense and lots are small, it is a fairly approximate and just measure of such benefits. In rural neighborhoods and other places such a rule is not applicable and cannot be constitutionally applied. *McKeesport v. Soles*, 165 Pa. St. 628, 30 Atl. 1019.

<sup>85</sup> *New Whatcom v. Bellingham, etc., Co.*, 16 Wash. 131, 47 Pac. 236.

Where an assessment must be

made in proportion to frontage and in accordance with benefits received by the property assessed, an assessment against a tract of forty acres, wholly unplatted and used exclusively for farm purposes, is invalid, when only a portion of the land abuts upon the improvement. *Ryan v. Sumner*, 17 Wash. 228, 49 Pac. 487.

<sup>86</sup> *Schaefer v. Werling*, 188 U. S. 516, 47 L. ed. 570, 23 Sup. Ct. Rep. 449. In *Loeb v. Trustees, etc.*, 179 U. S. 472, 45 L. ed. 280, 21 Sup. Ct. Rep. 174, the court held that the circuit court erred in holding the petition made a case within *Norwood v. Baker*.

<sup>87</sup> *White v. Tacoma*, 109 Fed. 32.



have an assessment made according to benefits.<sup>88</sup> If the cost is to be assessed upon abutting property in proportion to frontage, by the number of front feet of the lots, it must be levied with equality and uniformity upon all the property assessed.<sup>89</sup>

**503.** When a charter permits a street paving tax to be apportioned according to frontage, the designation of a taxing district by its street frontage is a compliance with the other charter requirement that the council shall "describe or designate the lots<sup>90</sup> and premises or locality to be assessed." And in case the charter makes it the duty of the board to determine the benefits derived by the owners from a street paving, and they make the apportionment according to the frontage of each lot upon the street, some being vacant, and others occupied by valuable buildings, and as in so determining they acted judicially, their judgment as to the amount of benefit cannot be reviewed by the court, unless they acted on an erroneous principle;<sup>91</sup> and an apportionment in accordance with the number of feet front is not necessarily an erroneous principle.<sup>92</sup> Even in some of those states which resolutely

<sup>88</sup> *Indianapolis v. Holt*, 155 Ind. 222, 57 N. E. 966, 988, 1100.

<sup>89</sup> *People v. Lynch*, 51 Cal. 15, 21 Am. Rep. 677; *Jaeger v. Burr*, 36 Ohio St. 164.

Where the statute provides for an assessment according to benefits, in order to sustain a levy of special taxes according to the foot frontage of the lots in the taxing district, it must affirmatively appear from the record that the board found that the benefits were equal and uniform as to all the parcels of land to be affected by the proposed improvement. *John v. Connell*, 64 Neb. 233, 89 N. W. 806.

But this showing will not prevail where the physical conditions

are such as to show the impossibility of such facts. *Kersten v. Milwaukee*, 106 Wis. 200, 48 L. R. A. 851, 81 N. W. 948, 1103.

For a case where the statute requires that the assessment may be according to the foot frontage, if the council shall find the benefits to be equal and uniform, see *Morse v. Omaha*, 67 Neb. 426, 93 N. W. 734.

<sup>90</sup> *Kalamazoo v. Francoise*, 115 Mich. 554, 73 N. W. 801.

<sup>91</sup> *O'Reilly v. Kingston*, 114 N. Y. 439, 21 N. E. 1004.

*Colorado.*

*Assessment a fair one.*

<sup>92</sup> A charter provision that the expense of grading streets shall be assessed upon all abutting lots in



reject the frontage assessment as being correct in principle, it is not infrequently given a tolerant reception and acknowledgment in practice, where the return or certificate shows the

proportion to frontage, though arbitrary, does not contravene the law that assessments for local improvements shall be in proportion to the benefits, because it appears to be a fair one, and where the rule works an injustice, relief may be granted. *Denver v. Campbell*, 33 Colo. 162, 80 Pac. 142.

#### *Illinois.*

*When in proportion to the benefits.*

In cases where the improvement is of such a character that the benefits may be expected to diffuse themselves along the line of the improvement, in a degree bearing some proportion to the frontage, a division of the burthen by that standard may appropriately be adopted, although ordinarily the power to adopt this method is denied, unless sanctioned by express legislative authority. *Davis v. Litchfield*, 145 Ill. 313, 21 L. R. A. 563, 33 N. E. 888.

*No violation of spirit of constitution.*

An ordinance requiring the cost of improving a street to be assessed upon the real estate abutting thereon in proportion to the frontage, is not in violation of the spirit of the constitution. *C. & A. R. Co. v. Joliet*, 153 Ill. 649, 39 N. E. 1077.

#### *Maryland.*

*Valid where owners have had notice.*

When all parties interested in the question of repaving a street at the expense of abutting owners

have ample opportunity to contest the passage of an ordinance authorizing such repaving, the expense to be proportioned by the front-foot rule, the ordinance is not made invalid by adopting such rule. *Mayor, etc., v. Stewart*, 92 Md. 535, 48 Atl. 165.

#### *Missouri.*

*Is applicable to corner lot.*

The "front foot" rule of assessment for a street improvement is applicable to a corner lot as a basis of taxation, according to its frontage upon the improvement, regardless of the fact that the lot has a front upon another street which meets the improved one at a right angle. *Moberly v. Hogan*, 131 Mo. 19, 32 S. W. 1014.

#### *New Jersey.*

*Principle not wrong where benefits properly distributed.*

The principle of frontage assessments is not necessarily wrong. If that mode properly distributes the benefits among the owners of property benefited, there can be no objection to its use. *Jersey City v. Howeth*, 30 N. J. L. 521; *Pudney v. Passaic*, 37 N. J. L. 65; *State v. Rutherford*, 55 N. J. L. 441, 27 Atl. 172; *State v. Elizabeth*, 56 N. J. L. 119, 27 Atl. 801.

The fact that in an assessment for a street improvement the benefits have been distributed along the line of the improvement, in proportion to the frontage, does not necessarily make the assessment void if that method properly



substantial justice of the tax thus levied, or that it was levied after taking into consideration the benefits in each case.<sup>93</sup>

### — How frontage determined

**504.** The question of how a frontage tax is to be determined under the front-foot rule seems at first blush to be too simple to require judicial pronouncement in order to go straight with certainty. But the way to this simple station, like that to all others where the principle of benefits is not used as a beacon light to guide the way, is beset with little traps and foot-falls, more annoying than serious. We are told that for the purpose of determining the frontage of a lot with a view to its assessment, reference must be had to its situation at the time the improvement is made, and not to

apportions the benefits. *Dooling v. Ocean City*, 67 N. J. L. 215, 50 Atl. 621.

*Or lots of different depths.*

An assessment for benefits from street improvements based upon the frontage of the property on the line of the streets improved, and when the depth of the lots assessed is not in all cases uniform, is not erroneous unless it appears by the evidence that the benefits have not been fairly and justly assessed among those benefited thereby. *Long Branch Commission v. Dobbins*, 61 N. J. L. 659, 40 Atl. 599.

Note—The court quotes from the evidence of the commissioners sufficient to clearly establish the fact that there was a proper exercise of judgment on their part, and then say: "I find in the record of this case no convincing proof that the assessment made by the commissioners is not just, and while there is conflicting evidence, there is a decided preponderance in the support of the report." *Id.*

*Ohio.*

*Reducing assessment to actual cost.*

Where an assessment is per front foot, and is based upon an estimate of the cost, and a certain number of feet frontage, and the cost of the work falls below such estimate, in reducing the assessment to the actual cost, and in fixing the cost per front foot, any part of the frontage subsequently appropriated for streets should not be deducted from the frontage actually assessable when the street was ordered. *Spangler v. Cleveland*, 35 Ohio St. 469.

<sup>93</sup> A street improvement assessment, otherwise lawful, is not rendered invalid because assessed in terms by the abutting foot, where it appears that it did not exceed the actual benefits to the land. *Shoemaker v. Cincinnati*, 68 Ohio St. 603, 68 N. E. 1; *Schroder v. Overman*, 61 Ohio St. 1, 47 L. R. A. 156, 76 Am. St. Rep. 354, 55 N. E. 153; *Walsh v. Barron*, 61



changes subsequently made,<sup>94</sup> but that the requirement of a statute that "each lot shall be charged in proportion to the frontage thereof" does not contemplate that the work in front of each lot shall be necessarily charged to that lot, but the amount of the whole work shall be ascertained, and each lot charged in the proportion that its frontage bears to that of all the lots.<sup>95</sup> Different amounts, upon different front feet, abutting upon different parts of the paving, may be levied, if a just proportion of the entire cost is assessed uniformly,<sup>96</sup> is the rule laid down in one state, while its neighbor says the owner should be charged in the proportion which the frontage of his lot bears to that of all the lots affected by the contract, and not that which it bears to those in a block,<sup>97</sup> while yet another state says the front foot rule imposes on the respective owners their proportionate shares of the entire cost according to the width of the respective streets on which they abut,<sup>98</sup> and yet another says the real front is a question of fact to be determined by the manner in which the street was laid out, or in which it has been built upon, and used and occupied by the owner.<sup>99</sup>

**505.** Inasmuch as the entire rule is one of legislative derivation, it is probable the correct rule is to be found in the legislative authority for this method of apportionment, and in its absence, an application of the ordinary rules of judicial construction and interpretation should prove sufficient.

#### — Assessments valid under the front foot rule.

**506.** The fact that the abutting lots differ somewhat in depth and value does not of itself render the assessment on

Ohio St. 15, 55 N. E. 164; Walsh v. Sims, 65 Ohio St. 211, 62 N. E. 120.

<sup>94</sup> Sandrock v. Columbus, 51 Ohio St. 317, 42 N. E. 255.

<sup>95</sup> St. Louis v. Clemens, 49 Mo. 552; Neenan v. Smith, 50 Mo. 525.

<sup>96</sup> Gilcrest v. Macartney, 97 Iowa, 138.

<sup>97</sup> Weber v. Schergens, 59 Mo. 389; Neenan v. Smith, 60 Mo. 292.

<sup>98</sup> Savannah v. Weed, 96 Ga. 670, 23 S. E. 900.

<sup>99</sup> Haviland v. Columbus, 50 Ohio St. 471, 34 N. E. 679.



a front foot basis void for inequality; <sup>1</sup> nor will an assessment purporting to have been made according to benefits, and found by the city council to be so made, be made invalid because all the lots were assessed alike.<sup>2</sup> A city may assess the cost of paving a street upon abutting property on the "foot front rule" without regard to the actual number of square yards in front of any particular property, and the fact that a street railway company has paved a portion of the street in front of a particular property, does not relieve the owner from assessment on a pro rata basis, ascertained by dividing the entire cost of the improvement in proportion to the entire number of feet of property fronting on the street.<sup>3</sup> A finding by the board to the effect that in its judgment, the several lots and pieces of lots and real estate described are specially benefited to the full amount in each case of the proposed levies, is a sufficient, though informal, finding that the benefits are proportional to the frontage.<sup>4</sup> It will be presumed, where nothing appears to the contrary, that in adopting the assessment prepared by the city engineer, the council considered it *prima facie* correct, and that the entire cost was apportioned among the abutting parcels according to the benefits received, and such assessment will be held valid when collaterally attacked.<sup>5</sup> Whether or not the front foot rule of assessment for the cost of paving and curbing a street within the limits of a city, is legally applicable to abutting property claimed to be rural in character, depends upon the conditions which exist at the time the improvement is made, and not those existing at the time of the enactment of the ordinance authorizing the improvements.<sup>6</sup>

<sup>1</sup> *Beaumont v. Wilkesbarre*, 142 Pa. St. 198, 21 Atl. 888; *Witman v. Reading*, 169 Pa. St. 375, 32 Atl. 576.

<sup>2</sup> The improvement in question was the paving of a street that had already been brought to grade. *Alexander v. Tacoma*, 35 Wash. 366, 77 Pac. 686.

<sup>3</sup> *Scranton v. Koehler*, 200 Pa. St. 126, 49 Atl. 792.

<sup>4</sup> *Portsmouth Savings Bank v. Omaha*, 67 Neb. 50, 93 N. W. 231.

<sup>5</sup> *Leeds v. Defrees*, 157 Ind. 392, 61 N. E. 930.

<sup>6</sup> *Keith v. Philadelphia*, 126 Pa. St. 575, 17 Atl. 883.



— Frontage assessments held invalid.

507. Where the principle of benefits is the definitely prescribed method of assessment, the courts are very rigid in protecting it against encroachment. While, as we have just seen, property similarly situated may be supposed to be similarly benefited, the presumption is quite to the contrary where the physical situation is such as to preclude the probability of equal results. The city charter of Milwaukee requires the board of public works to view the premises where the street is to be graded for the first time and “assess against the several lots or pieces of land, or parts of lots or pieces of land, which they may deem benefited by the proposed improvement, the amount of such benefit which those lots or pieces of land will severally, in the opinion of said board, derive from such improvement when completed in the manner contemplated in the estimate of the cost of such work, taking into consideration in each case any injury which in the opinion of the board may result to each lot or piece of land from such improvement.” For years, the board had followed a rule of its own, so manifestly in conflict with the provisions of the charter, that it is remarkable their assessments remained unchallenged for such a length of time. If the assessment district consisted, for example, of 3 blocks,

*When assessor's certificate controls.*

Where, upon a reassessment for change of grade, the certificate of the assessing board states that each lot was viewed, and the benefits and damages considered and determined, the fact that each lot of the same size is determined to have received the same benefit does not overcome their certificate, especially when it appears that all the lots were used and affected substantially alike. *Sanderson v. Herman*, 108 Wis. 662, 84 N. W. 890, 85 N. W. 141.

*Assessment for filling under sidewalk.*

There is no valid objection against assessing the cost of flagging sidewalks on the principle of frontage, but, under such a power, the estimate must not include any part of the expense of the substantial grading (excavation and filling) of that part of the street occupied by the sidewalks. Incidental grading, for the mere purpose of flagging, may be included, but not the substantial grading of any part of the street, although included in the sidewalks. *State v. Jersey City*, 37 N. J. L. 128.



1,000 feet in total length (excluding street intersections), upon the two sides of the street within the district would be approximately 2000 feet of abutting property to be assessed. If the estimated cost of the improvement was \$5000, or \$2.50 per front foot, the board would estimate the benefits at \$3.00 or \$3.50 per front foot, and allow no damages or injury whatsoever, although the grading in front of some lots would vary from a cut of 30 feet to a fill of 12 feet, costing ten or fifteen times as much in front of some lots as compared with others. The Wisconsin court very properly and promptly held that such an assessment was arbitrary and void, an adoption by the board of an arbitrary front foot rule of its own, and in direct violation of the charter provisions.<sup>7</sup> Where the whole expense of an assessment is laid upon the frontage of a street, at a uniform rate, without much regard to size, shape or depth of parcels of land, and without much regard to the situation, location or other circumstances, the principle of benefits is ignored, and the assessment is void, although on the face of the report purporting to be according to benefits.<sup>8</sup>

**508.** A city charter which authorizes the council to improve the streets at the cost of abutting owners, in proportion to frontage, is violative of secs. 17 and 19 of the Const. of Texas, and of the Fourteenth amendment of the Federal Constitution.<sup>9</sup> Under a statute providing that street improvement assessments shall be made upon the land fronting on the street improved, in "proportion to the benefits upon the property to be benefited, sufficient to cover the total expense of the work to the center of the street on which it fronts," an

<sup>7</sup> *Pittelkow v. Milwaukee*, 94 Wis. 651, 69 N. W. 803; *Kersten v. Milwaukee*, 106 Wis. 200, 48 L. R. A. 85, 81 N. W. 948, 1103; *Friedrich v. Milwaukee*, 114 Wis. 304, 90 N. W. 174; *Friedrich v. Milwaukee*, 118 Wis. 254, 95 N. W. 126; *Haubner v. Milwaukee*,

124 Wis. 153, 101 N. W. 930, 102 N. W. 578.

<sup>8</sup> *N. Y. & G. L. R. Co. v. Kearney*, 55 N. J. L. 463, 26 Atl. 800; *Lieberman v. Milwaukee*, 89 Wis. 336, 61 N. W. 1112.

<sup>9</sup> *Hutcheson v. Storrie*, 92 Tex. 685, 45 L. R. A. 289, 71 Am. St. Rep. 884, 51 S. W. 848.



assessment on the basis of lineal feet of frontage is invalid, and creates no lien for the cost of the work.<sup>10</sup> And in Illinois it was early held, long before the adoption of the present constitution, that an assessment for improvements made on the basis of the frontage of the lots upon the streets to be improved, is invalid as containing neither the element of equality or uniformity, if assessed under the taxing power; and if in the exercise of the right of eminent domain, is equally invalid, no compensation whatever being provided or even contemplated by the charter.<sup>11</sup>

<sup>10</sup> *Elma v. Carney*, 9 Wash. 466, 37 Pac. 707.

<sup>11</sup> *Chicago v. Larned*, 34 Ill. 203; *Ottawa v. Spencer*, 40 Ill. 211; *Bedard v. Hall*, 44 Ill. 91; *Wright v. Chicago*, 46 Ill. 44.

A charter provision for levying of a special tax on abutting lots in proportion to their *front* or *size*, does not authorize a special tax against each lot to defray the expense of the work done in front thereof. *State v. Portage*, 12 Wis. 563.

Although a special assessment based merely on frontage, and without regard to benefits actually conferred, is invalid, yet there is no rule of law precluding the board from taking into consideration the number of feet frontage of the several lots upon the street or improvement as an element in making the assessment. *Walker v. Aurora*, 140 Ill. 402, 29 N. E. 741.

Ordinance in question held to imply assessment by front foot rule, and hence invalid. *City Council v. Foster*, 133 Ala. 587, 597, 32 So. 610.

*Annual tax on water pipe by lineal foot.*

An annual tax of ten cents per

lineal foot on all water pipe in a city, whether principal mains or branch supply pipes, and whether the lot is improved or not, and irrespective of its location, the tax being not for one year or any specified time, but to be levied annually, for all time, and paid over to water commissioners, but without specifying the use to which it is to be put, and making no provision for a hearing as to benefit to property, or the equitable distribution of the tax, was held to contravene the provisions of the fourteenth amendment to the federal constitution, being a taking of private property under the guise of taxation, without just compensation, and without due process of law. The court rested its decision largely upon *Norwood v. Baker*. *State v. Robert P. Lewis Co.*, 82 Minn. 390, 53 L. R. A. 421, 85 N. W. 207, 86 N. W. 611. But a reargument being granted, the court reversed its first opinion, upon the authority of *French v. Barber Asphalt Paving Co.*, 181 U. S. 324, and because such reversal would give the parties an opportunity to have their decision reviewed by the federal court, if they



so desired. *State v. Robert P. Lewis Co.*, 82 Minn. 390, 53 L. R. A. 421, 85 N. W. 207, 86 N. W. 611. Affirmed in *State v. Trustees*, 87 Minn. 165, 91 N. W. 484. An *annual* tax to be paid for by *special* assessment possesses the element of novelty, at least.

The following are some of the later decisions upholding the front foot rule of assessment:

A resolution for a street improvement adopted by a common council, payment to be made on the front-foot rule, is not necessarily invalid, where the tax-payers have an opportunity to appear, and insist that the apportionment shall be on the basis of benefits. *Brown v. Central Bermudez Co.*, 162 Ind. 452, 69 N. E. 150.

A statute is not unconstitutional, as taking property for public use without due process of law, because it provides for the assessment of the cost of an improve-

ment according to the front foot rule. *Deane v. Indiana, etc., Co.*, 161 Ind. 371, 68 N. E. 686; *Chadwick v. Kelley*, 187 U. S. 540.

Where the benefits conferred by a new sewer are practically confined to the district in which it exists, and each abutting lot is specially benefited thereby, an assessment by the front foot is not inequitable. *Shannon v. Omaha (Neb.)*, 103 N. W. 53.

An assessment is not invalid because made in terms by the abutting foot, instead of in terms according to benefits, where the record discloses that the assessment did not exceed the special benefit to the land. *Shoemaker v. Cincinnati*, 68 Ohio St. 603, 68 N. E. 1; *Schroeder v. Overman*, 61 Ohio St. 1, 47 L. R. A. 156, 76 Am. St. Rep. 354, 55 N. E. 158; *Walsh v. Barron*, 61 Ohio St. 15, 55 N. E. 164; *Walsh v. Sims*, 65 Ohio St. 211, 62 N. E. 120.



## CHAPTER IX.

### OF THE PROCEEDINGS NECESSARY TO RETAIN JURISDICTION — THE ASSESSMENT.

- Commissioners — In general, 509.  
Appointment — Qualifications, 510-513.  
Oath of commissioners, 514.  
Judgment of commissioners, 515-516.  
Commissioners must act jointly — Signatures, 517.  
Death or absence of one commissioner, 518.  
Objections to report of — When made, 519.  
Evidence, 520.  
Commissioners as witnesses, 521.  
View of premises by, 522.  
Presumptions as to acts of, 523.  
Estimate of cost, 524.  
What expenses may be included in, 525-526.  
What expenses may not be included in, 527-528.  
Exceeding tax limit, 529.  
Statute of limitations, 530.  
Suits to vacate assessments, 531.  
Validity of legislative bond act, 532.  
Limitation on power to exempt, 533.  
Plans and specifications, 534.  
Eminent domain, 535.  
Condemnation — Effects of, 536.  
What property assessed, 537.  
Street intersections, 538.  
Description of property, 539-540.  
Assessing each parcel separately, 541.  
Omission of property from assessment, 542.  
Subdividing lands for assessment purposes, 543.  
Improvements must be single, 544-545.  
Acquiring title, 546.  
Conditions precedent, 547.  
Assessment roll, 548-549.  
Against whom assessment to be made, 550.  
When assessment may be made, 551.  
Requisites in making assessment, 552.  
As a ministerial act, 553.  
Property in two assessment districts, 554.  
Assessment by size or area, 555.  
Assessment for cost of work, 556-558.  
What assessment proceedings must show, 559.  
Sufficiency of record, 560-561.  
Conclusiveness of improvement bond, 562.  
Who may contest assessment, 563.  
When objections may be urged, 564-567.  
Evidence — In general, 568.  
Burden of proof, 569.  
*Prima facie* evidence, 570.  
Evidence as to benefits, 571.  
Method of assessment, 572-573.  
Amount of assessment — Modification, 574.



## §§ 509, 510 THE LAW OF SPECIAL ASSESSMENTS.

Error and amendment, 575.

Judicial notice, 576.

Figures, abbreviations and names,  
577.

Omission of dollar mark, 578.

Officers de facto, 579.

Dedication, 580.

Nuisance, 581.

### Commissioners — In general.

**509.** The entire procedure in the levy of special assessments being of purely statutory creation, it follows that the officer, board, or committee to make the assessment must be appointed or created in the manner provided by the Legislature. In cities of sufficient size, the board of public works is frequently vested with large powers in determining what improvements shall be made, as well as in making the appraisalment, and it is clearly within the power of the legislature to declare what local officers shall ascertain and determine the extent of the special benefits,<sup>1</sup> and it is no objection that the parties making the assessments for a public park are interested, where the law qualifies them to act.<sup>2</sup> They have no authority outside of the district for which they are specially appointed, and under a statute authorizing special assessments by the "corporate authorities of the towns" for a park partly situate in two towns, an assessment made by the corporate authorities of the two towns acting together is void, the authorities in one having no voice in the assessment of the property in the other.<sup>3</sup>

### — Appointment — Qualifications.

**510.** Where the requirements of the charter are that the assessment shall be made by three impartial commissioners to be appointed by the council, the city acquires no power to establish a board of commissioners of assessments to act in all cases, but they must be appointed for each specific case.<sup>4</sup> Nor does the council acquire the authority to instruct the appraisers as to what shall govern them in making the assessment, as it is their judgment and not that of the council, which is to determine this.<sup>5</sup>

<sup>1</sup> Crawford v. People, 82 Ill. 557.

<sup>4</sup> State v. Hudson, 29 N. J. L.

<sup>2</sup> People v. Brislin, 80 Ill. 423. 104.

<sup>3</sup> Hundley v. Com'rs, 67 Ill. 559.

<sup>5</sup> Steekert v. E. Saginaw, 22 Mich. 104.



**511.** The commissioners, or appraisers, appointed to assess damages, are *quasi* jurors, and should be free from all legal disability.<sup>6</sup> An assessment for opening a street will be set aside if one of the commissioners is a property owner and tax payer within the limits over which the board of commissioners has authority to act, where the statute creates the disqualification because of said ownership; <sup>7</sup> but the fact that one of them owned a lot located about 100 feet beyond the area of benefits as fixed by the board does not disqualify him as not being disinterested, so as to render the assessment for the improvement invalid, the statute providing the commissioners shall be resident freeholders of the municipality.<sup>8</sup> A commissioner is not disqualified because he is a trustee of a religious corporation owning premises liable to assessment for benefits,<sup>9</sup> nor is a special assessment made invalid because spread by a commissioner, appointed under a statute, who is not a member of the common council.<sup>10</sup> If the charter require the commissioners to be possessed of certain qualifications, it must appear upon the face of the proceedings that they are possessed of those qualifications.<sup>11</sup>

<sup>6</sup> *R. I. & A. R. Co. v. Lynch*, 23 Ill. 645.

In this case, one of the commissioners, after being agreed upon, was found to be a stockholder in the plaintiff road, and was held disqualified, and the report rejected.

<sup>7</sup> *State v. Circuit Court*, 64 N. J. L. 536, 45 Atl. 981.

<sup>8</sup> *State v. North Plainfield*, 63 N. J. L. 61, 42 Atl. 805.

<sup>9</sup> *People v. Mayor, etc.*, 63 N. Y. 291.

<sup>10</sup> *Citizens', etc., Trust Co. v. Chicago*, 215 Ill. 174, 74 N. E. 115; *Lake v. Decatur*, 91 Ill. 596.

In Illinois, the commissioner to spread a special tax for a public improvement in a village may be

appointed by the president of its board of local improvements. *Melrose Park v. Dunnebecke*, 210 Ill. 422, 71 N. E. 431; *Sumner v. Milford*, 214 Ill. 388, 73 N. E. 742; *Marshall v. Milford, Id.*

<sup>11</sup> *Vreeland v. Bayonne*, 54 N. J. L. 488, 24 Atl. 486; *Bramhall v. Bayonne*, 35 N. J. L. 476; *State v. Jersey City*, 25 N. J. L. 315; *State v. Newark*, 25 N. J. L. 413; *State v. Newark*, 36 N. J. L. 170; *State v. Passaic*, 38 N. J. L. 171.

Where the statute requires that the commissioners shall be "disinterested free holders," the order of appointment must recite that fact, otherwise the proceedings are defective. *Brewer v. Elizabeth*, 66 N. J. L. 547, 49 Atl. 480.



**512.** The assessment will not be invalidated by the mere clerical error of omitting a letter from the given name of one of the commissioners, in making the appointment,<sup>12</sup> and the objection that John F. K. was appointed a commissioner, and the roll was signed J. F. K. is not well taken.<sup>13</sup> But a special assessment will not be confirmed where there is a substantial difference in the names as signed to the affidavit, roll and oath.<sup>14</sup> Where public officers are clothed with important powers, subject to but few effectual restraints, so that the rights of private property are almost at their mercy, it will be held that the acts of such officers must be free from the motives of special pecuniary interest, and courts should open the way to a proper investigation of the sources of such improper motives. To do otherwise would be to encourage a prostitution of their powers to their own private ends by a judicial shield which should be applied to the protection of the oppressed. In such a case it is error for the court to refuse to permit the property owner to show that one of the commissioners making the assessment had a pecuniary interest in making it.<sup>15</sup> A contract between a city and an engineer by which he was to design and construct a system of waterworks, his compensation to be included in the assessment to be levied to pay for such construction, shows upon its

*Contra.*

The city council are primarily the judges of the competency of the persons to be appointed by them to make the estimate and assessment of the proposed improvement, and the presumption is that they performed their duty and were "competent persons." *Walker v. Aurora*, 140 Ill. 402, 29 N. E. 741.

<sup>12</sup> *Brethold v. Wilmette*, 168 Ill. 162, 48 N. E. 38.

<sup>13</sup> *People v. Lingle*, 165 Ill. 65, 46 N. E. 10.

<sup>14</sup> The signatures were John M.

Dunphy, as one commissioner, and alternately *James C. Hitchcock* and *Jonas C. Hitchcock*, as another commissioner, while the record showed the appointment of John M. Dunphy and J. C. Hitchcock as commissioners, with another whose name did not vary. *Harrison v. Chicago*, 163 Ill. 129, 44 N. E. 395.

<sup>15</sup> *Hunt v. Chicago*, 60 Ill. 183; *Shreve v. Cicero*, 129 Ill. 226, 21 N. E. 815; *Chase v. Evanston*, 172 Ill. 403, 50 N. E. 241; *Murr v. Naperville*, 210 Ill. 371, 71 N. E. 380.



face that such engineer is disqualified from making "a true and impartial assessment."<sup>16</sup> Nor can a city officer act as a commissioner of assessment under an ordinance providing for paying part by special assessment, when his compensation is in part a percentage on the amount so raised.<sup>17</sup>

**513.** The ownership of property in a special assessment district usually disqualifies the owner from acting as commissioner of appraisement, such ownership constituting an interest.<sup>18</sup> But the fact that one of the commissioners appointed to levy a special assessment was an employee of the agents of the owners of part of the property affected, is not such an interest as will work a disqualification.<sup>19</sup> Under the Illinois Local Improvement Act, the commissioner is not disqualified from spreading the tax by reason of being a contractor for the improvement, as nothing he could do in spreading such assessment could increase the estimate of cost, upon which the assessment is based.<sup>20</sup>

#### — Oath of Commissioners.

**514.** Where the statute requires the appraisers to take an oath before entering upon their duties, the provision is imperative, and an omission to comply invalidates the assessment.<sup>21</sup> But the failure of commissioners appointed under a statute to examine contracts as to fraud, to take the prescribed oath, does not affect the validity of their acts in certifying that a contract is free from fraud, they having been appointed by competent authority, having exercised

<sup>16</sup> *Murr v. Naperville*, 210 Ill. 371, 71 N. E. 380.

<sup>17</sup> *Chase v. Evanston*, 172 Ill. 403, 50 N. E. 241.

<sup>18</sup> *Shreve v. Cicero*, 129 Ill. 226, 21 N. E. 815.

Under a statute providing that no public improvement be ordered except by a vote of two-thirds of the trustees, ownership of land in the assessment district is not a disqualification. *Corliss*

*v. Highland Park*, 132 Mich. 152, 93 N. W. 254, 610, 95 N. W. 416.

<sup>19</sup> *Pearce v. Hyde Park*, 126 Ill. 287, 18 N. E. 824.

<sup>20</sup> *Betts v. Naperville*, 214 Ill. 380, 73 N. E. 752, *overruling*, *Murr v. Naperville*, 210 Ill. 371, 71 N. E. 380.

<sup>21</sup> *Wheeler v. Chicago*, 57 Ill. 415; *Union Building Ass'n v. Chicago*, 61 Ill. 439.



their functions without question, and being at least *de facto* officers, and it is no answer to the validity of their action that it could result in private property being taken for assessments.<sup>22</sup> In practice, however, there is no such publicity attending the appointment of appraisers as apparently to warrant the application of the rule as to *de facto* officers, and it is certainly safer to require the oath to be taken as provided by statute, as it undoubtedly is a requisite to the exercise of the jurisdiction conferred. Where commissioners of appraisement take the statutory oath before the ordinance providing for the assessment becomes operative, it is not an irregularity that will vitiate subsequent proceedings,<sup>23</sup> and it is no objection to the validity of the proceedings that the commissioners took the oath required by the charter, adding thereto other clauses not inconsistent therewith.<sup>24</sup> A notary public who is a superintendent of the assessment department of a city, is not disqualified to administer the oath to the commissioners.<sup>25</sup> When once duly sworn, it will be unnecessary for them to be re-sworn before re-casting their roll pursuant to a subsequent order of court.<sup>26</sup> The lot owner cannot impeach the assessment, in a collateral proceeding, because the commissioners of assessment did not

<sup>22</sup> *In re Kendall*, 85 N. Y. 302.

Commissioners appointed by a common council to appraise damages in laying out streets are public officers, and although it may not appear that they were free holders or were sworn as required by charter, yet they are officers *de facto* and their acts are valid as between the city and a party whose land has been taken for a public street. *Trinity College v. Hartford*, 32 Conn. 452.

<sup>23</sup> *Gurnee v. Chicago*, 40 Ill. 165.

<sup>24</sup> *Rich v. Chicago*, 59 Ill. 286.

If the oath of a commissioner be substantially correct, it is sufficient. *State v. Jersey City*, 24 N. J. L. 662.

<sup>25</sup> *McChesney v. Chicago*, 159 Ill. 223, 42 N. E. 894.

<sup>26</sup> *Schemick v. Chicago*, 151 Ill. 336, 37 N. E. 888.

When the commissioners are properly sworn at the proper time, and their report is returned for a reappraisal, their proceedings are valid without a new oath. *Low v. Galena & C. U. R. Co.*, 18 Ill. 324.



take the statutory oath, nor after application for confirmation.<sup>27</sup>

### — Judgment of Commissioners.

**515.** The determination of the assessing board as to what property is benefited, and the extent of such benefit, when made in accordance with statutory requirements, is conclusive, in the absence of fraud or mistake. But a determination, although honestly made, upon a rule of assessment other than that prescribed by statute, as upon a rule of frontage merely, is not valid.<sup>28</sup> It is equally true that de-

<sup>27</sup> Walker v. People, 169 Ill. 473, 48 N. E. 694.

An objection that the oath administered to the commissioners was defective, must be made at the time of application for confirmation, and will be too late on application for judgment of sale. Walker v. People, 170 Ill. 410, 48 N. E. 1010.

<sup>28</sup> Walters v. Lake, 129 Ill. 23, 21 N. E. 556; Latham v. Wilmette, 168 Ill. 153, 48 N. E. 311; State v. District Court, 29 Minn. 62, 11 N. W. 133; State v. District Court, 33 Minn. 295, 23 N. W. 222.

The judgment of commissioners of assessment on matters of fact within their lawful cognizance will not be reversed except upon clear proof that it is erroneous. State v. Passaic, 44 N. J. L. 171.

The judgment of the commissioners as to the amount of benefits received by the property owners from a local improvement, is conclusive unless clearly shown to be erroneous. State v. Plainfield, 63 N. J. L. 61, 42 Atl. 805.

"Whether particular property

is benefited, and to what extent it is benefited, must be left to the judgment of those whose duty it is to make the assessment, and that, when they have exercised their judgment, their determination, in the absence of fraud or demonstrable mistake of fact, is conclusive. But they must exercise their judgment, and if it appears they have not done so, but have substituted an arbitrary, inflexible rule instead of their judgment, their work cannot stand." State v. Judges of District Court, 51 Minn. 539, 53 N. W. 800, 55 N. W. 122, by Gilfillan, C. J.

The determination of the commissioners as to what property is benefited, is committed to the judgment of the commissioners, which must stand unless impeached for fraud. Wright v. Chicago, 48 Ill. 287; Elliott v. Chicago, 48 Ill. 293; Lawrence v. Chicago, 48 Ill. 292.

This refers only to a case where the limits of the taxing district are to be determined by the actual benefits conferred.

*Collateral Proceedings.*

In a collateral proceeding, it is



termination of the commissioners of assessment as to the proportionate amounts of the cost of an improvement to be borne respectively by the city and the property owners, is final. The fact that the city's share is fixed at "no dollars," does not show that the improvement is not a public one such as might be made by special assessments.<sup>29</sup> The judgment to be exercised is that of the commissioners solely, and a grading and paving assessment is fatally defective when the viewers do not, in their estimate of damages, exercise their judgment on the value of the work done, but base it upon the certificate of a local officer.<sup>30</sup>

**516.** It is a general rule that the report of commissioners duly appointed to make a special assessment, is *prima facie* evidence of its validity, and will, unless shown to be

not competent to show errors of judgment by the assessment commissioners in determining benefits. In such a proceeding, the determination is conclusive, in the absence of fraud. *People v. Hagar*, 52 Cal. 171.

*Difference of Opinion as to Amount.*

An assessment will not be modified, altered, annulled or recast merely because there is a difference of opinion as to whether the commissioner exercised sound judgment in spreading it, unless his action was so improper as to amount to fraud. *Betts v. Naperville*, 214 Ill. 380, 73 N. E. 752.

*Must exercise their own Judgment.*

Under a charter limiting an assessment to the benefits actually accruing, the commissioners must exercise their own judgment in fixing the assessment district, and their action will be illegal if they merely follow the instructions given them by some other cor-

porate authority. *Sinclair v. West Hoboken*, 58 N. J. L. 129, 32 Atl. 65.

<sup>29</sup> *Galt v. Chicago*, 174 Ill. 605, 51 N. E. 653.

<sup>30</sup> *Morewood Ave*, 159 Pa. St. 20, 28 Atl. 123, 132; *Ferguson's Appeal*, 159 Pa. St. 39, 28 Atl. 130; *Omega Street*, 125 Pa. St. 129, 25 Atl. 528; *Shiloh Street*, 152 Pa. St. 136, 25 Atl. 530.

Under a law limiting assessments to one-half of the value of the lot assessed, the statement of the commissioners of estate that such limit was in no case exceeded, together with a tabular statement of the specific assessments, is a sufficient compliance with the statute.

*In re Mayor, &c.*, 178 N. Y. 421, 70 N. E. 924.

*Respondet superior.*

In directing the construction of free gravel roads and levying assessments to pay therefor, the board of commissioners is not the agent of the county, and the



incorrect or invalid, be accepted as conclusive.<sup>31</sup> And like the appointment, the report of the commissioners must show on its face, a compliance with all legal rules, the observance of which is necessary to make a valid assessment, and give the proper tribunal authority to confirm the same.<sup>32</sup> Where the board report that they were directed by ordinance "to make a just and equitable assessment of the expense" among the owners, etc., "in proportion to the advantage which each shall be deemed to acquire," and then declared they had "made a just and equitable assessment thereof," an objection that the assessment is void because of the failure to state in the report that the assessors had assessed those benefited, and in proportion to benefit, is untenable. There being no allegation that the legal rule was varied, the assessment will not be held void for the absence from the report of a form of words.<sup>33</sup> When property is legally subject to

*maxim respondeat superior* cannot apply in any form. *Commissioners v. Fullen*, 111 Ind. 410, 12 N. E. 298.

<sup>31</sup> *Chicago R. I. & P. R. Co. v. Chicago*, 139 Ill. 573, 28 N. E. 1108.

<sup>32</sup> *Moore v. Mattoon*, 163 Ill. 622, 45 N. E. 567.

The foregoing was a case where only two commissioners signed. *State v. New Brunswick*, 38 N. J. L. 190, 20 Am. Rep. 380.

<sup>33</sup> *In re Roberts*, 81 N. Y. 62.

A report of the assessment board, stating the amount of damages and compensation as to each piece of land taken or injured, and that they "then assessed the amount of such compensation and damages, so awarded, upon the land and property benefited by such proposed improvement, assessing the same upon the several parcels in proportion to the bene-

fits which each parcel will receive from such improvement, conformably to the rules laid down in said city charter in that behalf, and that schedule B, herewith attached and made a part of this report, is our assessment list," shows that they assessed the benefits on all the property benefited. *Cook v. Slocum*, 27 Minn. 509, 8 N. W. 755.

*Power of Counsel on disapproval.*

Where the charter requires the appointment by the council of three commissioners to estimate the cost and also appraise damages, and after the return of the latter to the commissioners with the disapproval of the council, and the commissioners refuse to change their estimate, the council is without power to discharge such commissioners and appoint three others in their place. *State v. Passaic*, 41 N. J. L. 90.



assessment, and the proceedings of the commissioners are regular, the report is conclusive, in the absence of other proof, of the fact of benefit actually received, and of its amount and value, but where the statute so requires, the report must show affirmatively that a just and equitable assessment has been made.<sup>34</sup> The commissioner's report is *prima facie* evidence of the justice of the assessment; and the fact that they assessed against each lot the exact cost of the improvement in front thereof, will not vitiate the assessment where it appears that they determined that the benefit to each lot was equal to the improvement in front thereof.<sup>35</sup> Their report is conclusive as to the relative proportion of cost to be borne between the municipality and the property owners.<sup>36</sup> Where the only defect in assessment proceedings is the failure to give proper notice for confirmation, the report may be adopted in a new proceeding, by a proper reference, to be made as nearly as may be in the manner prescribed for a first assessment.<sup>37</sup>

— Commissioners must act jointly — Signatures.

517. Where the statute requires a certain thing to be done by the commissioners, whether taking the oath, examining the locality, assessing benefits, certifying the roll,

<sup>34</sup> *State v. Jersey City*, 42 N. J. L. 97; *Hendrickson v. Pt. Pleasant*, 65 N. J. L. 535, 47 Atl. 465.

<sup>35</sup> *Springfield v. Sale*, 127 Ill. 359, 20 N. E. 86; *Peyton v. Morgan Park*, 172 Ill. 102, 49 N. E. 1003.

<sup>36</sup> *Billings v. Chicago*, 167 Ill. 337, 47 N. E. 731.

<sup>37</sup> *Burton v. Chicago*, 62 Ill. 179.

*Error in report.*

The fact that commissioners appointed to make an estimate reported that the work was to be done "conformably to the draw-

ings of said ordinance attached," the latter being silent as to drawings, will not be taken as a showing that the commissioners disregarded the ordinance and acted upon drawings, there being no evidence that such drawings ever existed. *Barber v. Chicago*, 152 Ill. 37, 38 N. E. 253.

*Amendment of report.*

The report of assessment commissioners to the city council cannot be amended after judgment and at a subsequent term. *Henkel v. Mattoon*, 170 Ill. 316, 48 N. E. 908.



signing notices or making a report, they must act jointly, and all sign the requisite documents, or jurisdiction is not acquired.<sup>38</sup>

— Death or absence of one Commissioner.

**518.** Where one of three commissioners appointed to ascertain and assess damages for lands taken for a street, dies after the award of damages and before the assessment, the power to make such assessment vests in and should be exercised by the two surviving commissioners, there being no provision for filling the vacancy.<sup>39</sup> But an objection that an assessment was illegal because made up and notice published by three of the assessors instead of the full board can not be successfully maintained where there is no proof that all four were not present at the assessment, or that the fourth did not have notice of the meeting, or that a vacancy, which had been occasioned by the death of one of the assessors, had been filled at the time of the assessment.<sup>40</sup> In

<sup>38</sup> *McChesney v. People*, 148 Ill. 221, 35 N. E. 739; *Boynton v. People*, 155 Ill. 66, 39 N. E. 622.

The action of only two commissioners cannot be sustained. *Adcock v. Chicago*, 160 Ill. 611, 43 N. E. 589.

The report of commissioners of assessment must be signed by persons making it, and a report not signed or authenticated by the signature of such commissioners is not a compliance with the statute. *Hinkel v. Mattoon*, 170 Ill. 316, 48 N. E. 908.

Commissioners who are appointed to estimate the cost of an improvement must act jointly; and a special assessment is invalid when it appears their report was signed by two only, of the three commissioners, and by a third person not authorized to

act. *Markley v. Chicago*, 170 Ill. 358, 48 N. E. 952.

The certificate of the commissioners of assessment should show that they acted jointly, and where only two sign, no presumption is created that the third acted, the certificate being silent on that point. *Larson v. Chicago*, 172 Ill. 298, 50 N. E. 179.

An estimate of cost signed by only 1 out of 3 appointed commissioners, and two strangers, is void where there is nothing to show a regular appointment of the latter in place of the two commissioners who did not sign. *Murphy v. Chicago*, 186 Ill. 59, 57 N. E. 847.

<sup>39</sup> *People v. Mayor, &c.*, 63 N. Y. 291.

<sup>40</sup> *In re Merriam*, 84 N. Y. 596.



case an assessment board is duly appointed to view and assess swamp lands, and the assessment made by them is void because only two of the three members were present, the appointing power is without authority to appoint a new board to make a further assessment, or direct the old board to do so.<sup>41</sup>

### — Objections to report of — When made.

**519.** A judgment of confirmation entered by default cannot be collaterally attacked in a proceeding for the sale of the property because only two commissioners signed the assessment roll, but it may be attacked in a direct proceeding to review a judgment of confirmation.<sup>42</sup> The objection that

<sup>41</sup> *Harris v. Supervisors Colusa Co.*, 49 Cal. 662.

*Assessment by unauthorized person.*

Where an assessment is required by law to be levied by a certain officer, and his office becomes extinct with the expiration of the city's charter, a subsequent assessment by an unauthorized official is invalid. *Walker v. Dist. of Col.*, 6 Mackey, 352.

*Commissioners all present—agreement by majority only.*

Where all the commissioners are present and consulting, it is competent for the majority to determine upon the estimate to be reported, and their report being evidence of their action should show that all were present, and whether their action was unanimous or otherwise. *Hinkel v. Mattoon*, 170 Ill. 316, 48 N. E. 908.

*Recommendation by board—when insufficient.*

Where the statute requires a recommendation by a board of

three commissioners, the mayor and city engineer before a street improvement can be proceeded with, and the mayor, engineer and one commissioner met for the purpose of considering the matter, a report in favor of the improvement made by the mayor and engineer only, does not confer jurisdiction to proceed, as the report should be made and concurred in by a majority of the five members of the board. *Brophy v. Laudman*, 28 Ohio St. 542.

*Action of majority of board.*

In Michigan the action of a majority of a board of equalization and review in making a street improvement assessment is legal, if all members were notified of the meeting. *Cuming v. Grand Rapids*, 46 Mich. 150, 9 N. W. 141.

<sup>42</sup> *Larson v. People*, 170 Ill. 93, 48 N. E. 443; *Hinkel v. Mattoon*, 170 Ill. 316, 48 N. E. 908.

*Impeaching Commissioners' Report.*

A party whose property is as-



only two of the three special assessment commissioners acted in making the estimate and signed the report, will not be entertained on application for judgment of sale, where the other proceedings are sufficient to give the court jurisdiction to enter the judgment of confirmation.<sup>43</sup>

— Evidence.

**520.** The records of the assessing board, although made by statute *prima facie* evidence of the facts stated therein, are not conclusive evidence of the proceedings, and the facts may be shown by other evidence. Since the record is not conclusive as evidence, it does not conclude either party.<sup>44</sup> Where the statute authorizes an appeal to the County Court by one who is aggrieved by an assessment, and it appears on such hearing that the rule of apportionment adopted was erroneous, the Court is not concluded by the return of the commissioners, or the testimony of one of them as to what rule of apportionment was adopted, but the question is an open one to be determined on the evidence.<sup>45</sup> And it is error to refuse to accept competent evidence to show that the commissioners appointed in a street opening proceeding had prejudged complainant's case, and declared proofs would be useless.<sup>46</sup>

— Commissioners as witnesses.

**521.** Commissioners appointed to make a special assessment cannot be called as witnesses to impeach their report

assessed may possibly have his assessment reduced by showing that other property which has not been assessed is, in fact, benefited, and the extent of such benefit. The report cannot be impeached merely by showing that contiguous property has not been assessed, but it must be established by evidence that such other property will be actually benefited, and the amount thereof. C. R.

I. & P. R. Co. v. Chicago, 139 Ill. 573., 28 N. E. 1108.

<sup>43</sup> People v. Markey, 166 Ill. 48, 46 N. E. 742; McChesney v. People, 148 Ill. 221, 35 N. E. 739; Boynton v. People, 155 Ill. 66, distinguished, 39 N. E. 622.

<sup>44</sup> State v. District Court, 29 Minn 62, 11 N. W. 133.

<sup>45</sup> People v. County Court, 55 N. Y. 604.

<sup>46</sup> Cole v. Peoria, 18 Ill. 301.



by showing that they failed to discharge their duties, after such report has been acted upon and approved by the proper authorities, or to inculcate themselves, or show reasons for their actions, or stultify themselves.<sup>47</sup> Their declarations, and that of their clerk, as to the manner in which an assessment was made, are inadmissible, being merely hearsay,<sup>48</sup> while their certificate that the requisite number of proprietors have assented to a paving is not conclusive on the question of assent, but has merely a *prima facie* effect.<sup>49</sup>

— View of premises by.

**522.** The commissioners must examine the work and property assessed in person, and exercise their own judgment. It is not sufficient that they sign an estimate and report made by third persons.<sup>50</sup> Where the statute requires the assessment to be made upon actual view, compliance therewith must appear upon the record,<sup>51</sup> but it seems such report is not conclusive, but is subject to collateral attack.<sup>52</sup> The requirement that they go in person jointly to view the premises is met by their going together upon the land, traversing it in various directions, and from different points of observation obtain a view of the whole land, but this joint view and assessment is essential to the validity of the assessment, where required by city charter or general statute.<sup>53</sup>

<sup>47</sup> Wright v. Chicago, 48 Ill. 285; Jenks v. Chicago, 48 Ill. 296; Quick v. River Forest, 130 Ill. 323, 22 N. E. 816; Brethold v. Wilmette, 168 Ill. 162, 48 N. E. 38.

<sup>48</sup> Rue v. Chicago, 66 Ill. 256.

<sup>49</sup> Henderson v. Mayor, &c., 8 Md. 352.

<sup>50</sup> State v. Jersey City, 24 N. J. L. 662.

<sup>51</sup> Marsh v. Supervisors, 42 Wis. 502.

<sup>52</sup> When a board of commissioners created by statute for the

purpose of levying a special tax on swamp lands, are required by such statute to jointly view and assess the land, in their report state that they have jointly viewed and assessed the land, when in fact they have not, the report is not conclusive of the question, nor even *prima facie* evidence thereof unless required by statute, and may be attacked in a collateral action to recover the tax. People v. Hagar, 49 Cal. 229.

<sup>53</sup> People v. Hagar, 49 Cal. 229;



It has been held, in an action at law under a city charter for damages caused by the change of an established grade, that where a view of the premises is impracticable, a photograph properly identified as being as perfect as could be, is proper evidence to show the location and surroundings of the premises and improvements, and aid the jury in determining how they were affected by the change made in the grade of the street.<sup>54</sup>

— Presumptions as to acts of.

**523.** It has been held that the presumption is that the assessing board has exercised its proper judgment, in making an assessment, and that this presumption is final and conclusive, in the absence of fraud, unless it appears the board applied an illegal principle, or the record demonstrates a mistake of fact, of an affirmative nature, and to the contrary.<sup>55</sup> As stated, the exceptions emasculate the vitality of the rule, and leave but little more of it than a statement that it is presumed public officers do their duty, unless the contrary appears. In a quite recent case, the report of the board of public works, who were charged by defendant's charter with the duty of making the assessment, showed by its recitals that the requirements of the charter were followed as to viewing the premises and determining both the damages and the benefits to the plaintiff's property by the grading of the street. It was the conclusion of the court that, while such a report, made in due form, *prima facie* establishes all the facts required to sustain the validity of that report, yet evidence *aliunde*, showing that the conclusion of the board could not reasonably have been arrived at

People v. Hagar, 52 Cal. 171; pare Davis v. Saginaw, 87 Mich. 439.

Johnson v. Milwaukee, 40 Wis. 315; Watkins v. Zwietusch, 47 Wis. 515, 3 N. W. 35; Watkins v. Milwaukee, 52 Wis. 98, 8 N. W. 823; Pittlekow v. Milwaukee, 94 Wis. 651, 69 N. W. 803; But com-

<sup>54</sup> Church v. Milwaukee, 31 Wis. 512.

<sup>55</sup> State v. District Court, 80 Minn. 293, 83 N. W. 183; Allen v. Chicago, 176 Ill. 113, 52 N. E. 33.



by the exercise of judgment, is sufficient to overcome such evidence and call for a decision that the assessment was void, in the absence of independent proof to the contrary.<sup>56</sup>

<sup>56</sup> *Friedrich v. Milwaukee*, 118 Wis. 254, 95 N. W. 126.

This was a very unusual case. The assessment district consisted of one block only, about 315 feet long, the grading on which varied from almost nothing to about 30 feet. The evidence showed the various 30 foot front lots were worth from \$10 to \$20 a foot before the improvement. The evidence of plaintiff's witnesses was that the property was worthless after the improvement, and plaintiff permitted his property to go at foreclosure sale. Defendant's witnesses testified the lots were worth from \$100 to \$150 each after the improvement, while the board of public works assessed each lot with benefits of \$300, and found no damages. It is not to be wondered at that a court of equity would find that the board could not have exercised their judgment in the case.

The proportion of tax imposed on the right of way will be presumed correct. *C. R. I. & P. R. Co. v. Moline*, 158 Ill. 64, 41 N. E. 877.

*Miscellaneous Decisions as to Powers and Duties of Commissioners* — cannot estimate for part of Improvement.

Commissioners of assessment have no power to omit from their estimate a part of the work or improvement provided by the ordinance because of insufficient description. *Illinois Central R. R.*

*Co. v. Effingham*, 172 Ill. 607, 50 N. E. 103.

*Clerical Error.*

Where an assessment roll is recast by order of the court, the insertion of "George" instead of "John," before the name of one of the commissioners named in such order, will not vitiate the roll. *Schemick v. Chicago*, 151 Ill. 336, 37 N. E. 888.

*Fixing Prices — Forestalling Competition.*

Where the specifications for public work provide that the prices for "rock excavation and foundation planks" are fixed by the commissioner of public works, and so withdrawn from competition contrary to charter provisions, the assessment to pay for the improvement is invalid. *In re Metropolitan Gas L. Co.*, 85 N. Y. 526; *In re Pelton*, 85 N. Y. 651; *In re Merriam*, 84 N. Y. 596.

*Power of Park Commissioners.*

A statute authorizing park boards to make assessments "for the purpose of improving any boulevard, highway, driveway, or street," confers no power to levy an assessment for sewer and water mains intended to supply sewer and water service to residents on a boulevard. *N. Chi. Park Comrs. v. Baldwin*, 62 Ill. 87, 44 N. E. 404.

*Sessions of Board — Recess.*

Where the statute requires a board to remain in session from 9 a. m. to 5 p. m., and after re-



**Estimate of cost.**

**524.** In order that all parties may be advised of the extent of a proposed public improvement, it is customary to require some board or officer to prepare an estimate of the supposed cost, and to file or advertise the same. They are usually based upon plans or specifications, also publicly exposed, and when these requirements are prescribed by stat-

maintaining in session only a part of the day, a recess was taken, and no meeting was held for 30 days thereafter, a special tax depending on such proceedings is void. *John v. Connell*, 64 Neb. 233, 89 N. W. 806.

*Same — Same*

The fact that a city council acting as a board of equalization at a meeting regularly called and held to review certain special assessments, takes a recess before the entire time prescribed by statute for their sitting shall have expired, does not invalidate the assessment if the city clerk or some member of the board be present during the entire time to receive complaints, and give information, and final action is not taken except by the majority in open session. *John v. Connell*, 64 Neb. 233, 98 N. W. 457, distinguishing *Medland v. Linton*, 60 Neb. 249, 82 N. W. 866.

*Approval of Improvement Board.*

A special assessment cannot be successfully resisted by showing that the details of the plan have not been approved by the Board of Public Works. *Richards v. Cincinnati*, 31 Ohio St. 506.

*Legality of Board — How questioned.*

Where all the customary proceedings for a public improvement

are had before the persons acting as the board of commissioners, no question of the legality of the organization of that board or its existence can be raised in proceedings objecting to the assessment. That must be done by *quo warranto*. *Betts v. Naperville*, 214 Ill. 380, 73 N. E. 752.

*Reference to Commissioners.*

Where the charter requires that an improvement ordinance be referred to the commissioners of assessments and a city surveyor not interested in the improvement, a reference to the commissioners only is irregular. *State v. Bayonne*, 49 N. J. L. 311, 8 Atl. 295.

*Cannot assess street not named in order.*

Commissioners have no authority to assess the cost of improving a street not named in the order appointing them. *Ferris v. Chicago*, 162 Ill., 111, 44 N. E. 436.

*Proof of Notice.*

Where an ordinance, passed under statutory authority, prescribes the form and kind of notice of assessment, and required the commissioners to attach to the assessment roll an affidavit of the giving of such notice, such affidavit is receivable in evidence to prove the posting of notices of the meetings of the commissioners. *Goodrich v. Minonk*, 62 Ill. 121.



ute, they are mandatory, and an omission to make and file such estimate, plans or specifications will avoid the assessment based thereon.<sup>56</sup>

### — What expenses may be included in.

**525.** It is not always a simple matter to determine what items may be included. It is fundamental that only those which are included in the actual cost constitute the limitation upon the list, and then only to the extent to which they

<sup>56</sup> *Thomason v. Ruggles*, 69 Cal. 465, 11 Pac. 20; *Gafney v. San Francisco*, 72 Cal. 146, 13 Pac. 467; *Workman v. Chicago*, 61 Ill. 463; *Goodwillie v. Lake View*, 137 Ill. 51, 27 N. E. 15; *Gilmore v. Hentig*, 33 Kan. 156, 5 Pac. 781; *Olsson v. Topeka*, 42 Kan. 709, 21 Pac. 219; *Weller v. St. Paul*, 5 Minn. 95, Gil. 70; *Anderson v. Passaic*, 44 N. J. L. 580; *Kelley v. Cleveland*, 34 O. St. 468; *Frosh v. Galveston*, 73 Tex. 401, 11 S. W. 402; *Myrick v. La Crosse*, 17 Wis. 443; *Kneeland v. Milwaukee*, 18 Wis. 412; *Wells v. Burnham*, 20 Wis. 113.

#### *When Court without Jurisdiction.*

Where no public hearing is held, and no estimate of cost made by the engineer, as required by statute, the invalidity of the ordinance is established, and the court without jurisdiction to entertain the proceeding. *Clark v. Chicago*, 185 Ill. 354, 57 N. E. 15.

#### *Defects not Jurisdictional.*

The jurisdiction of the common council to order work is not affected by the defects of the specifications prepared by the engineer if they complied with the essential condition that they be accompanied by an estimate of cost

definitely determining the amount. *Haughwout v. Hubbard*, 131 Cal. 675, 63 Pac. 1078.

#### *Strict Compliance with Requirements for.*

Under a charter providing that "whenever the common council shall determine to make any public improvement, as authorized by this chapter, they shall cause to be made an estimate of the whole expense thereof, and of the amount to be charged to each lot and parcel of land, and, in case of grading, of the number of cubic yards to be filled in or excavated in front of each lot; . . . and such estimate shall be filed in the office of the city clerk, for the inspection of the parties interested, before such work shall be ordered to be done,"—but the council ordered a street to be graded in front of a lot without any estimate being made or filed, it had no jurisdiction to make the improvement at the lot owner's expense; and where the lot has been sold to pay for such improvement, the sale certificate will be canceled, and the issue of a deed thereon restrained. *Pound v. Supervisors*, 43 Wis. 63; *Massing v. Ames*, 37 Wis. 645.



contribute to the benefit resulting to the district by the proposed improvement. These are usually matters of legislative discretion, with which the courts are reluctant to interfere, and then only to the extent of the limitation stated.<sup>57</sup> Thus where a city charter provided for an assessment of abutting property for highway improvements only to the extent to which it was actually benefited, an assessment which rests solely upon the estimated cost of the improvement, and not upon a consideration or estimate of actual benefits, is invalid.<sup>58</sup> And none of the costs of the proceeding can be added unless the statute expressly grants the power.<sup>59</sup> The cost of engineering, surveying and superintendence may properly be included among the incidental expenses.<sup>60</sup> Where such surveying is performed by a city engineer or his assistants, who are under fixed salaries paid by the city and for a definite time, the reasonable cost of

<sup>57</sup> *Farr v. West Chicago Park Com'rs*, 167 Ill. 355, 46 N. E. 893; *Brown v. Fitchburg*, 128 Mass. 282; *Sears v. Street Com'rs*, 173 Mass. 350, 53 N. E. 876; *Smith v. Portland*, 25 Ore. 297, 35 Pac. 665.

<sup>58</sup> *Johnson v. Milwaukee*, 40 Wis. 315.

<sup>59</sup> *Morris v. Chicago*, 11 Ill. 650; *Canal Trustees, &c. v. Chicago*, 12 Ill. 403.

<sup>60</sup> *McDonald v. Conniff*, 99 Cal. 386; *Gibson v. Chicago*, 22 Ill. 566; *Atchison v. Price*, 45 Kan. 296, 25 Pac. 605; *Dashiell v. Mayor, &c.*, 45 Md. 615; *Beniteau v. Detroit*, 41 Mich. 116, 1 N. W. 899; *Cuming v. Grand Rapids*, 46 Mich. 150, 9 N. W. 141; *St. Paul v. Mullen*, 27 Minn. 78, 6 N. W. 424; *In re Lowden*, 89 N. Y. 548; *In re Johnson*, 103 N. Y. 260, 8 N. E. 399; *Longworth v. Cincinnati*, 34 O. St. 101.

#### *Not Double Taxation.*

Under the express provisions of a city charter authorizing the collection of a percentage to cover expenses of making surveys, plans, specifications and superintendence, the actual expenses of such items were included in local assessment. The assessment was not thereby rendered illegal, as involving double taxation, because the amount thus collected went into a special revolving fund used for convenience in making local improvements and largely supported by local assessments, while the actual expenses of these items were in fact defrayed out of another fund supported exclusively by general taxation. Property owners paid no more than they should have paid and enjoyed the use and benefit of the accumulation in the revolving fund. *Burns v. Duluth (Minn.)*, 104 N. W. 714.



such surveying cannot be ascertained and assessed upon the abutting property as a necessary expenditure.<sup>61</sup> But, if a superintendent of such improvement be necessary and one is specially employed by the city for that special improvement, the amount paid by the city for his service is a proper item to be included in the assessment.<sup>62</sup>

526. Among other items properly chargeable are advertising and printing;<sup>63</sup> a retaining wall made necessary for the proper protection of the street;<sup>64</sup> legal expenses in making searches and procuring releases,<sup>65</sup> and an attorney's fee in the foreclosure of an assessment lien, it being in the nature of a penalty for delay;<sup>66</sup> the compensation of appraisers for assessing damages;<sup>67</sup> incidental expenses, and the cost of purchasing, erecting and maintaining a pump in a reclamation district;<sup>68</sup> commissions and expense of collection and disbursement;<sup>69</sup> the cost of lateral and cross drain pipes

<sup>61</sup> Longworth v. Cincinnati, *supra*; Board v. Fullen, 118 Ind. 158, 20 N. E. 771; *Contra*, Gibson v. Chicago, *supra*; and see, People v. Kingston, 39 App. Div. 80, 56 N. Y. Supp. 606.

<sup>62</sup> Longworth v. Cincinnati, *supra*.

<sup>63</sup> Dashiell v. Mayor, &c., 45 Md. 615; Beniteau v. Detroit, 41 Mich. 116, 1 N. W. 899; Cuming v. Grand Rapids, 46 Mich. 150, 9 N. W. 141; St. Paul v. Mullen, 27 Minn. 78, 6 N. W. 242.

<sup>64</sup> In making a street improvement the expense of building a wall which is necessary for the proper protection of the street, and which is built partly upon the street and partly upon property adjoining, with the consent of the owners thereof, the expense may be assessed upon the property abutting on the improvement. Longworth v. Cincinnati, 34 O. St.

101. See Lipps v. Philadelphia, 38 Pa. St. 503.

<sup>65</sup> State v. Rutherford, 58 N. J. L. 113; 32 Atl. 688. But see S. C. 56 N. J. L. 340, 29 N. J. 156.

<sup>66</sup> Brown v. Central Bermudez Co., 162 Ind. 452, 69 N. E. 150; Scott v. Hayes, 162 Ind. 548, 70 N. E. 879; Cicero v. Green, 211 Ill. 241, 71 N. E. 884.

<sup>67</sup> Kuhns v. Omaha, 55 Neb. 183, 75 N. W. 562.

<sup>68</sup> Swamp Land District v. Silva, 98 Cal. 51, 32 Pac. 866.

<sup>69</sup> Gibson v. Chicago, 22 Ill. 566; Cicero v. Green, 211 Ill. 241, 71 N. E. 884; Dashiell v. Mayor, &c., 45 Md. 615; Matter of Eager, 46 N. Y. 100.

An objection that the warrant attached to the tax roll, permitted the collection of 2% additional for collection fees is without force. The cost of collection is a necessary part of the expense of a



which are necessary to make an improvement in a good and workmanlike manner;<sup>70</sup> the interest on assessments payable in installments;<sup>71</sup> and the interest to accrue on street improvement bonds, and the discount necessary to convert them into cash.<sup>72</sup> A statute limiting to five per cent of the assessed valuation the amount to be raised in any one year in any special assessment district, is not violated by issuing bonds payable in five annual installments, none of which exceed five per cent.<sup>73</sup> Where the cost of a "storm water sewer" is only five per cent of the entire cost of a street improvement, and such sewer is merely a covered drain for the sole purpose of carrying off surface water, and is absolutely essential to the proper construction and preservation of the street, it is no objection that an assessment for its cost was included in the street improvement assessment, due notice having been given.<sup>74</sup> Petitioners for certiorari to quash assessments cannot complain because the authorities, in making the assessment, left out of consideration a part of the cost of building the improvement, where the cost which they considered was much more than enough to justify the assessment.<sup>75</sup> Where the statute limits an assessment to a certain percentage upon the assessed valuation, an assess-

sewer, and may be included either in the original sum ordered to be levied, or with perhaps equal propriety added afterwards. *Warren v. Grand Haven*, 30 Mich. 24.

<sup>70</sup> *Longworth v. Cincinnati*, 34 O. St. 101.

<sup>71</sup> *Teese v. Oviatt*, 24 O. St. 249.

<sup>72</sup> *People v. Austin*, 47 Cal. 353.

<sup>73</sup> *Boehme v. Monroe*, 106 Mich. 401, 64 N. W. 204.

<sup>74</sup> *Gates v. Grand Rapids*, (Mich.), 98 N. W. 998.

<sup>75</sup> *New England Hospital v. Street Com'rs*, 188 Mass. 88, 74 N. E. 294.

*Part of Cost illegally incurred*  
— *When immaterial.*

Under a statute, enacted to authorize assessments in spite of illegality, providing not to exceed one half the cost, and not exceeding benefits derived, it is immaterial whether a part of the cost of construction was illegally incurred, or whether the illegality was of a kind the legislature might have authorized, where the amount legally expended was more than double the amount assessed. *Gardiner v. Collins*, 188 Mass. 223, 74 N. E. 341.



ment in excess is void only as to the excess; and one who seeks to annul the assessment cannot complain in a collateral proceeding until he has paid, or tendered, all except such excess.<sup>76</sup>

— What expenses may not be included in.

**527.** An addition made by the board to the legal amount of one's assessment in order to bring the total amount up to a sum large enough to permit payment in five annual installments, is an illegal and arbitrary act, without authority or jurisdiction, and renders the whole assessment void if the illegal assessment cannot be ascertained and separated.<sup>77</sup> And where benefits were assessed at a certain sum, and about six per cent was added by the equalizing board, the assessment was invalid.<sup>78</sup> So, too, an assessment in excess of twenty-five per cent of the value of the property, when that limitation is fixed by statute.<sup>79</sup> An estimated percentage for cost of collection may not be included,<sup>80</sup> nor the actual

*Sufficiency of itemized estimates.*

The itemized estimate of the cost of local improvement is sufficient if it shows the estimated cost of the substantial component elements of the improvement. *Hulbert v. Chicago*, 213 Ill. 452, 72 N. E. 1097; *Clark v. Chicago*, 214, Ill. 318, 73 N. E. 358. See also *Chicago U. T. Co. v. Chicago*, 215 Ill. 410, 74 N. E. 449.

A statutory provision that an itemized estimate of the cost of the improvement shall be made in writing by the engineer, over his signature, and made a part of the record of the first resolution for the improvement is mandatory, and a mere reference to such estimate in the record of such resolution is not a compliance with the statute. *Kilgallen v. Chicago*, 206 Ill. 557, 69 N. E. 586; *Bick-*

*erdike v. Chicago*, 203 Ill. 636, 68 N. E. 161; *Becker v. Chicago*, 208 Ill. 126, 69 N. E. 748.

<sup>76</sup> *Elkhart v. Wickwire*, 121 Ind. 331, 22 N. E. 342.

*Excess over Cost.*

Any excess of assessment collected over the cost of the improvement, cannot be devoted to another municipal purpose, but must be held rateably for those contributing. *Cleveland v. Tripp*, 13 R. I. 50.

<sup>77</sup> *Brennan v. Buffalo*, 162 N. Y. 491, 57 N. E. 81.

<sup>78</sup> *Chamberlain v. Cleveland*, 34 O. St. 552.

<sup>79</sup> *Hays v. Cincinnati*, 62 O. St. 116, 56 N. E. 658.

<sup>80</sup> *Spangler v. Cleveland*, 35 O. St. 469; *Higman v. Sioux City (Ia.)*, 105 N. W. 527.



cost, where the statute forbids;<sup>81</sup> and the expenses incurred in unsuccessfully defending suits brought against a borough because of its illegal and negligent acts in executing a public improvement,<sup>82</sup> extras or incidentals not specified in the ordinance,<sup>83</sup> where fifty per cent was added to the estimated cost of the work in front of each lot,<sup>84</sup> and the amount paid for repairs of a culvert. after its acceptance,<sup>85</sup> are all improper items which, if included in the assessment, will invalidate it. A judgment confirming an assessment, which includes the cost of making same, will be set aside if obtained after passage of a statute prohibiting such cost from being included, although the proceedings were commenced before such act was passed.<sup>86</sup> The power to revise an assessment does not authorize the addition of charges not named in the original assessment,<sup>87</sup> nor can an expense which was not legally capable of being assessed against private property originally be made a charge against such property by reassessment proceedings,<sup>88</sup> and where property has been specially assessed for a street improvement to the extent provided by statute, an assessment against the same property for a sidewalk is invalid.<sup>89</sup>

<sup>81</sup> Error sufficient to reverse judgment of confirmation. *McChesney v. Chicago*, 201 Ill. 344, 66 N. E. 217.

<sup>82</sup> *State v. Rutherford*, 57 N. J. L. 619, 31 Atl. 228.

<sup>83</sup> *Smith v. Portland*, 25 Or. 297, 35 Pac. 665.

<sup>84</sup> *Watkins v. Zwietusch*, 47 Wis. 513, 3 N. W. 35. *Johnson v. Milwaukee*, 40 Wis. 315.

<sup>85</sup> Where a street improvement required a brick and stone culvert, as well as earth construction, each class being done separately and by several contractors, the culvert being first completed and paid for,—it was error to include in the assessment the amount paid for re-

pairs of the culvert after its acceptance. *Spangler v. Cleveland*, 35 Ohio St. 469.

<sup>86</sup> *Kerfoot v. Chicago*, 195 Ill. 229, 63 N. E. 101; *Gage v. Chicago*, 195 Ill. 490, 63 N. E. 184; *Gage v. Chicago*, 196 Ill. 512, 63 N. E. 1031.

<sup>87</sup> *Schneider v. Dist. of Columbia*, 7 Mackey, 252.

<sup>88</sup> *Schintgen v. La Crosse*, 117 Wis. 158, 94 N. W. 84.

<sup>89</sup> *Pretzenger v. Sutherland*, 63 O. St. 132, 57 N. E. 1097.

*When objections may be made.*

An objection that an itemized estimate of cost has not been made as required by law comes too late upon application for judgment of



**528.** A review of the cases cited in the marginal notes upon the limitation of the assessment will lead irresistably to the conclusion that any excess beyond the cost of the work should be paid for from the general fund, and that any attempt to collect such excess from the abutting owner is

sale, and is in the nature of a collateral attack on the judgment of confirmation. *Gage v. People*, 207 Ill. 61, 69 N. E. 635; *Ryan v. People*, 207 Ill. 74, 69 N. E. 638.

An objection that an estimate of cost made by the engineer is not included in the first resolution of the board of public improvements, cannot be urged upon application for sale, as it could properly have been urged on application for confirmation, and when not made there is deemed waived. *Gage v. People*, 207 Ill. 377, 69 N. E. 840; *Steenberg v. People*, 164 Ill. 478, 45 N. E. 970; *People v. Talmadge*, 194 Ill. 67, 61 N. E. 1049; *Walker v. People*, 170 Ill. 410, 48 N. E. 1010; *Thompson v. People*, 207 Ill. 334, 69 N. E. 842.

*Salaries of local Board.*

Under a statute for levying assessments, and authorizing an amount not to exceed 6 per cent thereof towards the cost of making and collecting such assessment, the cost and expense of maintaining a board of local improvements and paying their salaries can not be included therein, as the statute applies only to the cost of making and collecting the particular assessment. *Betts v. Naperville*, 214 Ill. 380, 73 N. E. 752.

*Excessive Levy.*

A levy made after the improve-

ment is completed, in gross excess of the ascertained cost, is fraudulent and void. *Union &c. Ass'n v. Chicago*, 61 Ill. 439.

*Excess over cost to pay damages.*

The levying of ten per cent of an assessment to pay damages to the city in a suit then pending, the liability of the city being dependent on the result of that suit, makes such portion of the assessment void. *Gurnee v. Chicago*, 40 Ill. 165.

*Making assessment before estimate.*

Where the authorities undertake to levy and collect a tax for the construction of a sidewalk, without in fact building the same, or obtaining estimate of its cost, the assessment is absolutely void. *Belle-vue Imp. Co. v. Bellevue*, 39 Neb. 876, 58 N. W. 446.

*Expense of paving R. R. property improperly included.*

Where it is the duty of a railroad company to pave the approaches to a viaduct, but the whole cost of paving is spread proportionately over each piece of property assessed, the assessment is illegal, and each confirmation judgment is based on an illegal assessment. *Chicago v. Nodeck*, 202 Ill. 257, 67 N. E. 39.

*Assessment limited to valuation.*

Under a statute limiting the amount of a special assessment to fifty per cent of the assessed valuation, the term "assessed value"



the uncompensated taking of private property for public use.

### Exceeding tax limit.

**529.** It is no defense to an application for a judgment *in rem* for a delinquent special tax upon lots for a pavement, that the ordinance in providing that the city shall pay for the intersections, goes beyond the constitutional limit of taxation.<sup>90</sup> Assessments made against individual owners of land within a benefit district, to pay the cost of establishing a public park, are not taxes within the meaning of the constitution, and cannot be held unconstitutional because

refers to the value of the property as assessed for general taxation next prior to the time the improvements are ordered. *Ferry v. Tacoma*, 34 Wash. 652, 76 Pac. 277.

Where a statute provides that street improvements shall not be made when the estimated cost exceeds fifty per cent of the assessed value of the property assessed, the limitation refers to the whole of the property within the assessment district, and the assessment is not rendered invalid because some of the individual lots are assessed at more than half their assessed valuation. *Ferry v. Tacoma*, 34 Wash. 652, 76 Pac. 277.

#### *Assessment for work outside of resolution.*

In an action to foreclose a special assessment lien, an answer that there was wrongfully included a charge of fourteen cents per front foot for work done, not authorized by the resolution of intention, nor the invitation for sealed proposals, is good, and not affected by failure to appeal to the

board. *Donnelly v. Howard*, 60 Cal. 291.

#### *Estimate of cost — Evidence as to making.*

Where the estimate of cost is made and signed as required by law, evidence as to who made it is properly ruled out, because the cost of the system depends on the plans and specifications and the cost of actual labor and materials, and not on the estimate. *Betts v. Naperville*, 214 Ill. 380, 73 N. E. 752.

When statute requiring estimate of cost sufficiently complied with, see *Cheney v. Beverly*, 188 Mass. 8, 74 N. E. 306.

When second and increased estimate held to be in effect an original estimate, see *Denver v. Kennedy*, 33 Colo. 80, 80 Pac. 122, 467.

#### *Limitation on amount of Assessment.*

For case construing somewhat conflicting statutory provisions, see *Norton v. Fisher*, 33 Ind. App. 132, 71 N. E. 51.

<sup>90</sup> *People v. Green*, 158 Ill. 594, 42 N. E. 163.



they exceed the maximum rate therein allowed.<sup>91</sup> A charter provision that the tax levied for general expenses of the city shall not exceed a certain sum, without a petition for and vote by the tax payers does not apply to an assessment for building piers and breakwaters, to prevent encroachment by the lake.<sup>92</sup> But an assessment for street paving is invalid where it is made for the purpose of reimbursing the city for money to be paid by it to a contractor for paving under a contract that was void because of creating a debt in excess of the constitutional limit,<sup>93</sup> although the fact that a city has exceeded its debt limit can not be shown to defeat a proceeding to improve a street in part by special assessment and part by general taxation. The question cannot arise until the city seeks to borrow money or incur an indebtedness in such behalf.<sup>94</sup>

### Statute of limitations.

530. The legal truism that the statute of limitations does not run against a municipal corporation acting in the discharge of a public duty,<sup>95</sup> has no application to the commencement of actions at law or suits in equity begun against such corporations for violations of statutory duty in making assessments. The various statutes limiting the commencement of actions are applicable to and include these classes of cases. And the joinder of taxes, void for defects going to the validity of the assessment and affecting the groundwork thereof, with other taxes which a court of equity will require paid as terms of granting relief against the illegal taxes, will not prevent the running of the statute of limitations as to such illegal tax.<sup>96</sup>

<sup>91</sup> *Kansas City v. Bacon*, 147 Mo. 259, 48 S. W. 860.

<sup>92</sup> *Soens v. Racine*, 10 Wis. 271.

<sup>93</sup> *Allen v. Davenport*, 107 Iowa, 90, 77 N. W. 532.

<sup>94</sup> *Jacksonville R. Co. v. Jacksonville*, 114, Ill. 562, 2 N. E. 478.

<sup>95</sup> *McCartney v. People*, 202 Ill. 51, 66 N. E. 873; *Bell v. Norwood*, 8 Ohio C. C., N. S. 435.

<sup>96</sup> *Levy v. Wilcox*, 96 Wis. 127, 70 N. W. 1109.

Irregularities in condemnation proceedings which formed the groundwork of an assessment for benefits for opening a street



**Suits to vacate assessments.**

**531.** A statute providing that "no statute to set aside special assessments, or to enjoin the making of the same, shall be brought, nor any defense to the validity thereof be allowed, after the expiration of thirty days from the time the amount due on each lot or piece of ground liable for such assessment is ascertained, "being within the jurisdiction of the legislature, is not such a restriction upon the rights of litigants as calls for interference on the part of the courts, if the prior proceedings are sufficient to confer jurisdiction upon the corporate authorities to proceed."<sup>97</sup> But a provision of a city charter barring an action to set aside, or test the validity or regularity of a tax assessment unless brought within one year from the completion and delivery of

did not render the land assessed not "liable to taxation," within the meaning of Sec. 1210 h. Wis. Rev. Stats., even though they might render the condemnation proceedings void; and where such land was sold for nonpayment of the assessment, an action commenced more than a year after the sale to set aside the certificate for such irregularities was barred by said section. *Pratt v. Milwaukee*, 93 Wis. 658, 68 N. W. 392.

Sec. 1210 h. above referred to applies to sales for street improvement assessments, and certificates issued thereon.

An action to set aside an illegal special assessment for street improvements cannot be deemed commenced against the owner of the assessment certificate, to whom it has been transferred by the contractor, so as to stop the running of the statute of limitations as to the former, until the summons is actually served upon him, although it had been commenced

against the city and the contractor before the expiration of the period of limitation. *Levy v. Wilcox*, 96 Wis. 127, 70 N. W. 1109.

<sup>97</sup> *Wahlgren v. Kansas City*, 42 Kan. 243, 21 Pac. 1068; *Topeka v. Gage*, 44 Kan. 87, 24 Pac. 82; *Doran v. Barnes*, 54 Kan. 238, 38 Pac. 300; *Argentine v. Simmons*, 54 Kan. 699, 39 Pac. 181; *Kansas City v. Kimball*, 60 Kan. 224, 56 Pac. 78.

Under a statute limiting the time within which proceedings may be had to attack a special assessment to 30 days from the time the assessment is ascertained, an action commenced Oct. 2, to attack an assessment determined on Sept. 1 is too late, notwithstanding the fact that Oct. 1 fell on Sunday, and the Code provided that the time within which an act is to be done shall be computed by excluding the first day and including the last, but that, if the last day be Sunday, it shall be excluded. The Code provision does not apply. *Leaven-*



the roll, does not apply to an action to set aside a sale of the property upon which the assessment was imposed.<sup>98</sup> Where a city seeks to recover from a railway company the cost of a street improvement under a contract arising upon the acceptance of a grant under a city ordinance, the statute of limitations may be pleaded in bar, same as in ordinary actions.<sup>99</sup>

### Validity of Legislative Bond Act.

**532.** A statute authorizing the issue of bonds for street improvements, providing that the bonds, after issuance, shall be conclusive evidence of the regularity of all proceedings prior thereto, is not unreasonable because it fixes an arbitrary period of 30 days to commence proceedings after which defects which before might have been fatal are placed beyond inquiry.<sup>1</sup>

### — Limitation on power to exempt.

**533.** The provision in sec. 3, art. 9, of the Illinois Constitution of 1848, that "the property of the State and counties both real and personal, and such other property as the General Assembly may deem necessary for school, religious and charitable purposes, may be exempt from taxation," is a limitation upon the power of the legislature to grant ex-

worth v. Jones 69 Kan. 857, 77 Pac. 273; Kansas City v. Gibson, 66 Kan. 501, 72 Pac. 222.

<sup>98</sup> Brennan v. Buffalo, 162 N. Y. 491, 57 N. E. 81.

<sup>99</sup> Muscatine v. Chicago, R. I. & P. R. Co., 79 Iowa, 645, 44 N. W. 909.

#### *What covered by Statute.*

A statute which provides that "Every action or proceeding to set aside any sale of lands for the non-payment of taxes, or to cancel any tax certificate, or to restrain the issuing of any tax certificate

or tax deed, for any error or defect going to the validity of the assessment and affecting the groundwork of such tax, or on account of any void or defective special assessment, shall be commenced within one year from the date of such tax sale, and not thereafter," covers tax sales, and tax sale certificates issued to pay for paving a city street. Hamar v. Leihy, 124 Wis. 265, 102 N. W. 568.

<sup>1</sup> Chase v. Trout, 146 Cal. 350, 80 Pac. 81.



emptions from taxation except as to those specifically authorized by it. There is no power in the legislature to grant exemption from special assessments.<sup>2</sup>

### Plans and specifications.

**534.** It would seem that the preparation of plans, specifications, maps or diagram, showing in detail the work to be done, and their filing in some public place, being necessary for the information of bidders for the proposed work, should be a necessary preliminary to intelligent bidding, and it has been so held, and that the failure to file avoids all subsequent proceedings, such requirement being a condition precedent.<sup>3</sup> But the contrary has also been held, where the charter so permits, the requirement being deemed directory merely,<sup>4</sup> and it has also been held that the omission, even when required by statute, is a mere irregularity and insufficient to vacate the assessment.<sup>5</sup> And where plans and specifications are required, they must conform to and be consistent with the resolution to do the work.<sup>6</sup> Where it is the statutory duty of the city engineer to prepare the plans and specifications for a proposed street improvement, it will be presumed that he prepared them in proper time and in con-

<sup>2</sup> *Chicago v. Baptist Theological Union*, 115 Ill. 245, 2 N. E. 254.

<sup>3</sup> *State v. Bayonne*, 56 N. J. L. 463, 29 Atl. 168; *Buckley v. Tacoma*, 9 Wash. 253, 37 Pac. 441.

Under a charter providing that every resolution introduced into the Common Council for doing certain street work at the expense of adjoining lots, shall be referred to a committee, and shall not be adopted within fourteen days after its introduction, nor within ten days after the proceedings relative thereto at the time of its introduction have been published in the official paper; and that when the

common council determine to make such an improvement, they shall cause to be made and filed with the clerk certain estimates, before the work is ordered — compliance with each of these requirements is a condition precedent to the liability of adjoining lots for such work. *Hall v. Chippewa Falls*, 47 Wis. 267, 2 N. W. 279.

<sup>4</sup> *Magee v. Commonwealth*, 46 Pa. St. 358. This refers to the filing of the assessment. *Gilmore v. Utica*, 31 N. Y. 26, 29 N. E. 841.

<sup>5</sup> *In re Upson*, 89 N. Y. 67.

<sup>6</sup> *Fay v. Reed*, 128 Cal. 357, 60 Pac. 927.



formity to the ordinance;<sup>7</sup> but it will not be presumed that the plans, specifications and profile referred to in a contract, but not given in the record, will not supply apparent omissions in the contract.<sup>8</sup> Where the statute requires the engineer's certificate to be recorded, and upon the back of the certificate there is a diagram showing the amount of work done as required by the contract, and the diagram is referred to in the certificate, failure to record the diagram prevents a valid lien against the property.<sup>9</sup> The adoption by the common council of a resolution directing advertising for proposals for street work, "in accordance with the plans and specifications now on file," is equivalent to an adoption of such plans and specifications, and tantamount to a prior direction to the city engineer to make a survey, diagram, estimates and specifications.<sup>10</sup> As recorded the assessment and diagram must agree with that attached to the original assessment, and contain a sufficient description of the premises.<sup>11</sup> If the notice inviting sealed proposals for doing the work omits reference to a diagram and specifications thereof, the proceedings are invalid.<sup>12</sup>

### Eminent domain.

**535.** This is a vast subject, and there is no intent on the writer's part to go into it beyond calling attention to a few principles decided by the courts as applicable to cases where the payment is to be made by the levy of special assessment

<sup>7</sup> *Taber v. Grafmiller*, 109 Ind. 206, 9 N. E. 721.

<sup>8</sup> *Cuming v. Grand Rapids*, 46 Mich. 150, 9 N. W. 141.

<sup>9</sup> *Buckman v. Cuneo*, 103 Cal. 62, 36 Pac. 1025.

<sup>10</sup> *Stockton v. Skinner*, 53 Cal. 691.

<sup>11</sup> *Norton v. Courtney*, 53 Cal. 691. As to the sufficiency of diagram, see *Whitney v. Quackenbush*, 54 Cal. 306.

<sup>12</sup> *Stockton v. Clark*, 53 Cal. 82. *Sufficiency.*

That is certain which can be made certain. *Chase v. Trout*, 146 Cal. 350, 80 Pac. 81.

*Defining assessment district by reference to map.*

A resolution for a street improvement, and fixing the taxing district as "all the lots, premises and parcels of land fronting upon" a portion of a certain street "as



on benefited property. The propriety of the exercise of the right of eminent domain is a legislative and not a judicial question; and except as to compensation, the manner of its exercise by the legislature is unrestricted.<sup>13</sup> Proceedings under this power are adversary, the municipal-corporation on one side, and the property owners on the other; and where the charter of a city provides that its common council may appoint the jurors to assess the damages, that the council may confirm the report of the jury, and that such confirmation shall be conclusive and final, such proceedings are contrary to fairness, justice and right, and are void.<sup>14</sup> But because of the fact that such proceedings are purely statutory, charter provisions authorizing them are not void because they provide that a judgment of condemnation shall not be appealed from, but reviewed only upon certiorari.<sup>15</sup> Where the use is a public one, the legislature is the exclusive judge of the amount of land, and the estate therein, which it is proper for the public to acquire; and it may authorize the condemnation of the fee-simple of lands for public streets.<sup>16</sup> A change of a country road to a city street in consequence of the extension of the limits of a city does not impose an additional servitude upon the real property over which the

shown by a map of the proposed district on file," sufficiently defines the assessment district. *Boehme, v. Monroe*, 106 Mich. 401, 64 N. W. 204.

<sup>13</sup> *State v. Rapp*, 39 Minn. 65, 38 N. W. 926.

<sup>14</sup> *Lumsden v. Milwaukee*, 8 Wis. 485.

<sup>15</sup> *State v. Oshkosh*, 84 Wis. 548, 54 N. W. 1095.

<sup>16</sup> But the title so acquired is a "qualified or terminable fee," for street purposes only, which the municipality holds in trust for public purposes, and may neither sell nor give away. *Fairchild v.*

*St. Paul*, 46 Minn. 540, 49 N. W. 325.

A city has no power to purchase an easement for street purposes, under a charter which, besides the usual provisions for the condemnation of land for public grounds, streets, &c., provides that the city "may lease, purchase, and hold real or personal property sufficient for the convenience of the inhabitants thereof, and may sell and convey the same, and the same while owned by the city shall be free from taxation. *Trester v. Sheboygan*, 87 Wis. 496, 58 N. W. 747.



highway is constructed so as to require any new condemnation. Such highway becomes impressed with the character of a city street, subject to the exclusive control of the city authorities, and to the liabilities and servitude of all the other streets within the city.<sup>17</sup> Proceedings to condemn private property for a public street are to be taken as an entirety, and that as to any of the parties no valid street was laid in consequence of the want of proper notice to any of the land owners, a street cannot be regarded as lawfully established as against those who were properly served, so as to compel them to pay assessments laid upon them for benefits from this establishment.<sup>18</sup>

### Condemnation — Effects of.

**536.** The adoption of a special assessment ordinance for improving private property, such as an alley, is an assumption

<sup>17</sup> McGrew v. Stewart, 51 Kan. 185, 32 Pac. 896; Huddleston v. Eugene, 34 Or. 343.

<sup>18</sup> Brush v. Detroit, 32 Mich. 43. *Special Assessment Collateral to Condemnation.*

A special assessment proceeding is collateral to a condemnation proceeding, and the question of jurisdiction to enter the judgment of condemnation is the only one involved in that case that can be entertained in the assessment proceeding. Bass v. People, 203 Ill. 206, 67 N. E. 806.

#### *Hearing on Necessity for Taking.*

Where the statute permits land to be taken for a public park, and to assess a proportionate part of the cost upon the estates benefited, giving in each case a right of appeal to a jury, a person interested has no constitutional right to be heard before the municipal authorities on the question of the necessity of taking the

land, or whether it was benefited. Holt v. Somerville, 128 Mass. 408. *Massachusetts Statute.*

Where a portion of land is taken for a public park, and the balance is assessed for benefits, the owner cannot surrender the remainder under the Massachusetts Statute of 1874, if he has settled for the part taken and conveyed it by warranty deed. Holt v. Somerville, 127 Mass. 408.

#### *Assessing Amount Against Property Not Taken.*

Where there is an award of compensation for land taken, an assessment by special taxation of the amount of the award upon the land not taken, is not an adequate provision for compensation, because it compels the property owner to pay for his own land,—and this is especially true where the condemnation judgment is for damages to the land not taken as well as for the value of



tion of the duty to condemn the same.<sup>19</sup> It was formerly held in Illinois that municipal authorities may levy special assessments for street improvement purposes before acquiring the necessary soil by condemnation or otherwise, and may afterwards take the necessary steps to condemn and have the compensation and damages assessed,<sup>20</sup> but this rule was changed by statute in 1897, which provides that no special tax or assessment shall be levied to pay for any improvement until the land necessary therefor shall be acquired and possessed by the city;<sup>21</sup> and there the statute provides for the improvement of any street already condemned, ceded or opened, and an assessment for a street improvement prior to its condemnation is illegal and void.<sup>22</sup> Compensation must be actually made for the land taken, and benefits cannot be offset.<sup>23</sup>

the land taken. In such case the special tax imposed upon the abutting residue in proportion to its frontage, falls upon the property which has been determined to be damaged. *Bloomington v. Latham*, 142 Ill. 462, 18 L. R. A. 487, 32 N. E. 506.

<sup>19</sup> *People v. Sass*, 171 Ill. 357, 49 N. E. 501.

<sup>20</sup> *Holmes v. Hyde Park*, 121 Ill. 128, 13 N. E. 540.

<sup>21</sup> *People v. Sass*, *supra*.

<sup>22</sup> *Mayor, etc. v. Hook*, 62 Md. 371.

<sup>23</sup> *Payson v. People*, 125 Ill. 267, 51 N. E. 588; *Covington v. Worthington*, 88 Ky. 206, 10 S. W. 790, 11 S. W. 1038.

One, a part of whose land is taken for street purposes, must pay his proportion of the expense thereof on the same basis that other owners pay; and it is no objection that the amount of the tax thus imposed exceeds

the value of the property taken. *Ibid*.

*Condemnation — Questions determined by.*

The propriety of the condemnation of land for a street, and the power to make it, are matters necessarily passed upon by the court in a proceeding to condemn, and the court by entering judgment of condemnation necessarily determines that the property may properly be condemned. *Gage v. Chicago*, 146 Ill. 499, 34 N. E. 1034.

*Condemnation — Validity of Assessment Based On.*

A proceeding by special assessment to raise money to pay the compensation and damages awarded for property taken or damaged by a city for a local improvement is based upon an award of compensation, which must be a valid and legal one, and must have been made in the mode and



# What property assessed.

**537.** This subject has been generally discussed in a prior chapter,<sup>24</sup> and only a few concrete illustrations are referred to here. A municipal corporation cannot levy a special assessment on property beyond its corporate limits, but the correctness of what constitutes the boundary line cannot be

by the tribunal authorized to make it by the constitution and the law. *Ayer v. Chicago*, 149 Ill. 262, 37 N. E. 57.

*Same* — *Bar to Second Proceeding* — *Abandonment*.

A municipal corporation cannot ignore an assessment of damages made at its instance, and judgment of condemnation of land procured by it, and by the filing of a new petition, obtain a reassessment of damages by another jury. *C. R. I. & P. R. Co. v. Chicago*, 143 Ill. 641, 32 N. E. 178. *Same* — *Dismissal of Proceedings*.

Dismissal of condemnation proceedings at the instance of one property owner does not annul the assessment as to other owners who are not parties to such dismissal, and the judgment of confirmation of such assessment is binding on the city in a new proceeding for the same improvement. *Le Moyne v. Chicago*, 175 Ill. 356, 51 N. E. 718.

*Condemnation Judgment* — *Effect of*.

The judgment of condemnation merely fixes the amount of the compensation to be paid to the owner for the taking of his property. It does not of itself pass the title, but is merely a conditional judgment depending for its completeness upon the subsequent payment of the award. *C. & N. W. R. Co. v. Chicago*, 148 Ill. 141,

35 N. E. 881; *Ayer v. Chicago*, 149 Ill. 262, 37 N. E. 57.

*Same* — *Who Must Enter*.

It is the duty of the petitioner in a condemnation proceeding to see that a proper judgment is entered, and not that of the respondent. *Ligare v. Chicago*, 167 Ill. 637, 41 N. E. 1021.

*Procedure* — *Immaterial Error*.

The question as to whether the summons to jurors, in proceedings for condemning lands for public use, was properly served, is immaterial where the record shows that all the jurors attended and performed the duty required. *State v. Fond du Lac*, 42 Wis. 287.

*Same* — *How Jury Sworn*.

Where the charter provides that the court shall empanel a jury to decide on the necessity of the proposed condemnation "as in civil cases triable by jury," it implies that the jury should be sworn, as in civil cases, and nothing appearing to the contrary, it will be presumed the jury were properly sworn, viewed the premises and returned their verdict as required by the charter. *State v. Oshkosh*, 84 Wis. 548, 54 N. W. 1095. But see *Johnson v. Milwaukee*, 40 Wis. 315; *Lieberman v. Milwaukee*, 89 Wis. 336, 61 N. W. 1112.

<sup>24</sup> Ch. V.



questioned collaterally.<sup>25</sup> Where the statute permits, a tax for benefits from ditching and tiling a street may be laid upon property that does not adjoin the ditch,<sup>26</sup> while under an ordinance granting a railroad certain privileges on condition that it construct a viaduct with all proper approaches, and keep it in repair, the abutting owners cannot be assessed to pay for the paving of the roadway of the approaches.<sup>27</sup> Where a street is to be improved in sections, the assessment of benefits may be confined to property fronting on the street within such sections,<sup>28</sup> and an ordinance may provide that only contiguous property shall be specially assessed for a street improvement.<sup>29</sup> The whole subject is one of statutory regulation, limited by the application of the principle of benefits.

### Street intersections.

**538.** Inasmuch as street intersections are a part of the street, the expense of improving the squares caused by street intersections may be assessed upon the same property on which the other expenses of a street improvement are assessed, to the extent they are benefited thereby. And where the board of assessment finds no benefit to the general public, the omission to assess the municipality for the costs of im-

<sup>25</sup> *Bloomington Cemetery Ass'n v. People*, 139 Ill. 16, 28 N. E. 1076; *West Chicago Park Com'rs v. Chicago*, 152 Ill. 392, 38 N. E. 697.

<sup>26</sup> *Goodrich v. Minonk*, 62 Ill. 121.

<sup>27</sup> *McFarlane v. Chicago*, 185 Ill. 242, 57 N. E. 12.

<sup>28</sup> *Bigelow v. Chicago*, 90 Ill. 49. But no court has yet attempted to define the minimum limits of such a district.

<sup>29</sup> *Lake v. Decatur*, 91 Ill. 596. *Property on Both Sides of Street May be Assessed.*

Under the Indiana statute re-

quiring the cost of a street improvement to be levied on lots bordering the street in proportion to their frontage thereon, it is essential that the property on both sides the street be assessed although the improvement be of a part of the width of the street only. *Klein v. Nugent Gravel Co.*, 162 Ind. 509, 70 N. E. 801. *But Not for Repairs.*

When adjacent property has paid the original cost of grading or paving a street in a city, it has fully paid for all its local advantages, and it cannot thereafter



proving such intersections will not invalidate the assessment, and the owners of abutting property cannot object if their property is not assessed to an extent greater than its benefit, and the determination of the council as to what property is benefited is not reviewable by the courts.<sup>30</sup> By statute, the cities in Iowa are authorized to pass ordinances assessing upon a corner lot the cost of macadamizing one fourth of the square formed by the intersection of the streets.<sup>31</sup> Where a city has authority in certain cases to order the improvement of only a portion of a street lying between two main street crossings, and when so ordered, the assessment to be only upon the lots which front on the portions of the work ordered, an assessment is not void because only a part of the lots on the street on which the work is to be done are assessed therefor.<sup>32</sup> If intersecting streets are to be paved with different materials, only one can have a continuous pavement, and it is for the council to determine which material for paving shall be used at such intersection. Where the statute makes "all improvements of the squares or areas formed by the crossings of streets" chargeable to the city at large, this includes the sidewalks at the corners of these squares as well as the paving and macadamizing in the center.<sup>33</sup>

### Description of property.

**539.** The proceedings being *in invitum*, it is necessary that the lands to be assessed be accurately described, so that the assessment can be enforced against the right property, and such description will be deemed sufficient if from the whole proceedings taken together there appears to be no

be charged for maintenance and repairs. Appeal of Prot. Orphan Asylum, 111 Pa. St. 135, 3 Atl. 217, following Hammett's Case.

<sup>30</sup> Walters v. Lake, 129 Ill. 23, 21 N. E. 556; Creighton v. Scott, 14 Ohio St. 438; Lewis v. Seattle, 28 Wash. 639, 69 Pac. 393; Young

v. Tacoma, 31 Wash. 153, 71 Pac. 742.

<sup>31</sup> Wolf v. Keokuk, 48 Iowa, 129.

<sup>32</sup> McDonald v. Conniff, 99 Cal. 386, 34 Pac. 71.

<sup>33</sup> Noonan v. People, 183 Ill. 52, 55 N. E. 679.



difficulty in locating the lands, and where they are described by given distances along specified streets and avenues, and the assessment shows substantially that such lands are assessed for benefits.<sup>34</sup> It must be described so as to be capable of identification by some lawful mode, such as a government survey, a reference to an authenticated plat, or by metes and bounds, and unless so described as to be capable of such identification, the assessment and judgment will be void.<sup>35</sup> It must intelligibly describe the work to be done in all and each of its material parts, and a failure of description in any material part of the work vitiates the resolution as a whole and makes void any contract and assessment based thereon.<sup>36</sup> It must show the locality of the street assessed, and if a diagram be used, it must contain such references as will enable the description of the premises to be understood.<sup>37</sup> Where property is divided into blocks, the city has no authority to subdivide them into strips for special assessment purposes.<sup>38</sup> Where the statute so re-

<sup>34</sup> *Lawrence v. Killam*, 11 Kan. 499.

*Front-foot Rule.*

A finding by the authorities, supported by evidence, that the abutting property on a street which was to be paved was benefited to the entire cost, that the benefit was confined entirely to such abutting property, and that all of such property was uniformly and equally benefited per front foot, is not invalid as being made by an arbitrary rule of front-foot basis, or because the paving of the street intersections was ignored. *State v. District Court*, 80 Minn. 293, 83 N. W. 183.

Under a charter which provides that where public improvements are chargeable on the lots benefited, "all such improvements on

*cross streets and alleys* shall be paid for out of the ward fund, etc., where a street is improved across another street, the cost of such improvement within the line of such other street, including the crosswalk," is chargeable to the proper ward. *Pier v. Fond du Lac*, 38 Wis. 470.

<sup>35</sup> *Himmelman v. Cahn*, 49 Cal. 285; *Todemier v. Aspinwall*, 43 Ill. 401; *Upton v. People*, 176 Ill. 632, 52 N. E. 358; *State v. Bayonne*, 52 N. J. L. 503, 20 Atl. 69.

<sup>36</sup> *Bay Rock Co. v. Bell*, 133 Cal. 150, 65 Pac. 299.

<sup>37</sup> *People v. Quackenbush*, 53 Cal. 52.

<sup>38</sup> *Crain v. Chicago*, 139 Ill. 265, 28 N. E. 758.

"The assessment should contain such a description of the property



quires, the name of the owner of the property is necessary.<sup>39</sup>

540. Insufficiency of description as to two or more parcels of land does not invalidate the assessment as to the other property,<sup>40</sup> nor does a similar error as to property to be taken for an improvement afford any defense to an assessment for benefits by one whose lands were not taken.<sup>41</sup> While insufficiency of description of the lots specially taxed may be cause to sustain objections to the rendition of a judgment for taxes, it is not ground for dismissal on the application for judgment.<sup>42</sup>

A lot owner may be estopped to question the description of his lands on the assessment roll, when he has given deeds and paid taxes thereon under the description in the roll.<sup>43</sup> Defects in description should be taken advantage of before

upon which it is laid as will enable the officers whose duties it is to enforce it to properly convey title in the event of a sale. It must be such a description as will supply the means of identification and enable a surveyor to locate the specific property." Elliott on Roads and Streets, 2nd Ed., Sec. 597, quoted in Pennsylvania Co. v. Cole, 132 Fed. 668. Less strictness in description is required in proceedings to levy and collect taxes, than in grants and conveyances. Greenwood v. La Salle, 137 Ill. 225, 26 N. E. 1089.

<sup>39</sup> A statement of such name as P., Ft. W. & C. Railway Co., is insufficient to sustain an assessment against property owned by the Pittsburgh, Ft. Wayne & Chicago Railway Company. Pennsylvania Co. v. Cole, 132 Fed. 668.

<sup>40</sup> Goodrich v. Detroit, 184 U. S. 432, 46 L. ed. 627, 22 Sup. Ct.

Rep. 397; Gurnee v. Chicago, 40 Ill. 165.

<sup>41</sup> Goodrich v. Detroit, *supra*.

<sup>42</sup> People v. Green, 158 Ill. 594, 42 N. E. 163.

*Misdescription.*

The fact that property subject to a special assessment is assessed by the description of different property is not subject to the objection by the latter that his property is twice assessed, where the owner of the first property has paid his assessment. Gregory v. Ann Arbor, 127 Mich. 454, 86 N. W. 1013.

<sup>43</sup> Harts v. People, 171 Ill. 373, 49 N. E. 539.

*Payment on Misdescribed Property No Estoppel.*

Where the descriptions of property for special assessments were void, payment of assessments by the party assessed will not estop him from objecting to further compulsory payments. Upton v. People, 176 Ill. 632, 52 N. E. 358.



the confirmation, where there is not an entire failure to specify the nature of the improvement;<sup>44</sup> and where an assessment against supposed lots by their numbers has been confirmed, but where the land in question was a single tract which had never been divided into such lots, judgment of sale for a delinquent assessment was properly refused.<sup>45</sup> Upon application for the confirmation of a special assessment, the court has power to permit an amendment to the description so as not to include unnecessary property.<sup>46</sup> Where lands are described as the statute requires, by being copied from the tax duplicate, such descriptions are *prima facie* sufficient.<sup>47</sup> If a lot be described by the same number it bears on the official map, it is yet insufficient if there be no reference in the assessment to such map. The court will not take judicial notice that there is such a map, and the property owner is not chargeable with notice of it.<sup>48</sup>

<sup>44</sup> Shepard v. People, 200 Ill. 508, 65 N. E. 1068.

<sup>45</sup> People v. Eggers, 164 Ill. 515, 45 N. E. 1074.

<sup>46</sup> Leman v. Lake View, 131 Ill. 388, 23 N. E. 346.  
*Variance.*

Where property is described in the petition as "the east seven-eighths of lot 8," and in the verdict and judgment as "the east seven-eighths *feet* of lot 8," the word "feet" will be rejected as surplusage. Newman v. Chicago, 153 Ill. 469, 38 N. E. 1053.

*Collateral Attack.*

Where lands are to be taken for private use, and there are slight inaccuracies in some of the descriptions, to which the owners thereof, who were parties to the proceedings, made no objection, it has been held that parties whose lands were not taken, but were assessed to pay damages, could not attack the proceedings collat-

erally, because of such inaccuracies. Goodrich v. Detroit, 123 Mich. 559, 82 N. W. 255.

<sup>47</sup> Sample v. Carroll, 132 Ind. 496, 32 N. E. 220.

*Proper Description of Railroad Right of Way.*

Ill. Central R. Co. v. People, 170 Ill. 224, 48 N. E. 215; South Chicago City R. Co. v. Chicago, 196 Ill. 490, 63 N. E. 1013, 1135.  
*Misdescription, but Sufficiently Specific.*

Chicago v. Habar, 62 Ill. 283.

<sup>48</sup> Labs v. Cooper, 107 Cal. 656, 40 Pac. 1042.

*Unintelligible Description.*

An assessment upon premises so unintelligibly described that it is unable to ascertain the premises on which the charge is made, is void. For example, if the property is lots 41 and 42 of square 69, and the description is "of 41 and 42." McClellan v. Dist. of Col., 7 Mackey, 94.



**Assessing each parcel separately.**

**541.** It is a quite common provision of general statutes and city charters that each lot, block, piece, tract or parcel of land shall be severally and separately assessed, as to the benefits or damages incurred by the improvement, and this provision is usually deemed mandatory, and a failure to comply therewith vitiates the proceedings theretofore had.<sup>49</sup> This rule is not universal, although founded on substantial grounds of justice. The author remembers one case where two lots, owned by the same individual, were assessed together in a sum exceeding their value. Upon one lot stood a house, his homestead, upon which he desired to pay half the amount of the assessment, and redeem it, and abandon the other lot, but his tender was rejected. The property

<sup>49</sup> *Curry v. Folz*, 29 Ohio St. 320; *May v. Traphagen*, 139 N. Y. 478, 34 N. E. 1064; *Sharp v. Johnson*, 4 Hill, 92, 40 Am. Dec. 259; *Fowler v. St. Joseph*, 37 Mo. 228.

*Benefits Assessed in Gross on Several Tracts or Lots.*

*Louisville & N. R. Co. v. East St. Louis*, 134 Ill. 656, 25 N. E. 962.

Where, in constructing a viaduct, "part of blocks 8 and 9, and right of way across Broadway" was assessed to a railway company, and the blocks were subdivided into lots, all owned by the company, it was held that the proceedings were in disregard of the statute, and did not show that the property was assessed on the principle of benefits conferred. *L. & N. R. Co. v. E. St. Louis*, 134 Ill. 656, 25 N. E. 962.

Where the statute requires each lot to be separately assessed, and not to exceed in amount 25 per

centum of the assessed valuation of each, an assessment on several lots together, so as to avoid the limitation of the statute, cannot be maintained. *Stutsman v. Burlington*, 127 Iowa, 563, 103 N. W. 800; *Smith v. Des Moines*, 106 Iowa, 590, 76 N. W. 836; *Gill v. Patton*, 118 Iowa, 88, 91 N. W. 904.

*In re Westlake Ave.* (Wash.), 82 Pac. 279; *Pittsburgh, etc. R. Co. v. Oglesby* (Ind.), 76 N. E. 165; *Stutsman v. Burlington*, 127 Ia. 563, 103 N. W. 800.

But the rule seems to be relaxed where several lots are owned and occupied as one tract. *Parsons v. Grand Rapids* (Mich.), 104 N. W. 730; *Otis v. Sullivan*, 219 Ill. 365, 76 N. E. 487; *Barber Asphalt Paving Co. v. Peck*, 186 Mo. 506, 85 S. W. 387. And see, *Denver v. Dumas*, 33 Colo. 94, 80 Pac. 114; *Spalding v. Denver*, 33 Colo. 172, 80 Pac. 126.



was used and treated by him as an entirety, not making a separate assessment of the component parts necessary, as has been held by one eminent court.<sup>50</sup> Another court holds, in a very recent case, that two parcels of land occupied together by a widow, one of which is owned in fee, and in the other she has a dower estate, may be assessed as one parcel,<sup>51</sup> and another holds that although there should be separate assessments against land in which there are separate and distinct interests,<sup>52</sup> yet another court of equal eminence and ability, holds that an assessment in one aggregate sum, for a special improvement tax upon lots owned by plaintiff, and others owned by his wife, is void, and an attempt to legalize it by the legislature nugatory.<sup>53</sup>

<sup>50</sup> State v. Bayonne, 55 N. J. L. 102, 25 Atl. 267.

Under a charter requiring each lot or parcel to be assessed separately, sixteen lots assessed to one person lying together may be assessed as one parcel. State v. Jersey City, 24 N. J. L. 662. The Supreme Court of Illinois has held to the same effect in De Koven v. Lake View, 129 Ill. 399, 21 N. E. 813, but distinguishes the principle by saying, "when the statute does not require a separate assessment."

#### *Collateral Attack.*

The fact that a special tax is levied against two lots owned by the same party, jointly instead of severally, will not invalidate the tax in a collateral proceeding, as it will be presumed in the absence of evidence to the contrary that some good reason existed for listing them together. Pfeiffer v. People, 170 Ill. 347, 48 N. E. 979; Howe v. People, 86 Ill. 288; L. & N. R. Co. v. East St. Louis, 134 Ill. 656, 25 N. E. 962, distinguished.

<sup>51</sup> Parsons v. Grand Rapids, (Mich.), 104 N. W. 730.

<sup>52</sup> New London v. Miller, 60 Conn. 112, 22 Atl. 499.

<sup>53</sup> Hamilton v. Fond du Lac, 25 Wis. 490.

Where several lots are assessed together, without separate valuation, an erroneous assessment thereon cannot be reduced to the limits prescribed by a statute limiting an assessment to half the value of the property, and then affirmed, there being no sufficient basis for apportioning the tax. *In re Cram*, 69 N. Y. 452.

Assessing lots in pairs is in direct conflict with a statute providing that the council shall procure a plat showing the separate lots or parcels of ground subject to assessment, and the amount to be assessed against each. Gill v. Patton, 118 Iowa, 88, 91 N. W. 904. An assessment against too much land is void. Benson v. Bunting, 141 Cal. 462, 75 Pac. 59; Ryan v. Altschul, 103 Cal. 177, 73 Pac. 339. For a case holding it proper to assess differ-



**Omission of property from assessment.**

**542.** Where a lot within the assessment district fixed by the proper authority, is entirely omitted from the assessment of either benefits or damages, the effect is to increase the cost on the remaining lots within the district, establishes in effect a different taxing district from the one properly established, disturbs all principles of uniformity and apportionment, and renders the entire assessment void.<sup>54</sup> This

ent lots used for street railway purposes in one parcel, see, *Chicago U. T. Co. v. Chicago*, 207 Ill. 544, 69 N. E. 849.

*Alabama.*

<sup>54</sup> *Mayor, etc. v. Dargan*, 45 Ala. 310.

*Arkansas.*

*Monticello v. Banks*, 48 Ark. 251, 2 S. W. 852; *Davis v. Gaines*, 48 Ark. 370, 382, 3 S. W. 184.

*California.*

*People v. Lynch*, 51 Cal. 15, 21 Am. Rep. 677; *Levee District v. Huber*, 57 Cal. 41; *Diggins v. Brown*, 76 Cal. 318, 18 Pac. 373. An allegation in the complaint that the property in the assessment district was not all assessed, is not demurrable. *Davies v. Los Angeles*, 86 Cal. 37, 24 Pac. 771.

*Illinois.*

Assessments should not only be made in the ratio of benefits, but they must be imposed equally upon the property equally benefited, or they will be unlawful. *Chicago v. Baer*, 41 Ill. 306.

Omission to assess a horse railway for a street improvement renders the assessment void. The presumption is that the track was liable therefor. *Page v. Chicago*, 60 Ill. 441; *People v. Cole*, 128 Ill. 158, 21 N. E. 6.

*Indiana.*

*Nevins, etc., Co. v. Alkire*, 36 Ind. 189.

Under a statute requiring the cost of street improvements to be assessed by frontage on all lots bordering on the street, an assessment for the improvement of a part of the width of a street only, is absolutely void where the property on only one side of the street has been assessed, and is subject to collateral attack, as the council had no jurisdiction to proceed. *Klein v. Nugent Gravel Co.*, 162 Ind. 509, 70 N. E. 801.

*Michigan.*

*Rentz v. Detroit*, 48 Mich. 544, 12 N. W. 694, 911.

*Montana.*

*Beck v. Holland*, 29 Mont. 234, 74 Pac. 410.

*New York.*

*Matter of Klock*, 30 App. Div. 24, 51 N. Y. Supp. 897.

Property on one side of street erroneously omitted, because of ownership by the state, and supposedly exempt, assessors omitting such property do not act judicially, and their decision can be reviewed collaterally. *Hassan v. Rochester*, 67 N. Y. 528.

*Oregon.*

*Masters v. Portland*, 24 Or. 161, 33 Pac. 540.



is in strict analogy to the rule in regular tax proceedings, and yet, like most questions that have come before the courts in special assessment proceedings, the decisions are not uniform, even in the same court.<sup>55</sup> The better reason and the greater weight of authority is decidedly in favor of the affirmative of the proposition.

### Subdividing lands for assessment purposes.

**543.** Land which is not subdivided cannot be assessed in the character of lots, or arbitrarily be so subdivided by ordinance for special assessment purposes.<sup>56</sup> But such por-

#### *Pennsylvania.*

Scranton v. Levers, 200 Pa. St. 56, 49 Atl. 980.

#### *Wisconsin.*

Friedrich v. Milwaukee, 114 Wis. 304, 90 N. W. 174.

#### *California.*

<sup>55</sup> O'Dea v. Mitchell, 144 Cal. 374, 77 Pac. 1020.

#### *Illinois.*

Rich v. Chicago, 152 Ill. 18, 38 N. E. 255; Allen v. Commissioners, 176 Ill. 113, 52 N. E. 33.

#### *Missouri.*

"If the jurors must determine the benefits, then it is for them to say whether a particular lot is benefited at all or not. The council must determine the boundaries of the benefit district; but the error of the argument made for the appellants is in assuming that all property in the district must be assessed. Whether it must all be assessed depends upon the fact whether it is all benefited, and that is a question for the jury." Kansas City v. Baird, 98 Mo. 215; 11 S. W. 243, 562; Kansas City v. Bacon, 157 Mo. 450, 57 S. W. 1045.

#### *New York.*

Smith v. Buffalo, 90 Hun, 118, 35 N. Y. Supp. 635; Harriman v. Yonkers, 181 N. Y. 24, 73 N. E. 492. See, also, *in re* Churchill, 82 N. Y. 288.

#### *New Jersey.*

The basis of a special assessment being land benefited, the failure to assess a horse railway company, the track of which runs over the improved street, because its franchise is more valuable by reason of the improvement, is not erroneous in the absence of proof that the real estate of the company is benefited. King v. Dur-yea, 45 N. J. L. 258.

An assessment for benefits will not be disturbed on account of the failure of the commissioners to assess all the property benefited by the improvement, unless it is made to appear that such failure operated to injure the party complaining thereof by imposing on his lands an assessment greater than they would otherwise have been called upon to bear. State v. Bayonne, 60 N. J. L. 406, 38 Atl. 761.

<sup>56</sup> People v. Cook, 180 Ill. 341,



tion of an undivided tract of land as is benefited by the improvement may be assessed therefor, and the owner cannot be heard to insist that he is injured because only a portion of such tract is liable for the tax, instead of the whole.<sup>57</sup> Where land standing on the tax list as a single parcel is severed into two parcels by the appropriation of part of it for a street, they may be separately assessed for the improvement, although remaining an entirety for general taxation.<sup>58</sup> And if the improvement extends through an unsubdivided tract of land, such tract is not subject to local assessment to pay for such improvement to a greater distance than the average distance to which assessments on subdivided lots are levied.<sup>59</sup> Whatever rule is adopted for the assessment of part of an unplatted piece must be applicable to the whole.<sup>60</sup>

54 N. E. 173; *Bickerdike v. Chicago*, 185 Ill. 280, 56 N. E. 1096.

<sup>57</sup> *Barber v. Chicago*, 152 Ill. 37, 38 N. E. 253.

<sup>58</sup> And where the amount of the two assessments is added together, and charged upon the whole lot as if undivided, it is error. *Spangler v. Cleveland*, 35 Ohio St. 469; *Younglove v. Hackman*, 43 Ohio St. 69, 1 N. E. 230. As to valuation of un-subdivided lands under the Ohio Statutes, see *Parmelee v. Youngstown*, 43 Ohio St. 162, 1 N. E. 319.

<sup>59</sup> *Cain v. Omaha*, 42 Neb. 120, 60 N. W. 368.

<sup>60</sup> An assessment of a vacant unplatted piece of ground, having 600 feet frontage south, and 2000 feet west, treating the south frontage to the depth of 150 feet as unplatted, and the balance as unplatted, is erroneous. The whole tract should be assessed by the same rule. *State v. Robert P. Lewis Co.*, 72 Minn. 87, 42 L. R. A. 639, 75 N. W. 108.

The method of ascertaining the area of the benefit of a local improvement which results in arbitrarily dividing some lots used as a whole as one plat of ground, so as to assess only the portion lying within the area, is illegal. *State v. N. Plainfield*, 63 N. J. L. 61, 42 Atl. 805.

Where assessment commissioners arbitrarily divide a tract of land upon which valuable buildings are situated, by lines which intersect the buildings, and levy separate assessments for benefits on such smaller district, the court will not indulge the presumption that the aggregate of these separate assessments is the amount of benefit for the entire tract. *State v. Bayonne*, 55 N. J. L. 102, 25 Atl. 267.

In laying water pipes upon a street, certain lots of which had a frontage of 25 feet and others of 45 feet, the narrow lots were furnished with one lateral service pipe each and the larger lots were



**Improvements must be single.**

**544.** Several and distinct improvements may not be joined in one proceeding, but the right to deal with a public improvement as a whole must be determined by the unity of the work, and not the diversity of names that may be given to its various parts.<sup>61</sup> The fact that a single street has different names for different portions cannot preclude the whole being graded or paved under a single resolution, and the cost provided for by a single assessment. And if a street is of various widths, it may in a proceeding to improve it, be divided into as many sections as there are different widths, and the property in each section assessed for its cost.<sup>62</sup> An ordinance may include the paving of three streets in one general improvement, the pavements being of different widths, sufficiently described, and separate estimates of cost required,<sup>63</sup> and a resolution of intention to pave a street is not rendered invalid because it includes work of various kinds

for the purposes of the assessment subdivided into half lots, each one of which had a service pipe and charged accordingly; the smaller lots being assessed as entire lots. It was held that the scheme adopted was unauthorized and void, and that the property should not have been assessed for more than one service pipe to each whole lot. *Warren v. Chicago*, 118 Ill. 329, 9 N. E. 883.

Under a statute limiting a special assessment to twenty-five per cent of the value of the property, a tract of land 700 feet in front, was assessed as an entirety, and was worth as an entirety, more than four times the amount of the assessment, while about 250 feet, through which ran a ravine, was worth somewhat less. It was not the duty of the council to

subdivide it, and its assessment as an entirety was upheld. *Schroder v. Overman*, 61 Ohio St. 1, 47 L. R. A. 156, 76 Am. St. Rep. 354, 55 N. E. 158.

<sup>61</sup> *Weckler v. Chicago*, 61 Ill. 142; *Cuming v. Grand Rapids*, 46 Mich. 150, 9 N. W. 141.

<sup>62</sup> *Findlay v. Frey*, 51 Ohio St. 390, 38 N. E. 114; *Cuming v. Grand Rapids*, *supra*.

The proceedings for widening of an alley in a block cannot be included with the proceedings for opening an alley in the same block running at right angles with the first alley. The property would become liable for assessments to which there would be no liability if the proceedings were separate and distinct. *Weckler v. Chicago*, *supra*.

<sup>63</sup> *Haley v. Alton*, 152 Ill. 113, 38 N. E. 750.



upon other streets.<sup>64</sup> It is within the province of the legislature to provide, in dealing with the benefits by the amount of which an assessment should be limited, that changes in the streets and the construction of a terminal station as parts of a single public improvement, constitute one joint enterprise.<sup>65</sup> The work of grading, filling and bridging one street, and the grading of two others in connection therewith, may be carried on as one improvement,<sup>66</sup> and under a charter provision authorizing the improvement of streets upon petition, one-half the expense to be paid by assessment upon abutting property, two streets cannot be united in a single improvement, and the total expense distributed against the property abutting on all.<sup>67</sup> An ordinance for laying water pipe is not void, as providing for two separate and distinct improvements, because it provides for laying the same on two different streets, running at right angles, it being important to make such a circuit in order to keep the water pure and fresh.<sup>68</sup>

**545.** Where two estimates are made for a street improvement, one being for grading and curbing, and the other for macadamizing, under one resolution, and two assessments made therefor, the work was in fact but one improvement, for which but one assessment should have been levied.<sup>69</sup> If the ordinance provides for the improvement of a street by grading the same, sodding the center thereof, graveling the sides and constructing a sewer under the street, this constitutes but one improvement, although containing different elements,<sup>70</sup> and where two separate proceedings were instituted at the same time for the assessment of benefits and damages

<sup>64</sup> *Bates v. Twist*, 138 Cal. 52, 70 Pac. 1023; *San Francisco Paving Co. v. Egan*, 146 Cal. 635, 80 Pac. 1076.

<sup>65</sup> *Sears v. Street Com'rs*, 180 Mass. 274, 62 L. R. A. 144, 62 N. E. 397; *Wells v. Street Com'rs*, 187 Mass. 451; 73 N. E. 554.

<sup>66</sup> *State v. District Court*, 33 Minn. 295, 23 N. W. 222.

<sup>67</sup> *Hutchinson v. Omaha*, 52 Neb. 345, 72 N. W. 218.

<sup>68</sup> *Ricketts v. Hyde Park*, 85 Ill. 110.

<sup>69</sup> *In re Walter*, 75 N. Y. 354.

<sup>70</sup> *Murphy v. Peoria*, 119 Ill. 509, 9 N. E. 895.



against property between two bridges on a street, for a change of grade, and the construction of such bridges and the approaches thereto, and only one report was made to the common council, and but one list or award of benefits and damages filed, the identity of each proceeding being maintained by separate numbers, the owner's rights were not affected, nor the validity of the assessment impaired.<sup>71</sup> But an attempt to carry forward the improvement of part of the street and the repair of the remainder as a single undertaking is void,<sup>72</sup> and so is an attempt by a city, under a charter provision that "the improvement of each street, or part thereof, shall be made under a separate proceeding," to divide a street into separate parts, improve with entirely different improvements, and reunite them in one proceeding.<sup>73</sup>

### Acquiring title.

**546.** Municipal authorities may levy special assessments for a proposed street improvement before acquiring title to the soil, either by condemnation or otherwise, and before the compensation for property taken or damaged, is ascertained,<sup>74</sup> and the owner of property specially assessed

<sup>71</sup> State v. Blake, 86 Minn. 37, 90 N. W. 5.

*Different Kinds of Pavement on One Street.*

Where a street is paved for part of its length with asphalt at \$1.79 per yard, and the balance with brick at \$2.38 per yard, it being one improvement and in one district, the cost of paving the whole street is assessable, according to benefits, upon the whole line, and it is improper to assess according to the cost of the pavement upon which the adjoining property fronts. Cossitt Land Co. v. Neuscheler, (N. J.), 60 Atl. 1128.

"Each person on a street is

peculiarly benefited by the entire paving of the street, and the assessment should be laid with relation to the benefit derived by the improvement as a whole. It cannot, under the conditions of this case, be divided up, and one half assessed one way, and another another." Id.

<sup>72</sup> Oregon R. E. Co. v. Portland, 40 Ore. 56, 66 Pac. 442.

<sup>73</sup> Oregon Transfer Co. v. Portland (Ore.), 81 Pac. 575.

<sup>74</sup> Prescott v. Chicago, 60 Ill. 121; Hyde Park v. Borden, 94 Ill. 26; Hunerberg v. Hyde Park, 130 Ill. 156, 22 N. E. 486; Leman v. Lake View, 131 Ill. 388, 23 N. E.



for improving a street cannot be heard to object to the confirmation of the assessment that the municipality has not acquired title to the soil to be graded and paved.<sup>75</sup> So, also, an objection that the land whereon a sidewalk is laid is still the private property of the objector, and that the city has taken no steps to acquire the title, is of no avail where it appears the property assessed has received all the benefits of such improvements,<sup>76</sup> while the mere fact that the city is prevented, for a limited but uncertain time, from taking possession of a small part of the lands to be included in the street, does not invalidate a special assessment made for the purpose of extending and improving the street.<sup>77</sup>

### Conditions precedent.

**547.** Where a series of acts is required to be done before a tax on property is properly enforceable, such acts are conditions precedent to the exercise of the power to levy the tax, and all statutory requirements must be complied with, or the tax cannot be collected.<sup>78</sup> This is merely another form of expressing the rule that runs through all the proceedings for the laying of special assessments to pay for public improvements. Being purely legislative in their inception, it is the legislature which creates them and which directs the methods in which the power delegated to municipal bodies shall be exercised. Thus where a street is designated for improvement, the city cannot improve only part of it, and collect the cost therefor from the proprietors abutting on the part so improved, and a tax bill so issued for such partial improvement is illegal. The cost should be apportioned among the abutting owners throughout the entire district designated by the improvement ordinance,<sup>79</sup>

346; *Goodwillie v. Lake View*, 137 Ill. 51, 27 N. E. 15; *Maywood Co. v. Maywood*, 140 Ill. 216, 29 N. E. 704.

<sup>75</sup> *Holmes v. Hyde Park*, 121 Ill. 128, 13 N. E. 540.

<sup>76</sup> *Boynton v. People*, 159 Ill. 553, 42 N. E. 842.

<sup>77</sup> *Harris v. Chicago*, 162 Ill. 288, 44 N. E. 437.

<sup>78</sup> *Hewes v. Reis*, 40 Cal. 255.

<sup>79</sup> *Independence v. Gates*, 110 Mo. 374, 19 S. W. 728.



and upon a special assessment for grading, paving and curbing, it appearing that the curbing had been done some years previously, and adopted by the city in making the new improvement, the city can not collect for work it never performed, and the assessment is invalid.<sup>80</sup> Under the Iowa statute a special assessment for the construction of a sewer cannot be levied and collected in advance of the completion thereof.<sup>81</sup>

### Assessment roll.

**548.** As all subsequent proceedings in special assessment cases are predicated upon the assessment roll, it follows that the existence of such roll is a jurisdictional fact, without which the court has no right or authority to act or render judgment against the property involved.<sup>82</sup> It is the most important document in the entire proceeding, the one to which an opposing party first turns his attention, and which invalidates all subsequent proceedings if insufficient upon its face. If its form or general outline be provided by statute, such form must be closely followed, as statutory provisions upon that subject are usually held to be mandatory.<sup>83</sup> Unless the statute requires, it is not necessary for the assessment roll to contain the valuation of the various pieces of property assessed. The manner in which benefits are assessed is left to the discretion of the Commissioners, but subject to review by the courts for fraud, corruption, oppres-

<sup>80</sup> *Dorathy v. Chicago*, 53 Ill. 79.

<sup>81</sup> *Sanborn v. Mason City*, 114 Iowa, 189, 86 N. W. 286.

<sup>82</sup> *Morrison v. Chicago*, 142 Ill. 660, 32 N. E. 172.

The assessment roll must show on its face what rule was followed. *Blanchard v. Barre*, 77 Vt. 420, 60 Atl. 270. And it must further show that it was made by the proper officers. *Tusting v. Asbury Park* (N. J. L.), 62 Atl. 183. But

see, *Cheney v. Beverly*, 188 Mass. 81, 74 N. E. 306.

<sup>83</sup> A charter provision that the board shall "make out an assessment on which they shall enter the names of the persons assessed, the value of the property for which they are assessed, the amount assessed," etc., is mandatory. *Steckert v. E. Saginaw*, 22 Mich. 104; *Beidler Manufacturing Co. v. Muskegon*, 63 Mich. 44, 29 N. E. 678.



sion, or the adoption of a wrong rule.<sup>84</sup> Nor is the assessment vitiated because the assessment roll fails to state the width of the intersections, or the length of the pavement, or how the amount chargeable against the city is arrived at, where the plat filed with the roll permits the ascertainment of the omitted facts by mere computation,<sup>85</sup> or because it makes no distinctions between residents and non-residents.<sup>86</sup> Where the column in an assessment roll for damages contains no entry of damages, it will be presumed that the column headed "benefits," shows only benefits in excess of damages, even if damages were shown.<sup>87</sup> A judgment confirming a special assessment will not be reversed because the assessment roll does not give the proper name of a corporation as the owner of the property assessed.<sup>88</sup> In Illinois, the assessment roll will not be rendered invalid by the omission therefrom of the names of the owners of lots, where known, although required by statute, as such omission will be presumed to be because their names were in fact unknown, and could not be reasonably ascertained, if there be no proof to the contrary.<sup>89</sup>

**549.** In proceedings to confirm an assessment of benefits, it is error to permit substantial changes to be made in the roll without the entry of an order of record modifying such roll, and where the judgment of confirmation is uncertain in respect to the amount charged to certain property, it is erroneous;<sup>90</sup> but where the statute permits, the court may alter an assessment roll before judgment, or order it recast.<sup>91</sup> Where one party owns an entire block, which is one half in his name, and the balance in another's, it is not error

<sup>84</sup> *Scammon v. Chicago*, 42 Ill. 192.

<sup>85</sup> *Walker v. Detroit*, 136 Mich. 6, 98 N. W. 744.

<sup>86</sup> *Williams v. Mayor*, 2 Mich. 560.

<sup>87</sup> *Huston v. Clark*, 112 Ill. 344; *Lovell v. Sny Island Dr. Dist.*, 159 Ill. 188, 42 N. E. 600.

<sup>88</sup> *West Chi. S. R. Co. v. People*, 156 Ill. 18, 40 N. E. 605.

<sup>89</sup> *White v. Alton*, 149 Ill. 626, 37 N. E. 96.

<sup>90</sup> *Morrison v. Chicago*, 142 Ill. 660, 32 N. E. 172.

<sup>91</sup> *Brooks v. Chicago*, 168 Ill. 60, 48 N. E. 136.



for the court to refuse to recast the assessment, and order it to stand against the entire block in the name of the owner, for the whole amount assessed against it. The owner is not prejudiced by such action.<sup>92</sup> A caption in the assessment roll for a special *assessment* designating it as "an assessment for a special *tax*," may be amended as a mere clerical error.<sup>93</sup> The clerk may certify to the collector a part of the assessment roll confirmed, without waiting for the confirmation of the remainder, when for any reason such confirmation is delayed.<sup>94</sup>

### Against whom assessment to be made.

**550.** If the statute requires the assessment to be made in the name of the owner of the property, if known, it is mandatory, and must be complied with, or the omission invalidates the assessment, and the sale based thereon is void for want of jurisdiction.<sup>95</sup> But in the absence of such requirement, the assessment being upon the property for the benefits conferred, an assessment against the property by its description is undoubtedly sufficient, and an omission or error in the special tax bill as to the name of the owner is without avail.<sup>96</sup> A change in the ownership of land bene-

<sup>92</sup> *Schemick v. Chicago*, 151 Ill. 336, 37 N. E. 888; *Brooks v. Chicago*, 168 Ill. 60, 48 N. E. 136.

<sup>93</sup> *Springfield v. Sale*, 127 Ill. 359, 20 N. E. 86.

<sup>94</sup> *McChesney v. People*, 171 Ill. 267, 49 N. E. 491; *Doremus v. People*, 173 Ill. 63, 50 N. E. 686.

<sup>95</sup> *Reeves v. Grottendick*, 131 Ind. 107, 30 N. E. 889; *Hill v. Warrell*, 87 Mich. 135, 49 N. W. 479; *Chapman v. Brooklyn*, 40 N. Y. 372.

Where the statute requires the names of the owners of property affected by a street improvement assessment to be entered in the city lien docket, such provision is

mandatory, and an assessment to a stranger to the title is void. *Dowell v. Portland*, 13 Or. 248, 10 Pac. 308; *Hawthorne v. E. Portland*, 13 Or. 271, 10 Pac. 342.

<sup>96</sup> *St. Louis v. De Noue*, 44 Mo. 136.

Under a statute authorizing and requiring commissioners to make a description of each parcel of land, the names of persons claiming an interest therein, and the amount assessed for benefits, the assessment is against the land without reference to the title, the only inquiry being as to the amount of the benefit conferred, and it is immaterial whether the one in pos-



fited by the assessments produces no effect upon the ability of the corporate authorities to make an assessment,<sup>97</sup> but if the assessment be made against a deceased person, it is void under a statute requiring the assessment to be made against the owner, if known; if not, the word "unknown" must be written in the proper place.<sup>98</sup> If the property be correctly described, it is immaterial that the wrong initials are prefixed to the owner's name, where the statute makes the assessment a lien on the property regardless of the name of the owner.<sup>99</sup> The fact that a lot assessed for a street improvement was listed in the name of "S. D. Henning" instead of S. W. Herring will not defeat the title of a purchaser of the lot at a sale ordered for the collection of the assessment, where the property assessed was properly described.<sup>1</sup>

#### When assessment may be made.

**551.** The time for making the assessment, relative to the other proceedings, frequently, or perhaps usually, depends upon the provisions of the charters of various cities. They may be made before ascertaining the damage to be paid to

session had a limited title or the fee to the property. *Zion Church v. Mayor, etc.*, 71 Md. 524, 18 Atl. 895.

Special assessments for street improvements should be paid by the life tenant, who is bound to keep down all incidental charges on the estate. *Warren v. Warren*, 148 Ill. 641, 36 N. E. 611.

<sup>97</sup> *In re Commissioners of Elizabeth*, 49 N. J. L. 488, 10 Atl. 363.

<sup>98</sup> *Smith v. Davis*, 30 Cal. 536; *Smith v. Cofran*, 34 Cal. 310.

<sup>99</sup> *Kendig v. Knight*, 60 Iowa, 29, 14 N. W. 78.

*Principle of Benefit Should Appear.*

As property may be specially

assessed only upon the principle of benefits accruing thereto, and not to the owner generally, it must appear from the proceedings that the assessment is made upon this principle. *L. & N. R. Co. v. E. St. Louis*, 134 Ill. 656, 25 N. E. 962.

<sup>1</sup> *Felker v. New Whatcom*, 16 Wash. 178, 47 Pac. 505.

The land in an open public street is in no proper sense a city lot, and the owner of the fee thereof can not properly be termed the owner of a lot. *Schenectady v. Trustees*, 144 N. Y. 241, 26 L. R. A. 614, 39 N. E. 67.



private parties for property taken or damaged, or before acquiring title to the property to be improved,<sup>2</sup> but it would be void if the record shows it was made before the meeting of the board called for the purpose of making it.<sup>3</sup> It usually rests largely within the discretion of the commissioners.

### Requisites in making assessment.

**552.** An assessment is the first step and an indispensable incident in proceedings to collect taxes; and being the foundation of all subsequent proceedings, no tax can be collected without a valid assessment.<sup>4</sup> Three elements must concur to make a valid local assessment: 1st. The work must be public, and of a character to confer special benefit on the district assessed, as distinct from the general benefit to the state at large. 2nd. The assessment must be supported by benefits, actually or presumptively received by the

<sup>2</sup> *Hyde Park v. Borden*, 94 Ill. 26. See title, *Acquiring Title*, Sec. 546.

<sup>3</sup> *Derby v. West Chi. Park Com'rs*, 154 Ill. 213, 40 N. E. 438. *When Time Commences to Run*.

Where the statute provides that an assessment must be made within two years after the passage of the original order therefor, and its approval by the mayor, the time within which the order takes effect depends upon the action of the mayor. If he approves, it takes effect from the time of his approval; if he returns it with his objections, and it is subsequently passed by the council over his veto, it takes effect from the time of its subsequent passage; if he allows 10 days to pass without action after receiving it, the expiration of this time gives the order full validity; if he returns it with his objections, and it is

not subsequently approved by the requisite number of the council, it never takes effect.

#### *Federal Courts.*

*Gardner v. The Collector*, 6 Wall. 499-504, 18 L. ed. 890, 891; *Louisville v. Savings Bank*, 104 U. S. 469-478, 26 L. ed. 775-778. *California*.

*People v. Clark*, 1 Cal. 406. *Indiana*.

*Tarleton v. Peggs*, 18 Ind. 24. *Massachusetts*.

*Quinn v. Cambridge*, 187 Mass. 507, 73 N. E. 661.

#### *Vermont.*

*In re Wellman*, 20 Vt. 653-656, Fed. Cas. No. 17,407.

#### *West Virginia.*

*State v. Mounts*, 36 W. Va. 179-186, 15 L. R. A. 243, 14 S. E. 407.

<sup>4</sup> *City Council v. Montgomery*, 133 Ala. 587, 598, 32 So. 610.



persons or property subjected to it. 3d. The contribution must not manifestly exceed the benefit conferred.

Any pretended assessment wanting in these elements would cease to be taxation, and become a taking of property without process of law and without adequate compensation.<sup>5</sup> Within this rule, an assessment for a street improvement based upon the value of the lands abutting the improvement, regardless of their frontage thereon, or depth of such lots, which necessarily affects their value, and results in burdening some parcels with three or four times as great a charge for each foot of frontage as other parcels on same street, is void for inequality.<sup>6</sup> Any attempt to levy a special assessment on the basis of the cost of the improvement or by a percentage on the valuation of the land, of necessity ignores the principle of benefits, and is of very doubtful validity, even when receiving the express sanction of the legislature, although such assessments have been sustained by the courts.<sup>7</sup> The assessment is regarded as an entirety, and if void for one reason, is void for any purpose.<sup>8</sup> Where the assessment for a street improvement is invalid for the reason that it included the valuation of improvements on the abutting land, no part of the assessment can be enforced, although the valuations of land and improvements was separately stated.<sup>9</sup>

<sup>5</sup> *Excelsior, etc., Co. v. Green*, 39 La. Ann. 455, 1 So. 873.

<sup>6</sup> *Howell v. Tacoma*, 3 Wash. 711, 28 Am. St. Rep. 83, 29 Pac. 447.

Where proceedings for a street improvement were begun under a charter which required the assessment to be according to the value of abutting property, and prior to the actual levying of the assessment the old charter provision was superseded by a new one providing the assessment should be laid according to the frontage of the abutting property, an assess-

ment according to value is unauthorized and void. *Wilson v. Seattle*, 2 Wash. 543, 27 Pac. 474.

<sup>7</sup> An assessment of one per cent on the valuation of lots fronting the street improved, held valid in *Burnes v. Atchison*, 2 Kan. 454.

<sup>8</sup> *Ryan v. Altschul*, 103 Cal. 174, 37 Pac. 339.

<sup>9</sup> *Heath v. McCrea*, 20 Wash. 342, 55 Pac. 432.

An ordinance for street grading which charges the cost on both the land and improvements is void under a charter provision that assessments of such nature shall be



**As a ministerial act.**

**553.** It has been held that the assessment is a ministerial act, and may be made by the city engineer where required by statute.<sup>10</sup> That the power of the legislature over the entire scheme of assessment extends to the designation of the person or persons who are to make the assessment, is unquestioned, yet if the latter be made on the principle of benefits, it is certain the person so designated acts judicially, and his acts are valid only when within the bounds of his discretion, judicially exercised.

**Property in two assessment districts.**

**554.** Where streets fronting on both sides of a corner lot are being improved, it is proper to assess such lot in the two different assessment districts, the entire parcel being benefited by both improvements.<sup>11</sup>

**Assessment by size or area.**

**555.** Sewer assessment according to area, and regardless of improvements, is a valid mode of assessment under the

made upon "real estate only." *Spokane Falls v. Brown*, 3 Wash. 84, 27 Pac. 1077.

But where the law is subsequently changed, an assessment under the scheme subsequently adopted will be valid and binding if the property owners are not thereby called upon to pay any greater amount of money nor to pay the same sooner, than was required under the law in force when the improvement was begun. *S. C.*, 8 Wash. 317, 36 Pac. 26.

A street opening statute providing for an assessment upon the owners or occupants of lands deemed to be benefited, and making such assessment a continual lien upon the premises, contemplates that the assessment is to be

laid upon the land. *Beecher v. Detroit*, 92 Mich. 268, 52 N. W. 731.

<sup>10</sup> *Ray v. Jeffersonville*, 90 Ind. 567.

Where the city engineer is the proper officer to make the estimate and apportion the costs, the adoption of his estimate by the common council is a sufficient assessment; and the fact that the resolution of adoption provides that property-owners who have paid part of former assessments which have been vacated, does not impair the effectiveness of such assessment. *Reeves v. Grotten-dick*, 131 Ind. 107, 30 N. E. 889.

<sup>11</sup> *Nowlen v. Benton Harbor*, 134 Mich. 401, 96 N. W. 450.



Colorado Constitution.<sup>12</sup> But this is contrary to the weight of authority, although the area rule would, from the nature of the use, be fairer as applied to a sewer assessment than to any other. But this method, in order to be valid, must take into consideration the probable benefits,<sup>13</sup> and in a late case it was determined that it might be made in proportion to both area and benefits. An assessment upon the size or width of a lot without reference to its value is invalid.<sup>14</sup>

### Assessment for cost of work.

**556.** Although by general consensus of judicial opinion, this method of apportioning the expense has the least foundation for its authorization, logically or legislatively, of any rule or method of assessment, the usual difference of opinions among those courts who do not keep the lode-star of benefits steadily in view, is manifest upon this question. The Ohio court holds that the entire expense of a street improvement may be assessed upon the lots abutting the part of the street improved, if permitted by statute,<sup>15</sup> but would be illegal as to any excess above such cost,<sup>15a</sup> which excess is recoverable when authorized by statute.<sup>16</sup> The courts of New Jersey and Washington hold that an assessment against each lot for the cost of the work done in front of it is invalid,<sup>17</sup> while the Supreme Court of New York, in an early

<sup>12</sup> *Gillette v. Denver*, 21 Fed. 822.

<sup>13</sup> *State v. Commissioners*, 38 N. J. L. 190, 20 Am. Rep. 380; *Thomas v. Gain*, 35 Mich. 155, 24 Am. Rep. 535.

<sup>14</sup> Where the certificate of the city engineer showed upon its face that the assessment for a sewer was made in strict accordance with the resolution of the common council, requiring it to be in proportion to area, and that it was made in proportion to the benefits received, it is a fair construction thereof that it was made in pro-

portion to both area and benefits, and it must be regarded as conclusive. *Walker v. Detroit*, (Mich.), 101 N. W. 847.

<sup>15</sup> *Chicago v. Larned*, 34 Ill. 203; *Holbrook v. Dickinson*, 46 Ill. 285.

<sup>15a</sup> *Creighton v. Scott*, 14 Ohio St. 438; *Upington v. Oviatt*, 24 Ohio St. 232.

<sup>16</sup> *Groesbeck v. Cincinnati*, 51 Ohio St. 365, 37 N. E. 707.

<sup>17</sup> An assessment for the cost of a street improvement, charging each lot with the expense of the work in front of it, is invalid



case, was of the opinion that when the statute authorizes the entire expense of a street improvement to be assessed on all houses and lots benefited in proportion to the advantage each shall have acquired, the assessment upon the owner of a lot is not limited to the expense incurred in front of his particular lot, but may be extended to his proportion of the whole expense.<sup>18</sup>

**557.** Where a general ordinance provides the mode in which the cost of constructing sidewalks shall be assessed, a resolution for building a particular sidewalk need not provide such mode, and the omission of the council to assess in the prescribed mode is a mere irregularity.<sup>19</sup>

**558.** Where a contract for street improvements provides the contractor shall be paid by an assessment levied upon adjacent lots in proportion to value, according to the statute in force; and before the work is completed the statute is amended to provide for an assessment in payment of such contracts by the front foot, the assessment must be made

(under Sec. 641, G. S). *New Whatcom v. Bellingham, etc., Co.*, 9 Wash. 639, 38 Pac. 163.

Under a charter provision that the entire expense of street improvements shall be assessed upon and paid by the lands benefited in proportion to the benefit received, an assessment shown by the report to have been made by assessing each lot with the cost of the amount of earth deposited in front of it is not warranted by law, and will not support a title made under a sale for the payment of the assessment. *State v. Jersey City*, 36 N. J. L. 188.

A law directing an assessment for street improvements to be imposed upon the land in front of which the work is done, is valid as to the flagging and curbing of sidewalks, and invalid as to

gutters, which are a part of the roadway. The principle of benefits is ignored. *State v. New Brunswick*, 42 N. J. L. 510.

A charter provision that each lot shall be assessed for the labor and materials necessary to grade the street in front of it, and for its share of the intersections, and to be credited for the materials taken in front of it, and proportionately from any neighboring intersection, is in total disregard of the well-established doctrine that the assessment shall not exceed the benefits, and an assessment made thereunder must be set aside. *State v. Jersey City*, 37 N. J. L. 128.

<sup>18</sup> *Ex parte The Mayor, etc.*, 22 Wend. 277.

<sup>19</sup> *Chariton v. Holliday*, 60 Iowa, 391, 14 N. W. 775.



under the provisions of the original statute, that mode being part of the contract.<sup>20</sup> And if, after assessment, and before confirmation, part of a lot had been sold, and the board had notice thereof, they should have assessed benefits and damages against the part so sold, as a separate parcel. Not having done so, their proceedings were, as to that tract, void.<sup>21</sup> The onus of establishing a substantial error in an assessment devolves upon the party making objection thereto and must be proved by affirmative evidence.<sup>22</sup>

### What assessment proceedings must show.

**559.** Proceedings for street improvements are purely statutory, and the rights and obligations of the parties to be affected thereby are to be determined by the terms of the statute. The right to an assessment, as well as the lien created thereby, exist only by force of the statute, and can be brought into existence only in accordance with its terms. Unless it affirmatively appear upon the face of the proceedings that every essential prerequisite of the statute conferring the authority has been complied with, such proceedings will be void.<sup>23</sup> A city must exercise its power in the manner prescribed by statutes, and when a street is cut down without so doing, it is liable for the injury, if any, to abutting owners.<sup>24</sup> No matter how honest the assessors may be, or how sincere they are in their convictions as to what is necessary as well as right, it is unsafe for them to neglect any duty, or omit any step, however light or trivial it may appear to them, if the legislature has required it to be

#### *General Statement of Law.*

<sup>20</sup> The method of payment provided by statute for street work is governed by the law in force at the time the contract is made. *Houston v. McKenna*, 22 Cal. 550; *Creighton v. Pragg*, 21 Cal. 115.

<sup>21</sup> *Brennan v. St. Paul*, 44 Minn. 464, 47 N. W. 55.

<sup>22</sup> *In re Merriam*, 84 N. Y. 596.

<sup>23</sup> *Ede v. Cuneo*, 126 Cal. 167, 58 Pac. 538; *St. Louis v. Koch*, 169 Mo. 587, 70 S. W. 143.

<sup>24</sup> *Blanden v. Fort Dodge*, 102 Iowa, 441, 71 N. W. 411; *Trustees, etc. v. Anamosa*, 76 Iowa, 538, 2 L. R. A. 606, 41 N. W. 313; *Meinzer v. Racine*, 74 Wis. 166, 42 N. W. 230.



done. That which the legislature has directed to be done under a statute delegating power to charge the property of individuals with the expense of local improvements, the courts cannot declare immaterial, and none of the steps prescribed can be held to be directory merely; and so, it cannot be held that the omission to take any step does not affect the proceedings.<sup>25</sup>

### Sufficiency of record.

**560.** The sufficiency of assessment proceedings is to be determined by inspection of the entire record, and not that of a single instrument or paper.<sup>26</sup> If the statute require the certificate of an official to any return or part of the proceedings, omission to furnish it is fatal to the assessment.<sup>27</sup> But an objection that the certificate of the assessor to a special assessment roll does not show the basis on which the assessment was made, is without force when such certificate, taken in connection with the proceedings of the council, shows a full compliance with the charter requirements.<sup>28</sup> Where commissioners were required by statute to certify that a certain column in the assessment headed "assessment for construction," contained the apportionment and assessment directed by the act, this requirement is mandatory, and their omission so to do invalidates the assessment.<sup>29</sup>

<sup>25</sup> Accordingly, when the commissioners of assessment, instead of taking the oath "faithfully and fully to discharge the duties" required by the charter, each took an oath to discharge the duties "to the best of his ability," the proceedings were declared illegal. *Merritt v. Port Chester*, 71 N. Y. 309, 27 Am. Rep. 47.

<sup>26</sup> *Lumbermen's Ins. Co. v. St. Paul*, 85 Minn. 234, 88 N. W. 749.

<sup>27</sup> *In re Cameron*, 46 N. Y. 502.

<sup>28</sup> *Gregory v. Ann Arbor*, 127 Mich. 454, 86 N. W. 1013.

<sup>29</sup> *Stebbins v. Kay*, 123 N. Y. 31, 25 N. E. 207.

Where a resolution of the common council directs a sewer tax to be assessed against the owners or occupants of the premises, the value of which is increased by the improvement, in pursuance of an ordinance requiring the assessment to be made in proportion to benefits, a recital in the certificate of the mayor merely that he had made the assessment rule "pursuant to the resolution," is insufficient. Such a certificate



**561.** Where the record does not show affirmatively that the proper rule of assessment was followed in all respects, and that the benefits on account of which the assessment was made upon the property, were deemed equal to the cost so charged upon it, the assessment cannot stand, when properly challenged.<sup>30</sup> The validity of an assessment, however, is not affected merely by the fact that it is entered on loose sheets of paper attached together in a roll, with a proper caption, and kept in a proper office<sup>31</sup> The report, plan or profile of work to be done, and the order of the common council to do the work, must ordinarily be construed together to determine whether the work done is authorized by the order.<sup>32</sup> The city must show that all necessary steps were taken, and whatever is required by the charter to appear on any document in connection with the assessment, must so appear, as such requirements are mandatory. Under this rule, a contractor's certificate for street work is absolutely void unless it affirmatively appears upon its face that the damages from a change of grade were considered by the commissioners in making the assessment;<sup>33</sup> and where a city engineer is directed to fill certain lots, and to make a list and estimate, and report same to the council, failure to show that this was done, is fatal to the assessment in an action to foreclose the lien.<sup>34</sup> Where the published notice for locating a drainage ditch contains a substantial misdescription of the proposed locality of the ditch, and is silent as to the "availability" of and "necessity" for the

is ambiguous, and does not necessarily import anything more than that he made an assessment as by the resolution he was directed, and is not equivalent, and does not give the statement that he has levied the tax, upon the basis established by the ordinance. *Warren v. Grand Haven*, 30 Mich. 24.

<sup>30</sup> *State v. District Court*, 29 Minn. 67, 11 N. W. 133.

<sup>31</sup> *State v. District Court*, 33 Minn. 164, 22 N. W. 295.

<sup>32</sup> The above rule was applied where the order was to "grade," and the work done was macadamizing. *State v. District Court*, 33 Minn. 164, 22 N. W. 295.

<sup>33</sup> *Sanderson v. Herman*, 95 Wis. 48, 69 N. W. 977.

<sup>34</sup> *Lufkin v. Galveston*, 56 Tex. 522.



proposed ditch, and other statutory requirements, such omissions and errors are fatal to the validity of the proceedings.<sup>35</sup>

### **Conclusiveness of improvement bond.**

**562.** The provisions in act authorizing the issue of street improvement bonds making the issuance of the bonds conclusive evidence of the validity of the assessment lien, is unconstitutional; but the provision making such issuance conclusive evidence of the regularity of all proceedings not essential to jurisdiction, is valid.<sup>36</sup>

### **Who may contest assessment.**

**563.** There is some minor difference of opinion among the various courts of last resort as to who may be heard to contest the validity of assessment proceedings. That a person must be injured by the proceedings in some way to be entitled to a hearing is undoubted. And it is no valid objection to the enforcement of an assessment that the assessment against neighboring lots is void.<sup>37</sup> The Wisconsin court has held the line to be drawn with the abutting owner. Under a provision in the Milwaukee charter, limiting the assessment of benefits and damages for grading a street to the property abutting on the street to be graded, it was held that no liability attached to property separated from that street by a strip less than six feet in width, and that the owner of such property could not rely on any defect or irregularity in the proceedings as a ground for the recovery

<sup>35</sup> *Miller v. Graham*, 17 O. St. 1.

The requirement that the contractor for a sewer shall obtain from the city engineer a certificate of compliance with the contract in order to be entitled to payment is satisfied by a certificate that the work done prior to a resolution of the council modifying the contract to that work, complied with the original contract. *Weston v. Syracuse*, 158 N. Y.

274, 43 L. R. A. 678, 70 Am. St. Rep. 472, 53 N. E. 12.

<sup>36</sup> *Ramish v. Hartwell*, 126 Cal. 443, 58 Pac. 920.

An assessment made under a general law which has been in effect repealed by charter provisions, is invalid. *Byrne v. Drain*, 127 Cal. 663, 60 Pac. 433.

<sup>37</sup> *Reeves v. Grottendick*, 131 Ind. 107, 30 N. E. 889



of damages for injury to his property caused by the illegal grading.<sup>38</sup> In Iowa, while an abutting owner has the right to demand that the requirements of law shall be strictly followed, such right is no different or greater than that possessed by every other property owner of the city.<sup>39</sup> Only a person injured by a special assessment ordinance can complain. He cannot object that it is oppressive to other parties.<sup>40</sup> Only one who is injured can complain of a double assessment.<sup>41</sup>

<sup>38</sup> *Damkoehler v. Milwaukee*, 124 Wis. 144, 101 N. W. 706.

In this case, the property had a frontage on one street of about 50 feet, and a length of about 130 feet along the street to be graded, except for the narrow strip theretofore sold off for the purpose of evading liability for the assessment. The street was graded down about 20 feet, so that all the narrow strip crumbled away and fell into the street, and considerable of plaintiff's property beside. This was held to constitute a taking of private property for public use without compensation, and the judgment for plaintiff allowed to stand.

<sup>39</sup> *Reilly v. Fort Dodge*, 118 Ia. 633, 92 N. W. 887.

<sup>40</sup> *Hyman v. Chicago*, 188 Ill. 462, 59 N. E. 10.

*Owners of franchise.*

The character of a turnpike, as a street, when so generally used by the residents of a city within whose limits it lies, cannot be questioned by any persons except the owners of the franchise. *State v. Passaic*, 42 N. J. L. 524.

<sup>41</sup> *Corliss v. Highland Park*, 132 Mich. 152, 93 N. W. 254, 610, 95 N. W. 416.

All persons interested in the sale of property under a special assessment proceeding, may appear and contest it, whether legal or equitable owners, or mere incumbrancers. *Chicago v. Rosenfeld*, 24 Ill. 495.

Where the report of commissioners showed an assessment in two separate parcels of railroad property, separated merely by the right of way, the court ordered the report modified to show the aggregate sum assessed against the whole block. There being no showing that the railroad company was in any manner injured by such action, it had no just cause of complaint. *C. R. I. & P. R. Co. v. Chicago*, 139 Ill. 575, 28 N. E. 1108.

*Credit for previous void assessment.*

A property owner cannot complain that another paid less than his share of a special tax because credited with a previous void assessment, when such sum comes out of the city, and neither increases nor diminishes the owner's tax. *Davis v. Litchfield*, 155 Ill. 384, 40 N. E. 354.



**When objections may be urged.**

**564.** Wherever the system of special assessment prevails, it is probable the statute or an ordinance fixes a time and place for hearing objections to the form, amount, or method of assessment. It is usual to provide that one who does not appear at the time and place fixed is barred from making any contest thereafter, except in certain circumstances. This is a wise provision, for it is proper the local officers should first have an opportunity for correcting any errors either of act or judgment before the aggrieved owner may apply to the courts for relief. In a general way it may be stated that such time is usually and naturally fixed after the making of the assessment, and before its confirmation by the body charged with that duty.<sup>42</sup>

**565.** Where the original ordinance provided for an assessment against contiguous property, and a new one provided for an assessment against the property benefited, an

<sup>42</sup> Such objection must be made when confirmation is sought, and comes too late upon application for sale. *Shepard v. People*, 200 Ill. 508, 65 N. E. 1068.

Must be made within the time provided. *Tuttle v. Polk*, 92 Ia. 433, 60 N. W. 733.

*Assessment of street railway property.*

When a street railway company makes no objection to the special tax levied against its property for a street improvement, other owners of contiguous property cannot be heard to question the validity of the tax assessed against such company. *White v. Alton*, 149 Ill. 626, 37 N. E. 96.

An objection that the statement of unpaid assessments has not been duly filed, comes too late on application for judgment of sale. *Smith v. Chicago*, 57 Ill. 497.

The fact that an assessment was not legally levied as respects benefits charged cannot be urged on foreclosure when objections had not been urged at the time of making assessment. *New Whatcom v. Bellingham, &c., Co.*, 16 Wash. 131, 47 Pac. 236.

Objections to the inclusion in an assessment of items of expense and of paving between street railway tracks cannot be urged in the Superior Court, when not specially raised before the council. *Young v. Tacoma*, 31 Wash. 153, 71 Pac. 742.

After the time limited by law for the review and correction of a special assessment of benefits and damages has elapsed, it cannot be impeached for mere mistakes of judgment. *Wright v. Forrestal*, 65 Wis. 341, 27 N. W. 52.



objection by the owner of contiguous land cannot be heard, as he is not injured by the new ordinance.<sup>43</sup> And where proceedings for confirming an assessment are several, as to the various lots assessed, those owners who appeal cannot be heard to object that as to the lands of others the assessment was improperly confirmed.<sup>44</sup> Where time to file objections is extended to a certain day, they must be filed before the opening of court on that day.<sup>45</sup>

**566.** An objection to an assessment for benefits, to the effect that there are no benefits, includes the objection that the assessment was excessive; and it is the duty of the court, in reviewing an assessment, to reduce the amount if it be deemed excessive, upon the evidence adduced.<sup>46</sup>

**567.** Objections of property owners who appear before the statutory board must be made in such a manner as to show the point on which a decision is asked, and to enable the opposite party to obviate the objection, if it can be done. Objections not so made will be deemed waived, and will not be considered by the court on appeal.<sup>47</sup> Two or more judgments in relation to the same assessment for a public improvement may be entered where objections are filed to only part of the real estate assessed.<sup>48</sup> Although the courts should always be open to relieve against wrong, oppression, or the exercise of arbitrary power, they should not be astute to find some means of setting a meritorious assessment aside when the objections to it are purely technical.<sup>49</sup>

<sup>43</sup> *Farrell v. West Chicago Park Commissioners*, 182 Ill. 250, 55 N. E. 325.

<sup>44</sup> *Rich v. Chicago*, 152 Ill. 18, 38 N. E. 255.

<sup>45</sup> *Clark v. Ewing*, 87 Ill. 344.

<sup>46</sup> *State v. District Court*, 68 Minn. 147, 70 N. W. 1088.

<sup>47</sup> *Fisher v. Chicago*, 213 Ill. 268; 72 N. E. 680.

<sup>48</sup> *Wisner v. People*, 156 Ill. 180, 40 N. E. 574; *Browning v. Chicago*, 155 Ill. 314, 40 N. E. 565; *Bliss v. Chicago*, 156 Ill. 584, 41 N. E. 160; *Wells v. Chicago*, 156 Ill. 148, 40 N. E. 567; *Zeigler v. People*, 156 Ill. 133, 40 N. E. 607.

<sup>49</sup> *Gilmore v. Utica*, 131 N. Y. 26, 29 N. E. 841.



# **Evidence — In general.**

**568.** It is not within the scope of this work to go into questions of evidence, practice, pleading or procedure, all of which matters are largely subject to local regulation; but only to present a few principles of general application, and furnish a few concrete illustrations taken from the decisions.

## **— Burden of proof.**

**569.** The burden of showing that an assessment is excessive and exorbitant is upon the property owner, and it must be shown at the proper time and place.<sup>50</sup> The burden is not upon the city to show that a lot on the line of the improvement was properly exempted from assessment.<sup>51</sup> The burden to show that the amount of the assessment is excessive,<sup>52</sup> that it was made arbitrarily, and without reference to actual benefits,<sup>53</sup> or that a street railway easement was not considered,<sup>54</sup> is upon him who asserts the affirmative in each case.

## **— Prima facie evidence.**

**570.** The legislature has power to declare by law what shall be the effect of instruments made by public officers, such as tax lists, tax deeds, &c., when offered in evidence;<sup>55</sup> and where tax-sale certificates and receipts for taxes and special assessments are made by law *prima facie* evidence of the validity of the taxes which they represent, the burden

<sup>50</sup> *People v. Mayor, etc.*, 4 N. Y. 419; 55 Am. Dec. 266.

<sup>51</sup> *Storrs v. Chicago*, 208 Ill. 364; 70 N. E. 347.

<sup>52</sup> *Bigelow v. Boston*, 120 Mass. 326.

<sup>53</sup> *Wright v. Forrestal*, 65 Wis. 341; 27 N. W. 52.

<sup>54</sup> *McVerry v. Boyd*, 89 Cal. 304, 26 Pac. 885.

Where a complaint in an action to foreclose an assessment lien sets out all the necessary facts, and is

not denied, formal proof of the allegations is unnecessary. *Raisch v. Hildebrandt*, 146 Cal. 721, 81 Pac. 21.

Petition need not allege the reading of the ordinance twice, and passed on two sessions on different days where it alleges passage of the ordinance by the requisite vote. *Cabell v. Henderson* (Ky.), 88 S. W. 1095.

<sup>55</sup> *Lumsden v. Cross*, 10 Wis. 282.



is on the party alleging the invalidity of the tax to point out in his pleadings and establish by his proof the facts making the tax illegal.<sup>56</sup> If the statute provides that the recommendation of the board of public improvements "shall be *prima facie* evidence that all preliminary requirements of the law have been complied with," the introduction in evidence of such recommendation with the ordinance and the engineer's estimate is sufficient.<sup>57</sup> The report of the assessing board, made in due form, *prima facie* establishes all the facts requisite to sustain the validity of their work, but evidence *aliunde* may be introduced to show that the conclusion of the board could not reasonably have been arrived at by the exercise of judgment, and evidence sufficient to overcome such proof calls for a decision that the assessment is void, in the absence of proof, independent of the report, to the contrary.<sup>58</sup>

— Evidence as to benefits.

571. On the question of benefits from the opening of a street, evidence that another strip of land has been recognized and used as a public street, and, with that condemned, will continue other existing streets from a village to a city, is admissible, as the opening of such continued street will confer a larger benefit, than if the street opened were not a thoroughfare.<sup>59</sup> But where the assessment upon an estate for constructing a sewer is to be made according to the value of the land, exclusive of buildings, in determining the amount of such assessment, evidence as to the relative benefit which each estate on the line of the sewer

<sup>56</sup> Ure v. Reichenberg, 63 Neb. 899, 89 N. W. 414; Wales v. Warren, 66 Neb. 455, 92 N. W. 590.

<sup>57</sup> Richards v. Jerseyville, 214 Ill. 67, 73 N. E. 370.

<sup>58</sup> Friedrich v. Milwaukee, 118 Wis. 254, 95 N. W. 126.

*Evidence complying with charter.*

A certificate of the treasurer, attached to the assessment roll, that

personal notice has been served as required by the charter, giving the section and title, is sufficient evidence, where it complies with the charter. Grand Rapids, etc., Co. v. Grand Rapids, 92 Mich. 564, 52 N. W. 1028.

<sup>59</sup> Waggemann v. N. Peoria, 155 Ill. 545, 40 N. E. 485.



may receive is immaterial.<sup>60</sup> Upon the trial of issues as to the amount of benefits from opening a street, evidence of the subsequent building of a bridge by the city connecting with such street is competent, where it appears the benefits to the property largely depended upon the existence of such bridge.<sup>61</sup> The basis for an assessment for benefits being the present enhancement in value, evidence as to the business of one occupying the lot, or that for street railway purposes a pavement is no improvement, is inadmissible.<sup>62</sup>

<sup>60</sup> *Snow v. Fitchburg*, 136 Mass. 183.

<sup>61</sup> *P. & C. R. & I. Co.* 158 Ill. 9, 41 N. E. 1102.

<sup>62</sup> *Jones v. Chicago*, 206 Ill. 374, 69 N. E. 64; *Chicago U. T. Co. v. Chicago*, 207 Ill. 607, 69 N. E. 803.

#### Miscellaneous Cases.

##### *California.*

##### *Parol evidence to explain record.*

In an action to enforce an alleged street assessment, parol evidence is admissible to show that a certain document offered by the plaintiff as the record of the board ordering the work to be done, was not in fact a record of the board, and that the true record did not authorize the work. *Dyer v. Brogan*, 70 Cal. 136, 11 Pac. 589.

##### *Illinois.*

##### *Competency — Frontage.*

Upon objection to validity of a special assessment, it is competent to show that the cost of the curb was assessed according to frontage, as such evidence would tend to show a violation of the principle of uniformity. *Creote v. Chicago*, 56 Ill. 422.

##### *Rule of apportionment.*

It is not competent, in a proceeding for judgment on a special assessment, to prove that the assessment was levied on the front

foot, and not according to benefits. *Jenks v. Chicago*, 48 Ill. 296.

This is in conflict with the principle in the preceding case, and is subject to criticism, as there would then be no jurisdiction to proceed. *Ambiguity — Extrinsic evidence.*

Where an ambiguity does not appear on the face of a writing, but is shown by extrinsic evidence, it may be explained by evidence of the same character, and this is true of an ambiguity of description of a similar nature. *Doyle v. Leas*, 5 Ill. 202; *Marshall v. Gridley*, 46 Ill. 247; *Harman v. People*, 214 Ill. 454, 73 N. E. 760. *Disqualification of commissioner.*

It is error to refuse to permit it to be shown by proper evidence that one of the commissioners of assessment is disqualified by interest. *Hunt v. Chicago*, 60 Ill. 183. *Offer of sale — Damages.*

An offer by the owner of property to sell at a certain price is competent against him as an admission in fixing the value at or near the time the offer was made. *Springer v. Chicago*, 135 Ill. 552, 12 L. R. A. 609, 26 N. E. 514.

##### *Competency of assessment roll — Instructions.*

Where by statute the assessment roll is made competent evidence as



to benefits assessed, and allows either party to introduce other evidence tending to establish the right of the matter, an instruction to a jury so made as to convey the impression that the assessment roll is not a part of the evidence, is properly refused. *Walters v. Lake*, 129 Ill. 23, 21 N. E. 556.

*Witnesses as to value.*

Any person who has knowledge of the fact which the construction of an improvement will have on the market value of the property assessed, is competent to give an opinion as to such value, the weight to be given such opinion being for the jury. *Pike v. Chicago*, 155 Ill. 656, 40 N. E. 567.

*Imperfect performance.*

On application for judgment of confirmation, evidence that the street would have been better improved by the use of other materials, and at less cost, is inadmissible. *Cram v. Chicago*, 138 Ill. 506, 28 N. E. 757.

On trial of a petition to confirm an assessment, evidence as to the quality of the work is inadmissible. *Haley v. Alton*, 152 Ill. 113, 38 N. E. 750.

*Restoring lost document.*

When an assessment roll has been lost or destroyed, a correct copy may be restored by order of court as a part of the record, and admissible in evidence as such. *Thomas v. Chicago*, 152 Ill. 292, 38 N. E. 923.

*Indiana.*

*City ownership — How disproved.*

After the work of improving a street has been concluded, a property owner who seeks to show the way did not belong to the city, must show that it was not ac-

quired by purchase, dedication, or prescription. *Jackson v. Smith*, 120 Ind. 520, 22 N. E. 431. *Massachusetts.*

*Proportion of benefits.*

While a petitioner for revision of an assessment may introduce evidence tending to show the assessment on his land was too great, he is not entitled to introduce evidence as to the proportion of benefit to his lands and other abutters on the way, as compared with the benefit to real estate generally in the city. *Alden v. Springfield*, 121 Mass. 27.

*Benefits to other property.*

On petition for reduction of an assessment, the question is as to the benefit to petitioner's land from the whole construction of a street, but the petitioner has no right to introduce evidence as to the benefit resulting from any particular piece of work done in the course of such construction. *Alden v. Springfield*, 121 Mass. 27.

*Relative benefit.*

In a trial for abatement of a special assessment for a sewer, evidence as to the relative benefit received by the other owners along the line of such sewer is inadmissible. *Keith v. Boston*, 120 Mass. 108.

*Award of damages.*

On the trial of a petition for revision of a special assessment, an offer to introduce the award of damages was properly rejected.

*Expert evidence.*

So, also, was expert evidence as to the proper size of a drain for the property in question.

*Depreciation by change in size of lots.*

So, also, that petitioner con-



**Method of assessment.**

**572.** Shallow property fronting a street, having a depth of 25 feet, should not be assessed upon the same basis as lots 100 feet deep, although it be corner property, and three

tended he was obliged by the taking to lay out his lots in various sizes which would not sell as well as lots of different dimensions.

*Photograph as evidence.*

It is within the discretion of the trial judge to admit a photograph of the premises as they were before any of the work was done.

*Admission of entire record.*

An exception does not lie to the admission in evidence of the entire record of the assessment, including the amount.

*Land made more healthy.*

The fact that land is made more healthy for occupation may be considered, although there be a similar benefit to other real estate in the neighborhood.

*Instructions to jury.*

The jury are rightly instructed that they cannot reduce the assessment unless satisfied by a fair preponderance of the evidence that it is not right, and that on this question the assessment "is not evidence either prima facie or in any other way." *Beals v. Brookline*, 174 Mass. 1, 54 N. E. 339.

*Michigan.**Legality of documents.*

The court will not pass on the legality of documents without an opportunity to inspect them. *Wilkins v. Detroit*, 46 Mich. 120, 8 N. W. 701, 9 N. W. 427.

*Ohio.*

The council cannot so prescribe the duties of a clerk of the board of improvement as to make the

minutes kept by him the sole and exclusive evidence of the action of such board. *Reynolds v. Schweinefuss*, 27 O. St. 311

*Pennsylvania.**Refusal to permit inspection.*

The refusal of a street commissioner and street committee to allow a pavement to be taken up at places, for purposes of inspection, is not prejudicial unless it be shown they had power to bind the city in the matter. *Schenley v. Commonwealth*, 36 Pa. St. 62.

*Inadmissibility of judgment.*

Where the record of a judgment for the defendant in a like action brought by the same plaintiff, in an action to recover for a street improvement assessment, is offered in an action brought a few years later, the question being the legality of the front rule as applicable to rural property, such judgment is inadmissible, either as evidence for the jury, or as a conclusive bar. *Keith v. Philadelphia*, 126 Pa. St. 575, 17 Atl. 883.

*Washington.**Proof of publication.*

Any competent proof tending to establish the publication of the filing of an assessment roll is admissible in the absence of any provision of the charter or ordinances requiring such proof to be preserved in any particular way. *Seattle v. Doran*, 5 Wash. 482, 32 Pac. 105, 1002; *modifying Wilson v. Seattle*, 2 Wash. 548, 27 Pac. 474.



other lots on an intersecting street, lying adjacent and abutting to the front property, were not assessed at all.<sup>63</sup> A special assessment otherwise just and proper will not be divided, because the commissioners proceeded upon a basis or adopted a method not deemed the best that could have been chosen.<sup>64</sup> After the annexation of a village to a city, a street improvement proceeding begun by such village before being annexed should be carried on in its name.<sup>65</sup> Where the charter authorizes an assessment for street improvements on the basis of the number of square feet in each one fourth of a square, taxation cannot be imposed on adjacent property that has not been laid out into squares.<sup>66</sup> Where part of an alley was improved under a charter requiring the payment of the cost to be made by the owners of property in the one fourth square, and later the remainder of the alley was improved, the owners first assessed should not be required to pay for the remainder of such improvement, but the cost should be equalized as if it were one improvement.<sup>67</sup> Under a charter empowering the mayor and councilmen to cause street improvements to be made, the council alone has power to direct work of that character to be done.<sup>68</sup>

#### *Wisconsin.*

##### *Proceedings void on their face.*

Where special assessment proceedings are void on their face for failure to comply with charter requirements, extrinsic evidence to show compliance with charter provisions will not be allowed. *Sanderson v. Herman*, 95 Wis. 48, 69 N. W. 977; 1 Greenl. Ev., Sec. 86; *Blackwell Tax Titles*, 248, 512; *Black Tax Titles*, Sec. 446; *Iverslie v. Spaulding*, 32 Wis. 394.

<sup>63</sup> *Cossitt Land Co. v. Neuscheler* (N. J.), 60 Atl. 1128.

<sup>64</sup> *Pike v. Chicago*, 155 Ill. 656, 40 N. E. 567.

This decision proceeds upon the

principle that the law having prescribed no basis for ascertaining benefits that the commissioners are at liberty to adopt such method as may in their judgment work out a just result. But the assessment would not be sustained if the method adopted would impose a greater assessment on any property within the amount of the benefit, or more than its just proportion of the improvement.

<sup>65</sup> *McChesney v. Hyde Park*, 151 Ill. 634, 37 N. E. 858.

<sup>66</sup> *Caldwell v. Rupert*, 10 Bush, 179.

<sup>67</sup> *Beck v. Obst*, 12 Bush, 268.

<sup>68</sup> *Saxton v. Beach*, 50 Mo. 488.



**573.** Where there are several lots within the improvement district, the cost of the work in front of which varies materially, while the advantage to the lots also varies, a uniform assessment is not justifiable. In a New Jersey case, a uniform assessment of about \$205 a lot was made, under the circumstances just indicated, although the market value was not enhanced anything like the amount of the assessment. The assessment was promptly vacated, and the court appropriately said:

“In the case in hand, even on the basis of cost, the uniform assessment was not justifiable. The different lots received varying advantage from the removal of rock, a matter that should have been considered in making the assessments. I can conceive of no rational rule applicable to this case that could lead to uniform assessment based on the cost of the whole improvement. Uniform assessments based on enhancement of value would be intelligible, and so would assessments, within absolute benefits, based on actual proportions of advantage to individual lots; but neither of these rules can be evolved from the result reached by the commissioners.”<sup>69</sup>

#### Amount of assessment — Modification.

**574.** The amount of an assessment should appear in dollars and cents before a court can render judgment thereon.<sup>70</sup> Where a statute limits the amount of a special assessment to 25 per centum of the actual value of the lot or tract at the time of the levy, and provides that the last preceding assessment roll shall be taken as *prima facie* evidence of such value, the assessment is not invalid because no evi-

<sup>69</sup> State v. Bayonne, 63 N. J. L. 202, 42 Atl. 773.

“It is an easy matter to follow the plain provisions of the act, and the sooner municipal authorities realize the necessity of doing so, the better it will be for all concerned. When that is done, less of our time, and the time of the

local courts, will be unnecessarily consumed in abortive attempts to correct inexcusable blunders.” Sterrett, J., in Scranton v. Barnes, 147 Pa. St. 465, 23 Atl. 777.

<sup>70</sup> Brown v. Joliet, 22 Ill. 123; Gibson v. Chicago, 22 Ill. 566; Chicago v. Walker, 24 Ill. 493.



dence was taken of the actual value of the property.<sup>71</sup> Where property has been assessed which should not have been placed upon the assessment roll, a court has no power to modify it and let the assessment stand for the amount justly chargeable.<sup>72</sup> Nor can it, on application for sale of property for unpaid special assessment, reduce the assessment to an amount equal to the cost of the work already done and the amount estimated to be necessary to complete the work.<sup>73</sup> And a charter provision that if, in the proceedings for any local improvement in said city, "any fraud or defect in the work, or substantial error, shall be alleged to exist or have been committed, the party aggrieved thereby may apply to have the assessment vacated or reduced," and giving the county judge jurisdiction to entertain such application, applies only to assessments thereafter made.<sup>74</sup> Where an assessment for a local improvement exceeds half the value as fixed by the ward assessors, the assessment is valid up to one-half, and the court has power to correct the assessment by reducing it to that amount.<sup>75</sup>

<sup>71</sup> *Owens v. Marion*, 127 Ia. 469, 103 N. W. 381.

*Valuation in previous years as basis.*

Where property was valued by the general assessors in 1858, assessments might be imposed thereon for local improvements in 1864, 1865, 1873 and 1875. In *re St. Joseph's Asylum*, 69 N. Y. 353.

The difference between this case and that of *Second Ave. Church* was that there was no evidence of any valuation ever having been made by the general tax assessors.

<sup>72</sup> *Spokane Falls v. Browne*, 3 Wash. 84, 27 Pac. 1077.

<sup>73</sup> *Conn. Ins. Co. v. People*, 172 Ill. 31, 49 N. E. 989.

<sup>74</sup> In *re Del. & H. Canal Co.*, 129 N. Y. 105, 29 N. E. 237.

<sup>75</sup> But in such case, interest should not begin to run until the

date of the order correcting the assessment. In *re St. Joseph's Asylum*, 69 N. Y. 353.

*Determining amount not condition precedent to entry.*

Under the Wisconsin statute, notwithstanding any charter prohibition against ordering the work of grading a street except at the expense of owners of property abutting thereon to the extent of the excess of benefits over damages caused to the property by the improvement, a valid determination of the amount chargeable to the property is not a condition precedent to ordering the work done in order to make the cost thereof to the extent contemplated a lien upon the property. *Pabst Br. Co. v. Milwaukee (Wis.)*, 105 N. W. 563.



### Error and amendment.

**575.** There is no error in allowing amendments to assessment rolls to correct mere clerical errors or omissions, which in no way affect a party's rights.<sup>76</sup> Thus clerical error in the amount of an assessment of benefits as stated in an order for the same, may be amended by substituting the actual amount, and notice thereof is unnecessary.<sup>77</sup> But after an assessment roll is filed, the improper erasure of a lot number and the substitution of another number, without leave of the court, is fatal to the validity of the assessment against such lot.<sup>78</sup>

The common council is without jurisdiction to award a contract for additional work not included in the original resolution, or to order such work done; and where the contract included such additional work had a specified price for the whole work and the amount thereof was included in the assessment as a part of the cost of the work, the entire assessment is thereby vitiated.<sup>79</sup>

Work done after the loss of jurisdiction by the board, without a new resolution of intention, is without authority of law, and an assessment therefor is void, and creates no liability.<sup>80</sup>

### Judicial notice.

**576.** In Wisconsin, city charters are public acts of which courts are bound to take judicial notice.<sup>81</sup> The con-

*Sale of building standing on land taken.*

Under a statute providing that a building standing on land condemned for an improvement may be sold, and the amount realized applied to the fund for paying for the property taken, an omission so to apply such amount does not necessarily invalidate the assessment, but the court may direct a pro rata reduction. *Power v. Detroit* (Mich.), 102 N. W. 288.

<sup>76</sup> *Lehmer v. People*, 80 Ill. 601.

<sup>77</sup> *Atkinson v. Newton*, 169 Mass. 240, 47 N. E. 1029.

<sup>78</sup> *Gage v. Chicago*, 216 Ill. 107, 74 N. E. 726.

<sup>79</sup> *Piedmont Paving Co. v. Allman*, 136 Cal. 88, 68 Pac. 493.

<sup>80</sup> *Pacific Paving Co. v. Geary*, 136 Cal. 373, 68 Pac. 1028.

<sup>81</sup> *Janesville v. M. & M. R. R. Co.*, 7 Wis. 484; *State v. Lean*, 9 Wis. 279; *Terry v. Milwaukee*, 15



trary rule prevails in Missouri, and the courts will not take judicial notice of city charters except when they are declared to be public statutes.<sup>82</sup> Where real property is shown to be located on a city street, such notice will be taken of the county in which it is situated,<sup>83</sup> and in San Francisco the courts will take judicial notice of its streets as designated on the official map of the city.<sup>84</sup>

### Figures, abbreviations and names.

**577.** Words, figures and abbreviations may be used to designate lands against which a judgment for taxes is demanded, but the description must be so certain that a definite locality can be given them.<sup>85</sup> But where property is described in a special assessment proceeding as lying in "Sec. 23, 38, 14," the courts take judicial notice that the figures "38" and "14," so used, refer to the township and range. And oral evidence is permissible to show that a description so made has a well defined meaning among surveyors.<sup>86</sup> The middle initial of a name is immaterial in a legal proceeding, and its presence or absence, or use of a different one, is not a legal variance. The use of the first initial is regarded as an abbreviation of the Christian name, not as the name of another. And variance in the spelling of names will ordinarily be disregarded where they are obviously *idem sonans*.<sup>87</sup>

Wis. 490; *Alexander v. Milwaukee*, 16 Wis. 248.

<sup>82</sup> *Butler v. Robinson*, 75 Mo. 192.

<sup>83</sup> *Linck v. Litchfield*, 141 Ill. 469, 31 N. E. 123.

<sup>84</sup> *Whiting v. Quackenbush*, 54 Cal. 306.

<sup>85</sup> *Olcott v. State*, 10 Ill. 481.

<sup>86</sup> *McChesney v. Chicago*, 173 Ill. 75, 50 N. E. 191.

*Construction — figures construed to meet dollars.*

See *Linck v. Litchfield*, 141 Ill. 469, 31 N. E. 123.

<sup>87</sup> There is no legal variance between the names "John J. Flagg" and "J. H. Flagg." *Claffin v. Chicago*, 178 Ill. 549, 53 N. E. 339.

Where an ordinance appoints one Frank Bettie a commissioner, and the estimate returned is signed by Frank W. Beattie, the presumption is, in the absence of proof, that they are the same persons, the middle initial being no part of the name, and the other two names being obviously *idem sonans*. *Gross v. Grossdale*, 177 Ill. 248, 52 N. E. 372.



**Omission of dollar mark.**

**578.** It was early held in Illinois that where there is no word, mark or character attached to or connected with the figures of an assessment showing what they were designed to represent, the defect was fatal.<sup>88</sup> A little later, in a case where the assessment roll failed to show the meaning of the column of figures headed "valuation," it was held that parol evidence was inadmissible to supply the deficiency.<sup>89</sup> This ruling did not long hold sway, for a few months afterwards it was held that this was an informality which was cured by a statute passed in 1853, and that although the dollar mark be omitted in some parts of a street opening assessment, it will be sufficient if there is requisite evidence in any part of the roll to determine the meaning of the figures.<sup>90</sup> It has been determined elsewhere that the omission of the dollar mark is not necessarily fatal;<sup>91</sup> but where there is no mark to indicate the values represented by the figures, the assessment is void.<sup>92</sup> The Illinois court now holds that the omission of the dollar mark prior to the application for

*Similarity of names — Presumption of identity of persons.*

Linck v. Litchfield, 141 Ill. 469, 31 N. E. 123.

*Abbreviation of name of owner in assessment.*

The abbreviated name "Chicago W. Div. R. R. Co.," in an assessment for a public improvement, sufficiently designates the "Chicago West Division Railway Company." West. C. S. R. Co. v. People, 155 Ill. 299, 40 N. E. 599.

*Sufficiency of abbreviated name.*

A notice addressed to "W. Div. R. W. Co." instead of the "Chicago West Division Railway Company" sent to the place of business of the latter company is sufficient to bind it by a judgment confirming an assessment against its property.

W. C. S. R. Co. v. People, 156 Ill. 18, 40 N. E. 605.

<sup>88</sup> Gibson v. Chicago, 22 Ill. 566; Lawrence v. Fast, 20 Ill. 340, 71 Am. Dec. 274.

<sup>89</sup> Chicago v. Walker, 24 Ill. 493.

<sup>90</sup> Hill v. Figley, 25 Ill. 156; Chicago v. Wheeler, 25 Ill. 478, 78 Am. Dec. 342.

<sup>91</sup> Walker v. Dist. of Col., 6 Mackey, 352.

<sup>92</sup> McClellan v. Dist. of Col., 7 Mackey, 94.

A judgment for taxes, in which figures only are used, without a dollar mark, or other definite means of determining whether the figures stand for dollars, cents or mills, is void. Potwin v. Oades, 45 Ill. 366.



judgment, is not a defect, and becomes one then only because the judgment must state the sum for which it was rendered,<sup>93</sup> and that a judgment of sale against tracts or lots of land not set forth in a schedule attached, in which the several amounts due do not appear, but only the totals at the bottom of the columns, and there is nothing to show that the numerals therein stand for dollars and cents, is defective.<sup>94</sup>

### Officers de facto.

**579.** Persons who assume and exercise the duties of a municipal office, are *de facto* officers, and their official acts will be held valid, until their right is called in question by *quo warranto*, and they are dispossessed thereby of all further power.<sup>95</sup> Where the council has assumed to appoint assessors under a general statute, whether or not they were officers *de jure* will not be considered in a suit to restrain a special assessment made by them.<sup>96</sup>

### Dedication.

**580.** A dedication of lands to a public street upon condition that the lots shall be exempt from charges for street improvement, unless a majority of abutting owners shall assent thereto in writing, is inoperative.<sup>97</sup> A dedication does not become effectual until accepted by the public.<sup>98</sup> An objection that property against which a judgment of condemnation for widening a street was entered had been dedicated to the city for street purposes prior to the filing of the con-

<sup>93</sup> *Chickering v. Faile*, 38 Ill. 340; *Elston v. Kennicott*, 46 Ill. 187; *Pittsburg, F. W. & C. R. Co. v. Chicago*, 53 Ill. 80.

<sup>94</sup> Where in schedule attached to a judgment of sale, there is a proper description of plaintiff's lots, with the figures "89.35" opposite, without any dollar mark preceding, there is nothing to fix

the meaning of these figures, and judgment based thereon is defective. *Gage v. People*, 213 Ill. 468, 72 N. E. 1108.

<sup>95</sup> *Samuels v. Drainage Com'rs*, 125 Ill. 536, 17 N. E. 829.

<sup>96</sup> *Boehme v. Monroe*, 106 Mich. 401, 64 N. W. 204.

<sup>97</sup> *Richards v. Cincinnati*, 31 O. St. 506.



demnation petition cannot be urged in the supplemental proceeding to levy an assessment to pay such judgment.<sup>99</sup>

### Nuisance.

**581.** Where a city creates a nuisance upon a private lot, owing to failure to provide proper sewerage in grading a street, the city may provide for abating it, as for other improvements; and where the work has been done in a regular manner, an assessment upon the lot of the cost of the work is valid at law.<sup>1</sup> But the lot owner in such case has a right of action against the city, either at law for damages, or in equity to restrain a sale of the premises for the assessment.<sup>2</sup> While the unlawful obstruction of a public street is a nuisance, that which is authorized by competent legal authority does not in law constitute a nuisance.<sup>3</sup>

<sup>99</sup> Gregory v. Ann Arbor, 127 Mich. 454, 86 N. W. 1013.

<sup>99</sup> South Chi. R. Co. v. Chicago, 196 Ill. 490, 63 N. E. 1046.

<sup>1</sup> Smith v. Milwaukee, 18 Wis. 69, and see Weeks v. Milwaukee, 10 Wis. 243.

<sup>2</sup> Smith v. Milwaukee, *supra*.

<sup>3</sup> Omaha v. Flood, 57 Neb. 124, 77 N. W. 379.

A lot owner has the right to maintain the surface of his lot at such grade as he may choose, as

long as no nuisance is created; and where a lot is so low as to become a nuisance by reason of its retaining stagnant water, the city cannot raise it higher than necessary to abate the nuisance, nor assess the cost against the owner without first giving him due notice and an opportunity to be heard. Bush v. Dubuque, 69 Ia. 233, 28 N. W. 542; Gatch v. Des Moines, 63 Ia. 718, 18 N. W. 310.



## CHAPTER X.

### ASSESSMENTS FOR SPECIFIC IMPROVEMENTS — VALID AND INVALID ASSESSMENTS.

**GRADING** — In general, 582.

Change of grade — General provisions, 583-585.

Is an improvement, 586.

**PAVING** — Pavement — What constitutes, 587-590.

What is not a pavement, 591.

Street intersections, 592.

Resolutions and estimates, 593.

Liability of abutting owners, 594.

Apportionment of tax, 595.

Reconstruction and repairs, 596.

Street railways — Liability for paving, 597.

**SEWERS** — In general, 598.

Assessment by benefits, 599-603.

Future benefits, 604.

Front foot rule, 605.

Sewer districts, 606.

Plans and specifications, 607.

Private sewers, 608.

Outlets, 609.

Connections, 610.

Assessments and objections, 611-612.

Drainage and drainage districts, 613-614.

**SIDEWALKS** — In general — Necessity of notice, 615.

Single improvement, 616.

What included in, 617.

Power of council — How exercised, 618.

Review of benefits, 619.

Liability for cost of sidewalk, 620.

**VALID AND INVALID ASSESSMENTS** — Valid assessments, 621.

Invalid assessments, 622.

## GRADING.

### In General.

**582.** In order to make lots fronting on a street chargeable with the expense of grading, every act which the statute requires the city officials to do, must be fully performed, or the assessment will be void.<sup>1</sup> This general statement of the law is equally applicable to all public improvements paid for by special assessments. A grade may, under certain conditions, be established by long user and by the acquiescence and recognition of the municipality,<sup>2</sup> but as a

<sup>1</sup> *McComb v. Bell*, 2 Minn. 295, Gil. 256; *Mayall v. St. Paul*, 30 Minn. 294, 15 N. W. 170.

<sup>2</sup> *Folmsbee v. Amsterdam*, 142 N. Y. 118, 36 N. E. 821.



rule, it can be established only by a duly enacted ordinance, even a resolution being usually considered insufficient for such purpose.<sup>3</sup> In cases where the charter makes the expense of opening and grading new streets payable by assessment upon the lands benefited, the council cannot make a valid contract to purchase part of the land needed, for a certain sum, part of the consideration being the grading by the vendor of the adjacent street, and thus cast the burden of the improvement on the city treasury.<sup>4</sup> It is not a valid objection to an assessment for pavements that it included also curb and gutters, cross-streets, cross-walks, and grading, where all the work except grading was done with stone, and together constituted one entire work,<sup>5</sup> nor to a grading assessment that the grade of a crossing outside the district had not been fixed.<sup>6</sup> And if the regrading of a street is necessary to prepare the surface for a duly authorized pavement, and no part of the cost of such regrading is included in the benefits assessed, the owners of abutting property have no standing, in a proceeding to assess benefits, to object to such regrading.<sup>7</sup> If such regrading requires the erection of an expensive wall and embankment for the purpose of affording access to private property outside the line of the street, the abutting owners are not liable for the cost and damage caused thereby.<sup>8</sup>

#### — Change of grade — General provisions.

**583.** In order to encourage both public and private improvement of streets, it is customary for city charters to

<sup>3</sup> McDowell v. People, 204 Ill. 499, 68 N. E. 379.

<sup>4</sup> State v. Jersey City, 34 N. J. L. 390.

<sup>5</sup> Williams v. Detroit, 2 Mich. 560.

<sup>6</sup> Warren v. Russell, 129 Cal. 381, 62 Pac. 75.

<sup>7</sup> Amberson Avenue, 179 Pa. St. 634, 36 Atl. 354.

<sup>8</sup> Wick Street, 184 Pa. St. 93, 39 Atl. 3.

*Construction of grading contract.*

Where a street improvement contract provides with reference to the grading that the contractor shall remove the ground or old pavement to such a depth as is necessary to make room for the pavement to be put down, and



provide that where a street grade is once duly established, and improved to such grade, the power of the council to make further changes is somewhat restricted, and damages awarded to abutting owners who may be injured by such subsequent change. And when it is required that "before any established grade shall be changed or any work shall be done on any street, in whole or in part at the expense of the abutting or adjoining real estate, the board of public works shall view the premises and determine the benefits and damages which shall accrue to each parcel of such real estate by such change or alteration of grade," the view and assessment are necessary in all cases of change of grade.<sup>9</sup> The power to alter the grade of a street implies the power to make such incidental changes in the grade of intersecting streets only as become necessary by reason of the change in the principal street, and the necessity for such readjustment of grades cannot be perverted into an excuse for making an entire change of grade in such cross streets, except so far as rendered necessary by the alterations made in the principal street, nor into an excuse for making any change beyond what is necessary for the purposes indicated. The extent of such changes is largely within the discretion of the municipal authorities, but the courts will rectify the abuse in obvious cases.<sup>10</sup>

**584.** A municipal ordinance fixing a grade is not jurisdictional and need not precede the resolution ordering the improvement where it is passed so that the work is done with reference thereto, and so that the owner may not be subjected to damages by reason of a subsequent change without compensation<sup>11</sup> therefor. But a statute providing that

shall also do such filling as is necessary to form the subgrade therefor, no expenses for grading are contemplated save such as are necessary to make room for the new pavement. *McCain v. Des Moines* (Ia.), 103 N. W. 979.

<sup>9</sup> *Jorgensen v. Superior*, 111 Wis. 561, 87 N. W. 565.

<sup>10</sup> *State v. Bayonne*, 54 N. J. L. 293, 23 Atl. 648.

<sup>11</sup> *Allen v. Davenport*, 107 Ia. 90, 77 N. W. 532.



when the grade of a street has been established it "shall not be changed until damages shall have been assessed and determined, and the amount of damages tendered to property owners, *before any such change shall be made*," is mandatory; and proceedings of a council in changing grade, making contract therefor, and levying an assessment to pay for same, without first assessing and tendering damages, are void.<sup>12</sup> Under the Nebraska statute, the amount paid for damages cannot be assessed against the abutting owner.<sup>13</sup>

**585.** If defects in a special assessment are of such a character as to affect its substantial justice, it is not aided by a charter provision making certain directions for the assessing of land and levying and collection of taxes and assessments directory only.<sup>14</sup> When a change of the grade of a street is itself an improvement for which benefits are assessed, or is a part of or incident of such an improvement, the assessment for damages should be made at the same time and as a part of the assessment for benefits.<sup>15</sup> As a general rule, the special provisions of a city charter relative to grading streets will not be influenced or varied by the general provisions of the charter giving the council general power in respect of street improvement matters.<sup>16</sup>

— Is an improvement.

**586.** The grading of a lot to the established grade is an "improvement" within the meaning of the statute making a city liable for damages to property resulting from the change of grade of a street, where improvements have been made thereon according to a grade previously established.<sup>17</sup> But putting macadamizing material upon a city street is not a change of grade, although it may elevate the sur-

<sup>12</sup> Hurford v. Omaha, 4 Neb. 336.

<sup>13</sup> Goodrich v. Omaha, 10 Neb. 98, 4 N. W. 424.

<sup>14</sup> Lieberman v. Milwaukee, 89 Wis. 336, 61 N. W. 1112.

<sup>15</sup> State v. Hoboken, 57 N. J. L. 330, 31 Atl. 278.

<sup>16</sup> Drummond v. Eau Claire, 79 Wis. 97, 48 N. W. 244.

<sup>17</sup> Chase v. Sioux City, 86 Ia. 603, 53 N. W. 333.



face.<sup>18</sup> And where in repairing a street the face thereof at the curb was made a few inches lower than before, but the level of the curb was not changed, there was no change of grade entitling abutting owner to damages.<sup>19</sup> And that a change of grade has been actually made in a street is no defense to the confirmation of the special assessment laid for its improvement. The property owner, if damaged, has an appropriate remedy.<sup>20</sup> Where a city charter provides that in case of change of a previously established grade, the damages to the lot owner shall be assessed and determined, as well as the benefits caused by such change of grade, it is necessary to render the assessment valid that it shall show upon its face that the provisions of the law for the benefit of the lot owner have been complied with, and that the assessing body has considered and passed upon, not only the question of benefits and injuries resulting from the improvement, but also the "damages, costs and charges" (as provided in the charter) by way of compensation for the expense caused by the change of grade.<sup>21</sup> Where a grade is lowered after contract let, under a resolution to fill to a higher grade, there is no jurisdiction to make such a change, no valid contract therefor, and no valid basis for an assessment, and in such case an appeal is unnecessary.<sup>22</sup> If a

<sup>18</sup> *Warren v. Henley*, 31 Ia. 31.

<sup>19</sup> *Coates v. Dubuque*, 68 Ia. 550, 27 N. W. 750.

As to what constitutes a change of grade, see *O'Reilly v. Kingston*, 114 N. Y. 439, 21 N. E. 1004.

As to principles, under constitutional provision against damaging, see *Eachus v. Los Angeles, etc.*, R. Co., 103 Cal. 614.

<sup>20</sup> *White v. Alton*, 149 Ill. 626, 37 N. E. 96.

<sup>21</sup> *Liebermann v. Milwaukee*, 89 Wis. 336, 61 N. W. 1112.

<sup>22</sup> *Warren v. Chandos*, 115 Cal. 382, 47 Pac. 132.

Where a street grade had been duly established and a legal petition for grading the street presented, and an ordinance providing for plans, specifications and estimates and for letting the contract was passed, and the contract let, and after such letting another ordinance was passed materially changing the grade of the street; and without new plans, etc., the grading done to the last established line, the assessment to pay therefor is invalid. *Argentine v. Daggett*, 53 Kan. 491, 37 Pac. 14.



judgment is rendered on a special verdict, and neither the facts found nor the undisputed evidence support the judgment, it will be reversed whether objections or exceptions to the judgment be taken by the losing party or not.<sup>23</sup>

## PAVING.

### Pavement — What constitutes.

**587.** A pavement is not limited to uniformly arranged masses of solid material, as blocks of wood, brick or stone, but it may be as well formed of pebbles, or gravel, or other hard substance, which will make a compact, even, hard way or floor,<sup>24</sup> and includes all the usual means of covering streets with stone or brick, so as to make a convenient surface for travel.<sup>25</sup> A first pavement of a street sufficient, in a legal sense, to exempt abutting property owners from liability for any subsequent improvement, may be defined generally as one that is put down originally or adopted or acquiesced in subsequently by the municipal authority, for the purpose and with the intent of changing an ordinary road into a street. If the purpose and intent be wanting, a mere surfacing of the road, however carefully or expensively done, will not be a paving; but if the intent and purposes are present, or to be barely inferred, then there is a

<sup>23</sup> When judgment is reversed because it contains items of damages not authorized by the special verdict, the cause may be remanded with leave to respondent to enter judgment for the correct amount, or, at his option, to take a new trial. *Tyson v. Milwaukee*, 50 Wis. 78, 5 N. W. 914.

#### *Recommendation of lot owners.*

Under a charter requiring a written recommendation of a majority of lot owners before grading a street, where the grade has been established by vote of the

council, a subsequent recommendation of the property owners that the street be graded must be presumed to refer to the grade so established. *Crossett v. Janesville*, 28 Wis. 420.

After such recommendation, the council cannot grade the street to a different grade from the one already established without a new recommendation therefor. *Ibid.*

<sup>24</sup> *Burnham v. Chicago*, 24 Ill. 496.

<sup>25</sup> *Warren v. Henley*, 31 Ia. 31.



paving, whatever the material may be.<sup>26</sup> The laying of a crosswalk is paving within the meaning of statutes authorizing assessments,<sup>27</sup> and paving gutters with cobble stone, and the cartway with broken stone is also a paving.<sup>28</sup> The word "macadamize" means the covering of a street by the process introduced by Macadam, consisting of the use of small stones of a uniform size, consolidated and leveled by heavy rollers. It is entirely distinct from the construction of rock gutters by laying flat stones, even on their UPPER surface, and filling the interstices with clean, hard rock, finely broken and screened.<sup>29</sup> Authority given by charter to "pave" streets is usually held to include the power to macadamize them, and to provide for their proper drainage by the construction of gutters,<sup>30</sup> and to do all that is necessary, usual, or fit for paving.<sup>31</sup> And when the power is given to pave, the city may pave with asphalt or in any other substantial manner.<sup>32</sup>

**588.** The obligation of an abutting owner to pay for the original paving of a street is purely statutory, and cannot be imposed without legislative authority. And not even by the legislature where no special benefit accrues. And the legislature which lays the imposition may also relieve against it.<sup>33</sup> The construction placed upon a statute for paving

<sup>26</sup> *Dick v. Philadelphia*, 197 Pa. St. 467, 47 Atl. 750.

<sup>27</sup> *In re Burke*, 62 N. Y. 224.

<sup>28</sup> *Huidekoper v. Meadville*, 83 Pa. St. 158.

<sup>29</sup> *Partridge v. Lucas*, 99 Cal. 519, 33 Pac. 1082.

<sup>30</sup> *Warren v. Henley*, 31 Ia. 31; *Burnham v. Chicago*, 24 Ill. 496; *Partridge v. Lucas*, 99 Cal. 519, 33 Pac. 1082; *Huidekoper v. Meadville*, 83 Pa. St. 158; *Dick v. Philadelphia*, 197 Pa. St. 467, 47 Atl. 750.

<sup>31</sup> *Schenley v. Commonwealth*, 36 Pa. St. 29, 78 Am. Dec. 359.

<sup>32</sup> *Schenectady v. Union College*, 66 Hun, 179, 21 N. Y. Supp. 147.

Under a statute authorizing the council by ordinance to levy and collect a special tax for the purpose of grading, macadamizing, building, guttering, curbing and repairing streets, alleys and avenues, the city is authorized to use asphaltum for paving. The word "building" as used in the statute includes "paving." *Morse v. West Port*, 110 Mo. 502, 19 S. W. 831.

<sup>33</sup> *Philadelphia v. Market Co.*, 161 Pa. St. 522, 29 Atl. 286.



streets and apportioning the benefits by the highest court of a state is conclusive on the federal supreme court.<sup>34</sup> Curbing is a necessary part of paving to separate and support the footway from the cartway, and a general power to pave implies power to repair and repave when the condition of the cartway or footway requires it; and of this *prima facie* the city officers may judge. But this does not confer the power to change, take up, alter and relay pavements, and reset curbs, at the expense of the fronting owner, who has recently paid for a good pavement or curb. It is in derogation of the right of private property, as laying a special tax on a small class.<sup>35</sup> Under a statute authorizing a city to pave a street and assess the cost thereof to abutting owners, while it is probable the cost of grading preparatory to paving may be included as one undertaking, and one assessment made therefor, it is not competent to charge the abutting owners for the grading alone, with reference to paving at some other time and as a separate improvement.<sup>36</sup>

**589.** Where the improvement consists in grading and preparing for paving, a property owner cannot complain if only the grading was assessed, as it reduces the charges against his lots.<sup>37</sup> Authority given a city to require abutting lot owners to pave the streets includes authority to re-

<sup>34</sup> Schaefer v. Werling, 188 U. S. 516, 47 L. ed. 516, 23 Sup. Ct. Rep. 449.

<sup>35</sup> Wistar v. Philadelphia, 80 Pa. St. 505, 21 Am. Rep. 112. Whether or not curbstones are ordinarily used in paving sidewalks is a question of fact for the jury. Schenley v. Commonwealth, 36 Pa. St. 29, 78 Am. Dec. 359.

Where the charter provides that the expense of setting curbs shall be assessed only upon lots of land that front on a street in proportion to their frontage, an assessment for curbing lots which do

not front on that street, is invalid. Harriman v. Yonkers, 181 N. Y. 24, 73 N. E. 493.

<sup>36</sup> Bucroft v. Council Bluffs, 63 Ia. 646, 19 N. W. 807; Scofield v. Council Bluffs, 68 Ia. 695, 28 N. W. 20.

Under a petition to pave a street the council may regulate the surface by grading and filling, and include such cost in the paving assessment. State v. Elizabeth, 30 N. J. L. 365.

<sup>37</sup> Magee v. Commonwealth, 46 Pa. 358.



quire them to build sidewalks,<sup>38</sup> and a resolution to pave includes gutterways as part of the roadway of the street, and they need not be specified unless constructed differently.<sup>39</sup> The cost of necessary filling, the adjustment of sewers, catch-basins and man-holes may properly be included in the estimate of cost under an ordinance for grading and paving a street.<sup>40</sup> Although a statute provide that a street once graded and paved at the expense of abutting property shall not be regraded at abutting owners' expense unless petitioned for by a majority of them, this will not prevent a special assessment thereon for a new pavement, notwithstanding the grade be slightly changed by reason of a change of the material of the pavement.<sup>41</sup> The power to repave streets once improved must be determined by the municipal authority in whom said power is vested, and cannot be reviewed or attacked collaterally, except in a clear case of fraud.<sup>42</sup>

**590.** A city has no authority to tax abutting property for the cost of temporary improvements, such as paving and guttering a street at other than the established grade, even though the property be benefited thereby.<sup>43</sup> Where a street is changed by macadamizing from an ordinary clay road into a good, reasonably smooth, and substantial artificial highway, practically equivalent to an ordinarily well improved street paved with cobble stones or other materials used for paving, it is paved within the meaning of the law, and subsequent repaving with wood, stone or asphalt must be borne by the public and not by the owners of the prop-

<sup>38</sup> Warren v. Henley, 31 Ia. 31.

<sup>39</sup> City Street Imp. Co. v. Taylor, 138 Cal. 364, 71 Pac. 446.

<sup>40</sup> Sawyer v. Chicago, 183 Ill. 57, 55 N. E. 645.

<sup>41</sup> Auditor General v. Chase, 132 Mich. 630, 94 N. W. 178.

<sup>42</sup> Simmons v. Saginaw, 104 Mich. 511, 62 N. W. 725.

<sup>43</sup> McManus v. Hornaday, 99 Ia. 507, 68 N. W. 812.

*Life tenant v. Remainderman—Who pays?*

An assessment for street paving must be deemed an assessment for a permanent improvement, as between a life tenant and the remainder-men, when the charter of the city in which the paving has been done provides that the expense of repairing it shall be paid by a general tax. Chamberlin v.



erty abutting on the street.<sup>44</sup> Under a statute authorizing the common council to cause a street to be paved or repaved, macadamized or remacadamized, the council is not precluded from ordering a street paved with bituminous rock on the ground that it has once been macadamized, unless constructed and accepted as a completed street by the council.<sup>45</sup>

— **What is not a pavement.**

**591.** A pavement involves the idea of a permanent improvement substantially for the entire width of the roadway, so that although a street has been curbed and guttered, and a narrow strip laid on each side with cobble stones for the purpose of binding and protecting the gutter stones, and although the sidewalks have been flagged and crosswalks laid, this is not a pavement.<sup>46</sup>

— **Street intersections.**

**592.** Under an ordinance for paving a street under which nothing has been done, it is competent for the council to repeal, in a later ordinance for paving an intersecting street with different material, so much of the first ordinance as applies to the street intersections, without impairing its validity otherwise.<sup>47</sup>

— **Resolutions and estimates.**

**593.** It is unnecessary that resolutions to cause certain paving to be done, or estimates in detail of the work and

Gleason, 163 N. Y. 214, 57 N. E. 487.

<sup>44</sup> Greensburg v. Laird, 138 Pa. St. 533, 21 Atl. 96; Harrisburg v. Sigelbaum, 151 Pa. St. 172, 20 L. R. A. 834, 24 Atl. 1070.

But in Philadelphia, and probably other large cities, it seems that macadamizing is not paving, but there may be a presumption the other way in smaller cities or towns. Dick v. Philadelphia, 197 Pa. St. 467, 47 Atl. 750.

<sup>45</sup> San Francisco Pav. Co. v. Egan, 146 Cal. 635, 80 Pac. 1076. Where the statute makes macadamizing of streets and curbing of sidewalks distinct kinds of improvement, the former does not include the latter. Beaudry v. Valdez, 32 Cal. 269.

<sup>46</sup> *In re Brady*, 85 N. Y. 268.

<sup>47</sup> Noonan v. People, 183 Ill. 52, 55 N. E. 679.



its cost, should be very technical in their wording. If from the resolution, estimate, contract and other documents or proceedings the intent of the council is made apparent, the intent will prevail, even where there are slight variances between some of the papers, and assessments made pursuant to such plain intent will be sustained.<sup>48</sup>

*Widening street.*

<sup>48</sup> Where a board of improvements recommends a street improvement by grading, paving and macadamizing to the full width of sixty feet, such recommendation will be held to embrace the widening of such portion of the street as may be less than sixty feet, if the recommendation is necessary to the widening of the street. *Krumberg v. Cincinnati*, 29 O. St. 69.

*Description of work.*

A charter provision requiring a resolution for a public improvement to "describe the contemplated improvement" is complied with by a resolution describing the work as "the paving of a street with the Nicholson pavement," and such description will include the incidental work of removing the earth for the paving and the setting of the curbstones. *Steckert v. E. Saginaw*, 22 Mich. 104.

*Failure to determine material.*

A street paving assessment is not vitiated because the council did not declare in their determination the street should be paved with stone, such determination being sufficiently evidenced by the order directing a contract to be made for such work. *Williams v. Detroit*, 2 Mich. 560.

*Detailed estimate.*

Where the charter requires the city engineer to make under oath

a detailed estimate of the cost of paving and curbing of a street, such estimate is sufficient if it states the surface to be paved, the kind of pavement, the cost per yard and the aggregate cost of the same; the number of lineal feet of curbing, its character and the cost per foot and aggregate cost; if the estimate states that the paving of a certain street is to be stone and asphalt, its character is sufficiently described. *Olsson v. Topeka*, 42 Kan. 709, 21 Pac. 219.

*Variance.*

Where the resolution called for proposals for paving a street for a width of forty-two feet "according to plans and specifications on file," and such plans called for a pavement only thirty-seven feet wide, because of a railroad tract which was to be paved by the owners, there is not such a variance as renders the proceedings invalid. *Voght v. Buffalo*, 133 N. Y. 463, 31 N. E. 340.

*Meaning of "delivered."*

The words "delivered on the work" at a specified temperature, in an ordinance for a brick pavement, describing how the spaces shall be filled with coal tar, mean that the filling shall be put on the pavement at that temperature, and not merely delivered. *Sawyer v. Chicago*, 183 Ill. 57, 55 N. E. 645.



— Liability of abutting owners.

594. Questions of considerable perplexity sometimes arise as to what is the limit of the liability of abutting property for a special assessment for paving or other street improvement, where, from the physical nature of the district, more work has to be done in front of some of the property than has to be done in front of the rest. Unless there be specific statutory requirements to the contrary, it may be taken as the rule that the owners on opposite sides of the streets shall be assessed equally, regardless of the amount of work done on the respective sides, and it may well be doubted, if the statute provided to the contrary, whether it be enforceable, especially in those states whose courts maintain the integrity of the principle of benefits,<sup>49</sup> although there is eminent authority to the contrary.<sup>50</sup>

— Apportionment of tax.

595. Under a statute requiring that for all paving the assessment shall be made for the full cost thereof on each block separately; on all lots and pieces of ground to the cen-

<sup>49</sup> Under statutory provisions authorizing a city to cause its streets to be paved, requiring adjacent owners to pave one-half in width of the streets contiguous to their respective lots, and to make assessments for paving on lots fronting the street, — where the city paved thirty feet wide in front of defendant's premises, on a street one hundred feet wide, and wholly on defendant's side, the defendant was liable to pay only one-half of the cost of such paving. *Muscatine v. C. R. I. & P. R. Co.*, 88 Ia. 291, 55 N. W. 100.

*Paving opposite public grounds.*

Where a strip forty-two feet wide in the middle of an avenue has been converted by the city into a park and maintained as such

with a roadway fifty-eight feet wide on each side of it, the owner of abutting property cannot be charged with the cost of improving more than one-half of the roadway on his side of the street, where the charter provision provides the expense of paving to the middle of the street opposite public grounds shall be paid from the ward fund. *Boyd v. Milwaukee*, 92 Wis. 456, 66 N. W. 603.

<sup>50</sup> The assessment of a greater amount for a street pavement, upon one side of the street than upon the other, on which there was a railroad track, is a matter within the judgment and discretion of the assessors. *Voght v. Buffalo*, 133 N. Y. 463, 31 N. E. 340



ter of the block on each side of such street or avenue, the distance improved or to be improved — the cost of such paving must be assessed for the full amount thereof, upon all the lots and pieces of ground to the center of the block on either side of said street, the distance to be improved, according to the assessed value of each lot and piece of ground; and such block on either side of such improved street, the distance of a block, becomes a taxing district within the contemplation of such statute.<sup>51</sup>

### — Reconstruction and repairs.

**596.** When the wearing or injury is partial, then repair is restoration, and not reconstruction. \* \* \* Repairing partial injuries, whether they occur from accident or from wear and tear, is only refitting a machine for use. And it is no more than that, though it should be a replacement of an essential part of a combination.<sup>52</sup> Where a street is paved with wooden blocks laid on a concrete base, and such blocks have become worthless and are entirely removed pursuant to a contract entered into with the city, and replaced with vitrified brick laid on the old base, such new improvement is not an “ordinary repair” within the meaning of the statute, but is a repavement of the street, to pay the costs of which an assessment may be laid against abutting real estate.<sup>53</sup> Under a statute which reads “it shall be no objection to the legality of any local improvement that a similar one shall have been previously made in the same locality,” a city may lay a new pavement to replace an old one, and cause the cost thereof to be defrayed by special assessment upon the property benefited, but it cannot charge the cost of

<sup>51</sup> Blair v. Atchison, 40 Kan. 353, 19 Pac. 815; Olsson v. Topoka, 42 Kan. 709, 21 Pac. 219; Parker v. Atchison, 48 Kan. 574, 30 Pac. 20.

<sup>52</sup> Wilson v. Simpson, 9 How. 109, 13 L. ed. 66; Goodyear, etc.,

Co. v. Jackson, 55 L. R. A. 692, 50 C. C. A. 159, 112 Fed. 146; American Bonding Co. v. Ottumwa, 137 Fed. 572.

<sup>53</sup> Robertson v. Omaha, 55 Neb. 718, 44 L. R. A. 534, 76 N. W. 442.



repairs to such property.<sup>54</sup> The fact that the foundation on which an existing asphalt pavement was laid is to be availed of as the foundation for a new asphalt surface does not necessarily make the work one of repair only.<sup>55</sup> Where the paving of a street becomes worn out, it may be renewed at the expense of the owners of abutting lots; and the question whether such renewal is for the public good is to be determined by the proper corporate authorities, and their determination is conclusive, except for want of authority, fraud or oppression.<sup>56</sup>

— Street railways — Liability for paving.

**597.** It is the prevailing custom to provide either in the articles of incorporation of, or the franchises granted to street railway companies, what is their liability for the improvement of the street, and in the absence of such provision it is the general rule that their obligation is merely to keep the street between their tracks in repair. So far as the question of the validity of special assessments upon street railways is concerned, it usually turns upon the statutory duty imposed upon them. When they are required to pave or repave, they must be assessed their proportionate share of the work, when it is done by the city, and an assessment upon the property owners for the full amount is void. The more important cases are stated at some length in the note.<sup>57</sup>

<sup>54</sup> *Bush v. Peoria*, 215 Ill. 515, 74 N. E. 797; *Scranton v. Sturges*, 202 Pa. St. 182, 51 Atl. 764.

<sup>55</sup> *Field v. Chicago*, 198 Ill. 224, 64 N. E. 840; *Bush v. Peoria*, *supra*. The latter case well distinguishes the facts constituting the difference between repairs and reconstruction of an asphalt pavement. For a case holding resurfacing to be a repair, see *American Bonding Co. v. Ottumwa*, 137 Fed. 572.

<sup>56</sup> *Coates v. Dubuque*, 68 Ia. 550, 27 N. W. 750.

*When railroad liable.*

<sup>57</sup> Objection to confirming an assessment is proper on the ground that the entire cost of paving has been assessed against private property when a valid ordinance requires a street railway company to pave at its own cost the part between its tracks. *Sawyer v. Chicago*, 183 Ill. 57, 55 N. E. 645.

Under a charter which provides "that all street railway companies now existing or hereafter organized therein shall be required to pave or repave between and to one



## SEWERS.

**In general.**

**598.** If a local improvement of any kind be an absolute necessity, a sewer or sidewalk must belong to that class; one, to avoid a nuisance which might be detrimental to the

foot beyond their outer rails at their own cost," a special assessment upon the lot owners for paving such part of the street is invalid. *Wales v. Warren*, 66 Neb. 455, 92 N. W. 590.

An assessment against a street railway for the cost of paving a street one foot outside of its street car lines, made during the life of a statute which in express terms provides the company should pave one foot outside of its rails, is valid. *Lincoln v. Lincoln St. Ry. Co.*, 67 Neb. 469, 93 N. W. 766.

*Cost of grading may be assessed.*

The cost of grading preparatory to paving a street is properly charged as incidental thereto; and assessments against a street railway company for paving its right of way may include the cost of grading also. *Lincoln St. R. Co. v. Lincoln*, 84 N. W. 802.

*Conflict between franchise and ordinance.*

Pursuant to a provision in its franchise, a street railway company was required to pave its right of way, sixteen feet in width, along a certain street. Another ordinance provided for paving the street its entire width, and the commissioners of assessment included in their estimate the cost of the paving the sixteen feet in question. Held, to have been wrongfully included in estimating the

cost of the improvement to be charged on the property benefited, and judgment of confirmation of the assessment roll properly denied. *Chicago v. Cummings*, 144 Ill. 446, 33 N. E. 34.

*Tracks must be actually laid, or no liability.*

Under an ordinance authorizing a street railway to maintain tracks on certain streets, on condition that if the city should pave any street on which it might run, the company should pave the space between the rails, such company cannot be compelled to pay any portion of the cost of improving a street upon which it was authorized to lay tracks, but had not actually done so. *Harris v. Chicago*, 213 Ill. 47, 72 N. E. 762.

*When property owners liable.*

Although a railroad runs through the center of a street for its entire length, the expense of paving such street may be assessed against the owners on either side, the railroad being but an incident to the street, which is the main thoroughfare of the city. *State v. Atlantic City*, 34 N. J. L. 99.

*Paving street car tracks.*

The proceedings of the council deciding the amount assessed to a street car company for street paving represented the cost of paving between the company's tracks, pursuant to the provisions of a



public health; the other to afford safe means of locomotion along the sides of the public highways. Occasionally a sewer is ordered built under the police power, but the ordinary way is to pay for it by a special assessment laid

certain ordinance, the company was liable to the assessment ordered, rather than upon the basis of benefits derived from the improvements, the ordinance not being set forth in the record. *Davies v. Saginaw*, 87 Mich. 439, 49 N. W. 667.

#### MISCELLANEOUS DECISIONS ON PAVING.

*Exempt from assessment for, unless foundation concrete.*

Where, in an action to set aside a special assessment for paving a street, it appears that the city charter exempts plaintiff's property from assessment for such improvement unless the pavement is a permanent one having a concrete foundation, the duty of showing that the pavement is such rests upon the city. *Schintgen v. La Crosse*, 117 Wis. 158, 94 N. W. 84.

*When provision for repairs invalidates assessment.*

Under a charter providing that the expense of keeping the streets in repair shall be paid out of the ward funds, an assessment on the abutting property for the paving of a street is invalid where the work was done under a contract requiring the contractor to keep it in good order and repair for five years after its completion and to guaranty that during that period neither the city nor the property owners should be at any expense whatever for any repairs made necessary by defective workman-

ship or material, or other reason, except the cutting through of the pavement for the purpose of laying certain pipes. *Boyd v. Milwaukee*, 92 Wis. 456, 66 N. W. 603.

*Narrowing roadway paved by owner.*

Where the paving and curbing of a footway had been done by the adjoining proprietor upon the requirement of the authorities, and four years later the roadway was narrowed by the authorities, and the same owner required to put up a new and costly curb, which he failed to do—these facts, and the further one that the street was in good repair and needed no repairs, were a defense to the *scire facias* on the claim filed against his property. *Wistar v. Philadelphia*, 80 Pa. St. 505; 21 Am. Rep. 112; S. C. 111 Pa. St. 604, 4 Atl. 511.

*What complaint on change of grade must show.*

Under a statute authorizing the paving of a certain street with wooden blocks, without petition of lot owners or resolution of the council; one-third of cost to be assessed on lots fronting such street, and two-thirds out of the ward fund—a complaint to recover for expenses incurred in raising the grade alleged, as to the repavement upon the new grade, that some of the lots were assessed more than others, and that the assessment was arbi-



under the taxing power.<sup>58</sup> They are not a new servitude entitling owners of abutting property on a county road which is taken in by the extension of a city, to compensation therefor.<sup>59</sup> As to the necessity for their construction, the judgment of the city council is conclusive, and they may be or-

trarily made, but did not allege that more than one-third was charged to the lots, or more than two-thirds to the ward fund; nor that plaintiff's lot was assessed more than its just proportion. Therefore, complaint shows no injury to plaintiff. *Owens v. Milwaukee*, 47 Wis. 461, 3 N. W. 3.

*Agreement for street repair.*

A city may require a guaranty by a contractor to keep a street pavement in repair for a specified time as a part of his warranty of the fitness of the material used; and this does not imply that any money raised by special taxation is to be applied to the purpose of keeping the pavement in repair. *Cole v. People*, 161 Ill. 16, 43 N. E. 607.

*Paving illegally let.*

It is no defense to a claim for street work that the contract was illegally and fraudulently let and the work badly done, unless specific defects be alleged and the special injury to defendant therefrom. *Pittsburgh v. MacConnell*, 130 Pa. St. 463, 18 Atl. 645.

<sup>58</sup> Sewers in cities and populous districts are a necessity, not only that the streets may be kept clean and in repair, but to prevent the premises of individuals from becoming nuisances. The expense of these is variously assessed. It may unquestionably be made by benefits, and by frontage under

proper legislation. In certain classes of cases, it has been customary to call upon the citizen to appear in person and perform service for the state, in the nature of police duties. The burden of improving and repairing the common highways of the country, except in the urban districts, is generally laid upon the people in the form of an assessment of labor. The assessment may be upon each citizen, in proportion to his property; or, in addition to the property assessment, there may be one also by the poll. But though the public burden assumes the form of labor, it is still taxation, and must therefore be levied on some principle of uniformity. But it is a peculiar species of taxation; and the general terms "tax" or "taxation," as employed in the state constitutions, would not generally be understood to include it. It has been decided that the clause in the Constitution of Illinois, that "the mode of levying a tax shall be by valuation, so that every person shall pay a tax in proportion to the value of the property he or she has in his or her possession," did not prevent the levy of poll-taxes in highway labor. *Cooley*, Const. Limit. 629.

<sup>59</sup> *Huddleston v. Eugene*, 34 Or. 343, 43 L. R. A. 444, 55 Pac. 868.



dered without a petition, when the statute so provides.<sup>60</sup> When a sewer has been constructed and paid for by special assessments on the property fronting on the street under which it is laid, the cost of its maintenance and reconstruction must be paid for by the city.<sup>61</sup> And where the sewer be constructed by the municipality at its own cost, an abutting owner cannot be assessed for the cost of its reconstruction.<sup>62</sup> Whether a main sewer or a merely local or lateral one is necessary on a particular street or portion of a street is a question of engineering and municipal judgment, vested exclusively in councils, and not reviewable in the courts except under extraordinary circumstances;<sup>63</sup> where the questions as to cost and the proper apportionment among different municipalities which contribute to a great public sewer, are left by the legislature for determination by a public board, the appellate court will assume the details have been or will be properly carried out, and if from unforeseen circumstances it cannot be done, that the legislature will exercise its prerogative of making a new and equitable adjustment.<sup>64</sup> In Iowa, a city has the right to make improvements upon a street and reimburse itself for the expense thereby incurred by levying a special tax upon abutting property owners.<sup>65</sup> A contract for an easement for sewer construction granting permission and license to extend and construct a sewer over certain lands, and to enter upon the premises from time to time for the purpose of keeping the sewer in repair, grants no right to enter upon the land for making sewer connections, or for any other purpose.<sup>66</sup>

<sup>60</sup> *St. Louis v. Oeters*, 36 Mo. 456; *Michener v. Philadelphia*, 118 Pa. St. 535, 12 Atl. 174.

<sup>61</sup> This is the general rule in Pennsylvania for all street improvements. *Erie v. Russell*, 148 Pa. St. 384, 23 Atl. 1102, following *Hammett's case*.

<sup>62</sup> *West Third Street Sewer*, 187 Pa. St. 565, 41 Atl. 476.

<sup>63</sup> *Oil City v. Oil City Boiler Works*, 152 Pa. St. 348, 25 Atl. 549.

<sup>64</sup> *Kingman*, petitioner, 170 Mass. 111, 48 N. E. 1075.

<sup>65</sup> *Burlington v. Quick*, 47 Ia. 222. See *Dittoe v. Davenport*, 74 Ia. 66, 36 N. W. 895.

<sup>66</sup> *State v. District Court*, 90 Minn. 540, 97 N. W. 425.



— Assessment by benefits.

599. The assessment for cost of constructing sewers, upon the principle of benefits, prevails in most of the states, and is practically the universal rule as to drainage districts outside of municipalities. There can be no assessment for the cost of a sewer on nonabutting property, unless some provision be made for draining into such sewer, or the owners are assured of some benefit therefrom. If it be so situated that it cannot be connected therewith, it cannot be rightfully assessed, and in any event only to the amount of special benefits received.<sup>67</sup> But an act of the legislature authorizing commissioners to assess a portion of the costs of a sewer upon land drained thereby, to be apportioned as they may deem just and equitable, will not support an assessment upon such lands;<sup>68</sup> and it is error to assess the entire expense of making a drain on one tract of land, omitting another not charged with its proportionate share.<sup>69</sup> Neither is the unequal cost of making lateral sewer connections, owing to the location of the main sewer nearer one side of the street than the other, a ground for levying a higher tax on the remoter lots, being violative of the rule that benefit to the property is the basis of the power of special taxation.<sup>70</sup>

*Payment for sewer crossing R. R. track.*

Where a street or sewer is made by a city across the tracks of a railway company the cost of the structural changes necessary to preserve and protect the tracks, must be borne by the municipality. *Mayor, etc., v. Cowen*, 88 Md. 447, 71 Am. St. Rep. 433, 41 Atl. 900.

<sup>67</sup> *Bickerdike v. Chicago*, 185 Ill. 280, 56 N. E. 1096; *People v. Brooklyn*, 23 Barb. 166; *Gilmore v. Hentig*, 33 Kan. 156, 5 Pac. 781.

*Contra.*

The expense of the improvement of streets by grading, paving, macadamizing and laying sidewalks has been too long imposed upon abutting property in Iowa, without regard to benefits, to be called in question, and the same principle applies to sewers. *Gatch v. Des Moines*, 63 Ia. 718, 18 N. W. 310. This rule is now reversed by legislation.

<sup>68</sup> *State v. New Brunswick*, 38 N. J. L. 190, 20 Am. Rep. 380.

<sup>69</sup> *Gilkerson v. Scott*, 76 Ill. 509.

<sup>70</sup> *Palmer v. Danville*, 154 Ill. 156, 38 N. E. 1067.



**600.** Where an assessment is made under a law authorizing the council to assess abutting property for the construction of a sewer at a flat rate per lineal foot, without regard to actual benefits or cost of construction, and where the amount collected in excess of the cost goes into a permanent improvement fund, the deficiency being paid out of it, the principle which justifies special assessments on abutting property, namely, that it is thereby specially and peculiarly benefited, is wholly ignored, and the owner deprived of his property without just compensation, and for the public use.<sup>71</sup> Under statutory authority, councils have authority, by ordinance, to declare that a sewer, with its branches, shall be a main sewer, and that all thereof shall be a local sewer for lands abutting thereon, and the cost of its construction may be assessed on property in the sewerage district according to benefits.<sup>72</sup> But an assessment of the entire cost of a main sewer upon the lands benefited cannot be sustained when it appears that lateral sewers connecting with it furnished drainage to the property by which they were laid, and were in consequence benefited by the construction of the main sewer, but were not assessed.<sup>73</sup>

**601.** Charter authority to lay down *necessary* sewers and drains is a limitation upon the power of the council to establish same, unless the benefits to the property thereby accommodated will be equal to or in excess of the cost of their construction.<sup>74</sup> A property owner cannot be assessed with the cost of a fifteen-inch main sewer where it appears that

<sup>71</sup> *State v. Pillsbury*, 82 Minn. 359, 85 N. W. 175. An assessment for sewers on the basis of benefits received is constitutional. *Masters v. Portland*, 24 Or. 161, 33 Pac. 540.

A sewer assessment will be deemed to have been made according to benefits, and the presumptions are that the statute has been complied with, unless the assess-

ment shows the contrary. *Harney v. Benson*, 113 Cal. 314, 45 Pac. 687.

<sup>72</sup> *Oil City v. Oil City Boiler Works*, 152 Pa. St. 348, 25 Atl. 549.

<sup>73</sup> *State v. Hudson Co.*, 53 N. J. L. 67, 20 Atl. 894.

<sup>74</sup> *Paulson v. Portland*, 16 Or. 450, 1 L. R. A. 673, 19 Pac. 450.



a ten-inch local sewer would have been sufficient to give the property all the benefit it derives from the main sewer. Such an assessment is contrary to the express terms of a statute by which the costs and expenses are to be assessed according to benefits, if sufficient property benefited can be found, and if not, then the deficiency is to be paid by the municipality. It also violates the general rule that the limit of special benefit is the limit of the liability to special assessment.<sup>75</sup> Nor is such rule modified by the fact that a watercourse which had furnished open drainage was converted into a closed and covered sewer, thus confining the odors and noxious substances which cause discomfort and injure health; such a benefit is one enjoyed by the whole city in common with property owners in the neighborhood of the sewer.<sup>76</sup> Under the Iowa statute providing that a certain portion of the expense of building sewers shall be assessed against abutting property in proportion to the linear feet front, and on adjacent property according to the benefit thereto, lots owned by a railroad in fee are liable to assessment, notwithstanding the right of way is situated on these lots.<sup>77</sup> As an equitable mode of adjustment, the proper municipal authorities may divide sewer assessments "into three classes, direct benefit, remote benefit, and more remote benefit."<sup>78</sup>

**602.** But in common with almost every question on the subject of special assessments, the courts are divided upon the finality of the decision of the local legislature or tribunal. A comparatively recent case in Missouri illustrates this division. The court held that where a municipal assembly is

<sup>75</sup> Park Avenue Sewers, 169 Pa. St. 433, 32 Atl. 574. But see Oil City v. Oil City Boiler Works, 152 Pa. St. 348, 25 Atl. 549.

<sup>76</sup> Beechwood Avenue Sewer, 179 Pa. St. 490, 36 Atl. 209.

<sup>77</sup> Minn. & St. L. R. Co. v. Lindquist, 119 Iowa, 144, 93 N.

W. 103, distinguishing C., R. I. & P. R. Co. v. Ottumwa, 112 Ia. 300, 51 L. R. A. 763, 83 N. W. 1074, holding that a right of way, when merely an easement, was not assessable.

<sup>78</sup> Collins v. Holyoke, 146 Mass. 298, 15 N. E. 908.



vested with the power to pass an ordinance for the construction of a sewer and the creation of a sewer district, and the issuing of special tax assessments on the property within the district to pay for the same, its acts under that power, in the absence of fraud, are conclusive upon the courts, whether the attack made thereon be collateral or direct, and the fraud that will authorize the court's interference with municipal action is not that the power exercised or the ordinance passed has resulted in an individual hardship in its execution, or that in the working out of the general scheme designed by an ordinance an individual burden is imposed without a corresponding benefit conferred (a necessary incident to any system of general taxation or special assessment yet devised for governmental maintenance and support); but only in those cases when the act of the municipal body is so unreasonable, oppressive and subversive of the rights of the citizen in the general purpose declared, as to clearly indicate and leave but one inference, that of an attempted abuse rather than the legitimate use of a power enjoyed; and of this qualified and limited assertion of right in the courts to interfere with municipal legislation, much doubt is felt.<sup>79</sup>

**603.** In this case, certain property was assessed for sewer purposes, which could not be reached at all by the sewer

<sup>79</sup> *Heman v. Schulte*, 166 Mo. 409, 66 S. W. 163.

If the former decision of this court in *Barber Asphalt Paving Co. v. French*, 158 Mo. 534, 54 L. R. A. 492, 58 S. W. 934, as to notice, is correct, then a man's property can be taken away from him without notice, without due process of law, and for public use without just compensation. For if he have no notice, he cannot appear directly, and at the enforcement of the tax bill he can only object to the validity of the assessment and levy. See *St.*

*Louis v. Ranken*, 96 Mo. 497, 9 S. W. 910, and *St. Louis v. Excelsior Br. Co.*, 96 Mo. 677, 10 S. W. 477.

The case was taken to the Supreme Court of the United States, and affirmed by an equally divided court. Decisions like this shock our faith in the supremacy of constitutional principles as much as an earthquake raises doubts as to the stability of the earth's crust. The trouble arose from the refusal of the court to properly apply the principle of benefits, for they say: "It cannot be



pipes except by passing through intervening private property, no rights in which had been secured, and the owners of which might arrest as a trespasser any person attempting to lay pipe thereon. The contrary rule obtains in Illinois, wherein it is held that confirmation of a special assessment is properly refused where the improvement to be paid for consists of a sewer connecting with a drainage district in which the property assessed is not located and to which it does not belong, and there is no evidence that the improvement is of any benefit whatever.<sup>80</sup>

— Future benefits.

**604.** An assessment on property, as presently benefited by the construction of a sewer, must be presumed to have been made on the ground of some present appreciable benefit. When it is shown by clear proof that the property cannot, without the construction of lateral sewers, connect with the main sewer for drainage, and that surface water is not carried therefrom by said sewer in a mode appreciably better than that previously afforded by the configuration of the land and natural watercourses, no benefit has been conferred on the property sufficient to justify a present assessment.<sup>81</sup> An act which aims to require a present ascertainment of the special benefit which will accrue to property from a main sewer now built, at an unknown period in the future when a connecting branch sewer shall be laid, is invalid.<sup>82</sup>

— Front foot rule.

**605.** A finding by the equalizing board that the lots affected "are specially benefited, and shall be assessed for

said as an inflexible rule of law that benefit assessments for local improvements can be levied only for special benefits conferred. Individual hardships will be entailed by the working out of any general system of taxation."

<sup>80</sup> *Chicago v. Adcock*, 168 Ill.

221, 48 N. E. 155. See, also, *State v. Elizabeth*, 37 N. J. L. 330.

<sup>81</sup> *State v. Bayonne*, 53 N. J. L. 299, 21 Atl. 453.

<sup>82</sup> *Vreeland v. Bayonne*, 60 N. J. L. 168, 37 Atl. 737.

Under the statutes of New Jersey, "when the benefit from the



the full cost of construction of such sewers according to their foot frontage," although informal, does not invalidate the assessment, as the finding that the property is specially benefited, and should be assessed as stated, is tantamount to a statement that the benefits are equal and uniform.<sup>83</sup> The fact that the amount assessed against objector's property for constructing a sewer is the same as that reported by the city engineer, determined by frontage, does not show that the same was arbitrarily determined without regard to benefits.<sup>84</sup>

### — Sewer districts.

**606.** Cities may construct sewers by districts or otherwise, and when done by districts and at the expense of the

construction of a sewer is prospective and depends upon the construction of lateral and connecting sewers not yet built," the benefits derived from existing sewers are to be determined and assessed when the assessment is made upon property sewerred and benefited by such existing sewers, but such assessments become liens only from the time connecting sewers are built, and draw interest only from the date of the confirmation of the assessment for the connecting sewer. It is simply an ascertainment of benefits. *Vreeland v. Bayonne*, 60 N. J. L. 168, 37 Atl. 737.

An assessment for a sewer one-third of a mile distant, and incapable of draining plaintiffs' land, and in its present condition of no benefit to them, and not a part of a system of sewerage which, when completed will reach such lands cannot be sustained. The probability that in the future the city may project a sewer to form a connection therewith, and benefit the lands, is too remote to

have any appreciable influence on the value of lands. *State v. Elizabeth*, 37 N. J. L. 330.

*Evidence of benefits — When error.*

Where property owners file no protest or objection with the council as to their assessment for a storm sewer, evidence tending to show that their property was injured, and not benefited, is erroneously admitted. *Denver v. Dumars*, 33 Col. 94, 80 Pac. 114; *Denver v. Hallett*. Id.

<sup>83</sup> *John v. Connell* (Neb.), 98 N. W. 457.

<sup>84</sup> *Wray v. Fry*, 158 Ind. 92, 62 N. E. 1004. For cases holding assessment by frontage valid, see *Payne v. S. Springfield*, 161 Ill. 285, 44 N. E. 105. *Rutherford v. Hamilton*, 97 Mo. 543, 11 S. W. 249. The Illinois case was one of special taxation.

A sewer assessment on the front foot rule does not necessarily violate the rule that they must be proportionate to benefits. *People v. Desmond*, 97 N. Y. Supp. 795.



property specially benefited, it is not essential that the district shall be defined by ordinance, but it will be sufficient if the records of the tax proceedings clearly show the property specially taxed for the improvement.<sup>85</sup> In so acting, the council exercises a legislative power for police purposes.<sup>86</sup> Where the sewer is a unit, although constructed along more than one street, a single assessment therefor is valid,<sup>87</sup> and although property in one district may not be specially assessed for the purpose of making local improvements in another or adjoining district, this principle will not prevent the expenditure of money in another district where such expenditure is a necessary incident to the proper completion of the work, as for obtaining a proper outlet for a sewer in an adjoining town.<sup>88</sup> As a general rule, in the absence of fraud in establishing a sewer district, or in letting the contract for the construction of a sewer, and in the absence of unreasonableness of the ordinances providing for the establishment and construction of the sewer, the courts will not interfere to stop the payment of a special tax bill issued as a benefit assessment for a sewer, and the ordinance will not be declared void simply because it is oppressive.<sup>89</sup> Where

<sup>85</sup> *Atchison v. Price*, 45 Kan. 296, 25 Pac. 605; *Wolff v. Denver* (Colo.), 77 Pac. 364.

<sup>86</sup> *Wolff v. Denver*, (Colo.), 77 Pac. 364.

<sup>87</sup> *Grinnell v. Des Moines*, 57 Ia. 144, 10 N. W. 330.

The construction of two sewers, disconnected with each other, but to be built in accordance with the plan adopted for sewerage in that district, may legally be included in one contract, and to assess the expense thereof in one assessment. *In re Ingraham*, 64 N. Y. 311.

The fact that a sewer constructed in one district or portion of the city connects with or is an extension of another already con-

structed, does not make the territory drained by both a single and distinct district, nor does it require that all the property within that territory shall be assessed for the sewer last constructed. When a section is built or extension made, only the territory drained and specially benefited by the construction of such section or extension can be assessed for these costs. *Atchison v. Price*, 45 Kan. 296, 25 Pac. 605.

<sup>88</sup> *Shreve v. Cicero*, 129 Ill. 226, 21 N. E. 815; *Maywood Co. v. Maywood*, 140 Ill. 216, 29 N. E. 704.

<sup>89</sup> *Heman v. Allen*, 156 Mo. 534, 57 S. W. 559.



statutory authority is given to construct sewers without forming a taxing district, and payment of the cost and expenses is provided for by an assessment on the lots fronting on the streets in which the sewer runs, it furnishes ample authority to the city to dispense with such districts, and a complaint to foreclose a lien need not allege the formation of a taxing district.<sup>90</sup> Under certain circumstances, a city has power to create a new sewer district within the limits of a larger district, and to assess the cost of a new sewer in said district upon the abutting property therein according to special benefits.<sup>91</sup>

#### — Plans and specifications.

**607.** Under a law requiring the making and filing of plans and specifications of work to be done in constructing sewers an initial step in such proceeding, the due filing of full *specifications* of the work to be done will not render a contract for the same valid unless the *plans* have also been made and filed.<sup>92</sup> And where the statute prohibits the construction of any sewer unless in accordance with a general plan, the omission to file such a plan is fatal to an assessment to pay the cost.<sup>93</sup>

#### — Private sewers.

**608.** The difference between a public and a private sewer, under the St. Louis charter, is not a mere difference in name,

<sup>90</sup> *White v. Harris*, 103 Cal. 528, 37 Pac. 502.

<sup>91</sup> *Sherman v. Omaha*, (Neb.), 103 N. W. 53.

Although a charter requires a city to establish sewer districts by ordinance, it need not pass another and specific ordinance to fix the route, dimensions, materials or laterals of a sewer within the district. These details may be either fixed by ordinance or left to the engineer to be regulated by contract. *State v. St. Louis*, 56 Mo. 277.

<sup>92</sup> *Kneeland v. Milwaukee*, 18 Wis. 412; *Wells v. Burnham*, 20 Wis. 113.

<sup>93</sup> *In re N. Y. Prot. Ep. School*, 46 N. Y. 178.

When alteration of plan will not avoid an assessment for sewers, see *State v. Jersey City*, 29 N. J. L. 441.

*Constructing sewer not on original plan.*

The fact that a sewer for which an assessment was imposed in 1873 did not appear upon the general plan for sewerage for the dis-



but a physical fact, so that the council may not by ordinance or otherwise authorize the construction of what is in fact a public sewer and by merely denominating it a private sewer, tax the cost of its construction on the lots in the district named. Such an act would be a fraud, and the special tax bill issued in pursuance of it invalid.<sup>94</sup> The consent of a city to a landowner to construct a private sewer sufficient for his property will not relieve him from liability for a public sewer thereafter constructed by the municipality in the street upon which his property abuts, and it is immaterial that the city authorities had issued permits to allow private parties to connect with the private sewer, or that a city schoolhouse was connected therewith.<sup>95</sup> An assessment

trict, adopted in 1865, does not of itself vitiate the assessment; that after such plan is adopted, additional sewers may be needed, and their construction is authorized by a statute permitting "such subsequent modifications as may become necessary in consequence of alterations made in the grade of any street or avenue or part thereof, in said district, or otherwise," and in order to invalidate such assessment it must be made to appear that the sewer did not accord with such general plan, or that no general plan had ever been devised, mapped and filed. *Roosevelt Hospital v. Mayor, etc.*, 84 N. Y. 108.

*Power not improperly delegated.*

It is not an improper delegation of power to provide in a contract for sewer work that it shall be done in accordance with the specifications referred to, which specified that "when the ground does not afford a substantially solid foundation, the contractor shall excavate the trench to such in-

creased depth as the street superintendent might decide to be necessary, and shall then bring it up to the required form and level, and with such material and in such manner as the street superintendent may direct." *Haughwout v. Hubbard*, 131 Cal. 675, 63 Pac. 1078.

*St. Louis charter.*

The plans and profiles required by the charter of St. Louis of 1870 to be prepared and submitted to the council are only in cases where the work is done by the city and paid for by appropriations from the public treasury. *State v. St. Louis*, 56 Mo. 277.

<sup>94</sup> *Hill v. Swingley*, 159 Mo. 45, 60 S. W. 114.

<sup>95</sup> *Philadelphia v. Odd Fellows, etc., Assn.*, 168 Pa. St. 105, 31 Atl. 917.

The existence of a private sewer is no defense against an assessment for a public sewer which cuts the former, and gives a better outlet. *Sargent v. New*



for a sewer built in a private way is not validated by the subsequent laying out of such way as a public street; but if, after assessment and before building, the way is laid out as a public street, the assessment is valid.<sup>96</sup> And property which abuts upon and is specially benefited by the construction of a sewer, will not be relieved from bearing its proportionate share of the expense of the same, because the owners thereof have previously constructed private drains or sewers which have not been authorized or adopted by the city as a part of its system.<sup>97</sup> An assessment for the cost of building sewers is not invalidated as being merely a private improvement because the city council authorized connection with private sewers, it being in the judgment of the council more complete and useful for the purpose for which it was intended.<sup>98</sup> The power of a city to build a sewer for sanitary or other purposes is not affected by the fact that parties charged with a special tax for its construction already have a private sewer built.<sup>99</sup>

#### — Outlets.

**609.** Where a proposed sewer is to have its outlet is a matter within the power of the corporate authorities to de-

Haven, 62 Conn. 510, 26 Atl. 1057.

<sup>96</sup> Bishop v. Tripp, 15 R. I. 466, 8 Atl. 692.

<sup>97</sup> Atchison v. Price, 45 Kan. 296, 25 Pac. 605.

<sup>98</sup> Boyce v. Tuhey, 163 Ind. 202, 70 N. E. 531.

In New York, the construction of a sewer through private property, is unauthorized. *In re Rhinelander*, 68 N. Y. 105.

<sup>99</sup> St. Joseph v. Owen, 110 Mo. 445, 19 S. W. 713.

*Laying sewer on private property.*

Where a sewer is laid out in a strip of land which is called a street, but is in reality private property, as are the lots border-

ing thereon, the statutory method of laying assessments on such lots is unreasonable and disproportionate, and in that respect the statute is unconstitutional. *Weed v. Boston*, 172 Mass. 28, 42 L. R. A. 642, 51 N. E. 204; *Dexter v. Boston*, 176 Mass. 247, 79 Am. St. Rep. 306, 57 N. E. 379.

*Same — Payment pro tanto.*

Where a district sewer ten thousand five hundred feet long was built by a contractor in compliance with the plans of the city engineer and under his immediate supervision, and was duly accepted by the city and one hundred and ninety-five feet of the sewer was



termine, and their decision will not be disturbed unless there has been a clear abuse of discretion,<sup>1</sup> and the corporation has authority to extend the sewer to an outlet beyond the limits of the city, and to acquire by purchase or otherwise the land upon which to construct the sewer to its outlet.<sup>2</sup> Where the charter provides that district sewers shall connect with a public sewer or other district sewer, or with a natural drainage, such requirement relates to a substantial matter and must be complied with, or the cost of construction of such sewers cannot be enforced by local assessment.<sup>3</sup> If a common sewer be intended to serve as an outlet for other sewers, and also to benefit the lands abutting it, no part of the cost need be assessed upon the owners of lands along the line of the tributary sewers.<sup>4</sup> And where a discharging sewer is created entirely outside of a sewer district, the cost of its construction cannot be assessed against the lots and pieces of ground in such sewer district.<sup>5</sup>

#### — Connections.

**610.** A requirement for a sewer connection with a dwelling on premises abutting on a sewer in a city is within the power of the local authorities under the laws of the state

not in a public street, but ran through private property, the owners of which had not consented thereto, this fact is not sufficient to excuse property owners from paying for so much of the sewer as runs through the public streets. *Johnson v. Duer*, 115 Mo. 366, 21 S. W. 800.

<sup>1</sup> *Church v. People*, 179 Ill. 205, 53 N. E. 554.

<sup>2</sup> *Callon v. Jacksonville*, 147 Ill. 113, 35 N. E. 223.

<sup>3</sup> *Johnson v. Duer*, 115 Mo. 366, 21 S. W. 800.

The fact that an ordinance for the construction of a sewer provides that it shall empty into a lake or river contrary to the stat-

ute is no defense to a proceeding by the city to collect the special assessments made to pay for such work. *Walker v. Aurora*, 140 Ill. 402, 29 N. E. 741.

<sup>4</sup> *Ayer v. Somerville*, 143 Mass. 585, 10 N. E. 457.

<sup>5</sup> *Ft. Scott v. Kaufman*, 44 Kan. 137, 24 Pac. 64.

#### *Non-compliance with charter.*

Where a charter required a district sewer to connect with a public sewer or other district sewer, or with the natural course of drainage, a connection with the bed of a creek which had become a pond by the construction of streets and railroads, did not form a natural course of drainage, and the



governing sanitation and public health, and this requirement may be undisputed for municipal convenience, and as a necessary police regulation at the time the sewer is constructed.<sup>6</sup> But the fact that sewer connections cost less on one side of the street than the other because the main sewer is laid nearer that side, affords no justification for levying a higher tax on the more remote lots, being in violation of the rule that benefit to the property is the basis of the power of special taxation.<sup>7</sup>

— Assessments and objections.

**611.** When a recorded plat at the time of the assessment showed a lot of a certain frontage, the fact that thereafter a portion of the same was sold and transferred to another person does not affect the validity of the assessment, and the whole of the lot is subject to taxation.<sup>8</sup> An assessment for a sewer is not rendered invalid because the resolution ordering the same did not direct the manner of payment;<sup>9</sup> nor because the city authorities called in an outsider to assist in making it;<sup>10</sup> nor because the sewers prove faulty, after being built under the direction of commissioners appointed by statute;<sup>11</sup> and where a large amount of rock excavation is rendered necessary for the connection of a sewer, the extra cost should not be charged on the land between the rock and the outlet, the benefit to the land drained being greater.<sup>12</sup>

assessment to pay for same was void. *Kansas City v. Swope*, 79 Mo. 446.

\* A statute conferring upon cities the right to assess the whole cost of the connection with the sewer in a street in front of an abutting land owner, is not an exercise of the power of eminent domain, or the taking of private property for public use without just compensation, but is within the power of the legislature as an incident of the police power of the

city. *Van Wagoner v. Patterson*, 67 N. J. L. 455, 51 Atl. 922.

<sup>7</sup> *Palmer v. Danville*, 166 Ill. 42.

<sup>8</sup> *Atchison v. Price*, 45 Kan. 296, 25 Pac. 605.

<sup>9</sup> *Grinnell v. Des Moines*, 57 Ia. 144, 10 N. W. 330.

<sup>10</sup> *Collins v. Holyoke*, 146 Mass. 298, 15 N. E. 908.

<sup>11</sup> *State v. Jersey City*, 29 N. J. L. 441.

<sup>12</sup> *Vreeland v. Bayonne*, 58 N. J. L. 126, 32 Atl. 68.



Where a sewer for which an assessment had been levied by reason of the uneven sinking of newly made land, ceased to conduct sewerage towards its outlet, but allowed its contents to flow out upon low land and become a nuisance, an assessment for a new sewer to do the work for which the old one was intended is legal.<sup>13</sup> And if a new sewer connect with an old one, for which the property had previously been assessed, it does not prevent an assessment on the same property for the new one; all property drained by the new sewer should be assessed to pay for its construction, and the assessment will be invalid if the property previously assessed be omitted.<sup>14</sup> Failure to comply with requirements which are directory merely;<sup>15</sup> or the fact that part of the land in the district cannot be drained, the persons objecting being those whose lands were drained;<sup>16</sup> or an irregularity in including improper items in a sewer assessment, where a larger amount is afterwards deducted,<sup>17</sup> will not invalidate an assessment. Under a charter provision that sewers should be of such dimensions as might be prescribed by ordinance, and might be changed, enlarged or extended, work was begun on a sewer under a defective ordinance. During its progress another ordinance was passed curing the defect, and all the work being in conformity with the latter ordinance, the assessment and special tax bills were valid.<sup>18</sup> An assessment is not made void by omitting, prior to the assessment, to construct a sewer in a street embraced in the plan, when it is found that such sewer cannot be constructed without grading the street to the established grade, for which no pro-

<sup>13</sup> *State v. Hoboken*, 45 N. J. L. 482.

<sup>14</sup> *State v. Jersey City*, 29 N. J. L. 441.

<sup>15</sup> As that the superintendent of sewers shall keep and submit to the council an account of the cost of constructing a sewer, and to report a list of persons benefited.

*Collins v. Holyoke*, 146 Mass. 298, 15 N. E. 908.

<sup>16</sup> *Johnson v. Duer*, 115 Mo. 366, 21 S. W. 800.

<sup>17</sup> *Wells v. Street Com'rs*, 187 Mass. 451, 73 N. E. 554.

<sup>18</sup> *St. Louis v. Schoenemann*, 52 Mo. 348.



vision is made by ordinance, and when the omitted sewer would be a lateral, into which no other sewer would drain or which would in no way affect the drainage of any other street.<sup>19</sup>

**612.** Where a sewerage system is constructed by the municipal authorities, a part of the cost to be paid by assessment on the abutting property, and a portion of the assessments are paid and another portion successfully resisted, a rule requiring the payment by those who resisted, of a sum equal to that paid by the others towards its cost, as a condition precedent to its use by them, is not unreasonable, the statute authorizing the authorities to make rules for the tapping of the sewers.<sup>20</sup> Upon application for sale of property for a sewer assessment, the objection thereto based upon the undisputed fact that the sewer was not laid on the line indicated by the ordinance, should be sustained, in the absence of proof that the sewer as constructed substantially complied with the ordinance, and that the deviation worked no injury to the owner, and occasioned no decrease in benefits.<sup>21</sup> Where no means are provided for a separate valuation of the real and personal property of a railroad, the assessment for construction of a sewer based on a valuation including the personal property of the owner is void.<sup>22</sup> Such is also the case when the street named does not in fact exist; but the objection must be made on application to confirm, where the defect does not appear on the face of the ordinance.<sup>23</sup>

<sup>19</sup> *Newell v. Cincinnati*, 45 O. St. 407, 15 N. E. 196.

<sup>20</sup> *Herman v. State*, 54 O. St. 506, 32 L. R. A. 734, 43 N. E. 990.

<sup>21</sup> *Church v. People*, 174 Ill. 366, 51 N. E. 747.

<sup>22</sup> *Chicago, M. & St. P. R. R. Co. v. Phillips*, 111 Ia. 377, 82 N. W. 787.

<sup>23</sup> *Dempster v. Chicago*, 175 Ill. 278, 51 N. E. 710.

Under the Indiana statute, the entire cost of building sewers may be assessed against the lots or parcels of land benefited, and the assessment cannot be questioned in the courts except for jurisdictional defects. *Boyce v. Tuhey*, 163 Ind. 202, 70 N. E. 531.

Under the St. Joseph charter special tax bills for sewers need not expressly show the computa-



— Drainage and drainage districts.

**613.** In establishing a drainage district, jurisdiction is derived solely from the statute, and every essential fact necessary to such jurisdiction must affirmatively appear on the record, as no presumptions will be indulged in to support it.<sup>24</sup> Lands outside a drainage district, whose owner has enlarged a ditch connecting with a district ditch, may be taxed therefor if the statute permits.<sup>25</sup> An act to authorize the drainage of land by other means than sewers does not authorize the filling in of such lands, and the levy of a special tax to pay for the same.<sup>26</sup> Drainage commission-

tion upon which the tax was apportioned. *St. Joseph v. Farrell*, 106 Mo. 437, 17 S. W. 497.

Assessment limited to per centage of valuation. See *Corliss v. Highland Park (Mich.)*, 95 N. W. 416.

*What defenses are inadequate.*

That defendant was assessed with and paid his part of the cost of sewers previously constructed and which as alleged by him were fully adequate, is no defense to a claim for the cost of a new sewer laid under proper authority. *Michener v. Philadelphia*, 118 Pa. St. 535, 12 Atl. 174.

It is no defense to a sewer assessment that the sewer was neither a benefit to the property nor a benefit to the public. *Michener v. Philadelphia*, 118 Pa. St. 535, 12 Atl. 174.

*Character of work not changed by name.*

It is not competent for a council in building a brick sewer, to change the character of the work by calling it some other name. *Clay v. Grand Rapids*, 60 Mich. 451, 27 N. W. 596.

"It is the duty of all public corporations to see that taxes and assessments are laid on principles of justice and equality, and that private persons shall not be compelled to assume public burdens. If a city council can do one thing and call it something else, so as to confound roads with sewers, and the repair of one with the building of the other, there is no safety to citizens against the grossest usurpations and injustice. If the work was a proper one, and very probably it was, it was the duty of the common council to build it under its right name, and make the public pay for it by the method of taxation appropriate to it, and not to lay the cost on property which is, apparently, much less benefited than the large district drained by it outside. *Campbell, C. J. in Clay v. Grand Rapids*, 60 Mich. 451, 27 N. W. 596.

<sup>24</sup> *Payson v. People*, 175 Ill. 267, 51 N. E. 588.

<sup>25</sup> *People v. Drainage Dist.*, 155 Ill. 45, 39 N. E. 613.

<sup>26</sup> *In re Van Buren*, 79 N. Y. 384.



ers have no power to create an indebtedness in advance, and then levy an assessment for the purpose of meeting such indebtedness,<sup>27</sup> and where they divided the lands authorized to be drained into three classes, and arbitrarily assessed them at fifty, forty and thirty cents per acre respectively, the assessment was void, as being regardless of whether the lands were benefited to such extent or not,<sup>28</sup> for under the Illinois Drainage Act, assessments are limited to the benefits received, and void as to the excess.<sup>29</sup>

**614.** As the benefits for which a drainage assessment may be made must relate to the betterment of the land for the purposes to which it may reasonably be put, the amount of the water shed does not furnish a proper rule for the assessment of benefits, but the amount that falls on it for which artificial drainage is needed. Where from the natural situation of the land this is little or nothing, there can be no ground for an assessment for drainage purposes, however much rain may fall.<sup>30</sup> Under a statute authorizing the construction of drains, and to levy an assessment for their cost upon the lands benefited "to a distance from said drain included between the adjacent streets and avenues thereto," there is no authority for mingling in one assessment the cost of drains running between different streets.<sup>31</sup>

<sup>27</sup> *Winkelmann v. Moredock, etc.* Drain. Dist., 170 Ill. 37, 48 N. E. 715; *Ahrens v. Minnie Creek Drain. Dist.*, 170 Ill. 262, 48 N. E. 971.

<sup>28</sup> *Lee v. Ruggles*, 62 Ill. 427.

<sup>29</sup> *People v. Meyers*, 124 Ill. 95, 16 N. E. 89; *Illinois C. R. Co. v. Commissioners*, 129 Ill. 417, 21 N. E. 925; *Gauen v. Drainage District*, 131 Ill. 446, 23 N. E. 633; *Hosmer v. Drainage District*, 135 Ill. 51, 26 N. E. 587.

<sup>30</sup> Lands, which, by reason of their level, are naturally drained, are not subject to assessment for

a ditch because the lower lands upon which the natural drainage discharges, require it for their protection. *Blue v. Wentz*, 54 O. St. 247, 43 N. E. 493.

<sup>31</sup> *In re Van Buren*, 79 N. Y. 384.

*Assessment per lineal foot.*

Where certain sewer taxes were assessed under a charter provision upon each lot fronting or adjoining a street through which a sewer had been constructed, at a sum per lineal foot of frontage, equal to 3½ per cent. of the average cost per lineal foot of



## SIDEWALKS.

**In general — Necessity of notice.**

**615.** If a charter authorize a council to provide by ordinance for the construction of sidewalks at the expense of abutting owners, such power is judicial in character, and can only be exercised upon notice to the owners, and giving them an opportunity to be heard.<sup>32</sup> And if the ordinance provide that the council may order the construction of a sidewalk by resolution, notice of which shall be served on the adjoining lot owners, and that in case the owner fails to construct the walk within the time fixed, the work shall be done on contract at his expense, service of the resolution is a condition precedent to the right to have the walk constructed at the expense of the owner.<sup>33</sup> A demand upon the property owner that he construct the sidewalk, and his refusal or neglect to do so, are a prerequisite to the creation of a lien for the cost of such walk.<sup>34</sup> And, although a resolution to

all sewers and drains constructed within the drainage district where such lot is situated, prior to a certain year, the tax is invalid because as an ordinary property tax it is in conflict with the constitution, not being assessed according to the true value of the property; and as an assessment for improvements, it is not imposed for and within the limits of special benefits derived therefrom. *State v. Paterson*, 48 N. J. L. 435, 5 Atl. 896

*When objections must be made.*

Objections to an assessment for drainage purposes that the commissioners have not properly determined the benefits, or that a second assessment has not been made for a proper purpose, must be made before the proper tri-

bunal, as it is too late to raise them on resisting application for judgment. *Moore v. People*, 106 Ill. 376.

<sup>32</sup> *Camden v. Mulford*, 26 N. J. L. 49; *Traction Co. v. Board of Works*, 56 N. J. L. 431, 29 Atl. 163; *State v. Vineland*, 60 N. J. L. 265, 37 Atl. 625.

<sup>33</sup> *Hawley v. Fort Dodge*, 103 Ia. 573, 72 N. W. 756.

<sup>34</sup> *Mt. Pleasant v. B. & O. R. Co.*, 138 Pa. St. 365, 11 L. R. A. 520, 20 Atl. 1052.

*When lien may be filed — Penalty.*

Where the statute so provides, upon the failure of an abutting lot owner to construct a board walk after notice to do so the borough may construct it, file a lien for the cost thereof, with 20 per cent additional as a penalty. *Smith v.*



construct a sidewalk may require a three-fourths vote of the council for its adoption, it may be repealed by a majority vote, and payment for the cost of the work cannot be enforced.<sup>35</sup> Charter or ordinance requirements as to resolutions for sidewalks and notice to owners are mandatory, and compliance therewith is necessary to charge private property for the cost of such improvement.<sup>36</sup>

— Single improvement.

**616.** Sidewalks on each side of the street may be included as a single improvement, and so may the improvements of several streets, unless, in the combination of streets and the like, the improvements should be so separate and distinct that the making of one cannot be reasonably said to benefit property abutting upon the other.<sup>37</sup> But under a statute authorizing the construction of sidewalks in any street, the expense to be assessed in just proportion upon the abutting property, there is no power to join in a single assessment the expense of constructing sidewalks in different streets.<sup>38</sup> A single assessment for sidewalks upon various streets so situated that the sidewalks on one street are of no benefit to the property upon another street, is void, if there be evidence of the relative location of the streets. Otherwise the presumption is indulged that there has been no abuse of discretion.<sup>39</sup>

Kingston, 120 Pa. St. 357, 14 Atl. 170; *Beltzhoover v. Maple*, 130 Pa. St. 335, 18 Atl. 650.

<sup>35</sup> *Chariton v. Holliday*, 60 Ia. 391, 14 N. W. 775.

<sup>36</sup> *Ives v. Irey*, 51 Neb. 136, 70 N. W. 961.

*Ordinance must provide for notice.*

Where a statute directs that an ordinance for constructing sidewalks at the expense of abutting owners, and that it shall provide for allowing them at least thirty

days' notice in which to do such work, and for giving them written notice, it is not enough that such notice be actually given. The ordinance must provide therefor. *State v. South Amboy*, 62 N. J. L. 197, 40 Atl. 637.

<sup>37</sup> *Davis v. Litchfield*, 145 Ill. 313, 21 L. R. A. 563, 33 N. E. 888.

<sup>38</sup> *Arnold v. Cambridge*, 106 Mass. 352.

<sup>39</sup> *Storrs v. Chicago*, 208 Ill. 364, 70 N. E. 347.



— What included in.

**617.** Where by statute the cost of constructing sidewalks by special taxation is authorized, the cost of curbing the street by making the curbstones the outer edge of the sidewalk is not included, but the cost of laying the gutter on an unpaved street may be included.<sup>40</sup> In a resolution for street improvements the board has a right to confine the curbing and sidewalks to the portion of the street where such work had not been done, and it is no objection that the assessment is not equal and uniform because the cost of laying the sidewalks was imposed only upon the lots where the curbing and laying of the sidewalks was done, instead of being distributed on all the frontage in the district. There being no contrary showing, the presumption is that no sidewalks were laid except in front of the lots shown in the assessment.<sup>41</sup>

**Power of council — How exercised.**

**618.** Under a general statute requiring that certain municipalities shall have "power to provide for the construction, etc., of permanent sidewalks," such "power" cannot be exercised in any other way than by formal legislative action on the part of the council.<sup>42</sup> A special tax for the construction of a sidewalk is invalid where the grade therefor has not been established;<sup>43</sup> and under charter power to authorize the improvement of a street or part of a street, the council may

<sup>40</sup>Joy v. People, 193 Ill. 609, 61 N. E. 1079; State v. New Brunswick, 44 N. J. L. 116.

<sup>41</sup>McSherry v. Wood, 102 Cal. 647, 36 Pac. 1010.

<sup>42</sup>Zalesky v. Cedar Rapids, 118 Iowa, 714, 92 N. W. 657.

<sup>43</sup>McDowell v. People, 204 Ill. 499, 68 N. E. 379.

*Intersection of two streets.*

The construction of a sidewalk at the intersection of two streets with a grade which does not com-

ply with the ordinance does not render invalid a special tax bill issued to pay for the same, when the failure to observe the requirements of the ordinance was due to difference in grade of the streets, and the walk as constructed was not less valuable to the abutting property nor less convenient and safe for public use. Steffen v. Fox, 124 Mo. 630, 28 S. W. 70.



order the sidewalk laid on one side of the street only.<sup>44</sup> Where the irregularities of the surface require, a city may cause a sidewalk to be raised on posts, instead of placed directly on the ground; and the mere fact that such walk crosses running water in front of only regularly laid out lots, will not make the action of the city in building it *ultra vires*, nor destroy the lot owners' liability for assessments.<sup>45</sup> Where the pavement of a sidewalk is in good condition and repair, and the municipality tears it up in order to carry out a municipal improvement, the property owner cannot be charged with the expense of relaying the pavement.<sup>46</sup>

### Review of benefits.

**619.** A determination by the common council that certain sidewalks shall be constructed by special taxation is a determination that the property so specially taxed is benefited to the amount of such special tax, and that determination, as well as the necessity of the improvement, will not be reviewed by the courts, except for abuse of discretion.<sup>47</sup>

### Liability for cost of sidewalk.

**620.** Under charter authority, a city may charge the cost of a sidewalk along the side of a corner lot wholly to such

<sup>44</sup> State v. Portage, 12 Wis. 563.

<sup>45</sup> Challiss v. Parker, 11 Kan. 384.

<sup>46</sup> Philadelphia v. Henry, 161 Pa. St. 38, 28 Atl. 946.

"If, while the pavement is good and stands in no need of repair, the city may tear it up, relay and charge the owner again with one excessively costly, it would be exaction, not taxation." Agnew, C. J. in Wistar v. Philadelphia, 80 Pa. St. 505, 21 Am. Rep. 112.

<sup>47</sup> Pierson v. People, 204 Ill. 456, 68 N. E. 383; White v. People, 94 Ill. 604; Craw v. Tolono, 96 Ill. 255, 36 Am. Rep. 143; Spring-

field v. Green, 120 Ill. 269, 11 N. E. 261; Lightner v. Peoria, 150 Ill. 80, 37 N. E. 69; Payne v. S. Springfield, 161 Ill. 285, 44 N. E. 105; I. C. R. Co. v. People, 170 Ill. 224, 48 N. E. 215; Job v. Alton, 189 Ill. 256, 82 Am. St. Rep. 448, 59 N. E. 622; McChesney v. Chicago, 171 Ill. 253, 49 N. E. 548; Walker v. Morgan Park, 175 Ill. 570, 51 N. E. 636; Field v. Western Springs, 181 Ill. 186, 59 N. E. 929. But as we have already seen (Special Taxation), this rule has been changed by statute.

Special taxation of contiguous



lot,<sup>48</sup> or stipulate in one contract for making sidewalks on several streets, and to assess the cost thereof on the different lots fronting on such sidewalks, according to their frontage.<sup>49</sup> But where a strip of land surrounding a tract of land designed for a public park was conveyed to a city by parties who owned other land outside of and abutting said strip upon the express conditions in the deed of conveyance that the grantee should lay out and improve such strip as a public street, and forever after keep the same in good repair and order at its own expense, such city, for improving and keeping in repair such street, cannot require payment by its grantors because of their ownership of the aforesaid abutting property; and the same exemption from liability exists in favor of one who has since purchased a part of such abutting property.<sup>50</sup>

## VALID AND INVALID ASSESSMENTS.

### Valid assessments.

**621.** Although the system of taxation by special assessment is of legislative creation, and the statutes upon the sub-

property does not violate Sec. 1, Art. ix, Ill. Const. of 1870, requiring taxes to be levied "so that every person and corporation shall pay a tax in proportion to the value of his, her or its property." *Harrigan v. Jacksonville (Ill.)*, 77 N. E. 85.

<sup>48</sup> *Lawrence v. Killam*, 11 Kan. 499.

<sup>49</sup> *Challiss v. Parker*, 11 Kan. 384; *Challiss v. Parker*, 11 Kan. 394. These cases hold that a sidewalk may be made before the street is graded.

<sup>50</sup> *Omaha v. Megeath*, 46 Neb. 502, 64 N. W. 1091; *Browne v. Palmer*, 66 Neb. 287, 92 N. W. 315.

*Right to widen sidewalk within half a block.*

See *Mitchell v. Peru*, 163 Ind. 17, 71 N. E. 132.

*What cost bill must show.*

Under the Illinois statute providing the cost of constructing sidewalks shall be paid by special taxation on contiguous property, allowing the owner certain time within which to construct it, and thereby relieve his property from such special tax, and, in case of his neglect, to cause it to be constructed, and its cost collected from the owner it is essential that the bill of cost of such sidewalk shall show the separate items of cost of grading, materials, laying



ject should be strictly followed, it is not absolutely essential to the validity of an assessment that the statute be blindly followed in all cases. Special assessment statutes, in common with other legislative acts, frequently contain provisions which the courts construe as directory merely. There is no absolute rule that can be laid down which will include all mandatory provisions and exclude those which are only directory. It is far the wiser course when any doubt exists to follow the statute literally. All provisions which have for their object the guarding of the rights of the taxpayer, such as fixing the principle of assessment, giving of notice, reception of bids, awarding of contracts, and acceptance of the work, so that no expense be unnecessarily incurred which will become a charge upon property, these will be deemed mandatory, and strict pursuance compelled. But mere prescriptions as to the way in which the actual work of assessment shall be done, especially when couched in general language, and which cannot affect the rights of the property owner, are usually adjudged to be directory. Mere technical objections are not encouraged. Unless the statute regarding the imposition of a special tax requires a literal compliance therewith in matters of mere form, a substantial compliance with all things designed to safeguard the interests of property owners satisfies all the demands of strict compliance.<sup>51</sup>

and supervision, in order to sustain the validity of the special tax. *Miservey v. People*, 208 Ill. 646, 70 N. E. 678.

*For case holding same insufficient*, see *People v. Cash*, 207 Ill. 405, 69 N. E. 904.

*California.*

*Omission to certify duplicate roll.*

<sup>51</sup> Under a statute requiring the mayor to certify to the correctness of the assessment roll, the omission to affix a copy of such certificate to the duplicate roll

delivered to the collector is immaterial. Only a clerical duty is involved. *San Francisco v. Certain Real Estate*, 50 Cal. 188; *Doherty v. Enterprise M. Co.*, 50 Cal. 187. *Separate assessments — Invalidity of one.*

Where separate assessments are made for different portions of the work, and separate demands are made for the payment of each assessment, the invalidity of one of the assessments does not render



— Invalid assessments.

**622.** It is impossible to lay down any general rule as to the validity of assessments that will cover all cases. The

the other invalid. *Parker v. Reay*, 76 Cal. 103, 18 Pac. 124.

*Corporation de jure or de facto*  
— *Levy by.*

The validity of an assessment levied by an irrigation district in no way depends upon the *de jure* character of the corporation, and it is immaterial whether such district be a corporation *de jure* or *de facto*. *Quint v. Hoffman*, 103 Cal. 506, 37 Pac. 514, 777.

*Irregularity in preliminary bond.*

An irregularity in a preliminary bond in that it is a few dollars less than the specified percentage of cost, is not jurisdictional, and does not vitiate subsequent proceedings. It becomes *functus officio* after the contract is awarded, and the property owner cannot object if the work is satisfactorily performed under the contract. *Greenwood v. Morrison*, 128 Cal. 350, 60 Pac. 971.

*Connecticut.*

*Ratification by council.*

Under a charter authorizing assessment by the council, or a committee appointed by it, an assessment is not made void because such committee was appointed by the mayor, and the report of such committee accepted by the council and adopted as its assessment. *Bartram v. Bridgeport*, 55 Conn. 122, 10 Atl. 470.

*Illinois.*

*Prior improvement.*

Upon proceedings for opening a street sixty-six feet wide, it appeared that the same street had

been opened three years before to a width of sixty feet, with a ditch on both sides, and it was held to constitute a *prima facie* defense. *Follansbee v. Chicago*, 62 Ill. 288. *Consolidation of several assessments.*

The consolidation of several separate and distinct assessments against various tracts of land into one proceeding, when reported for confirmation, when each lot of land appears only once in the rolls, does not invalidate the proceeding so as to defeat an application for judgment thereon. Even if it were error, it could not be reached in a collateral proceeding. *Prout v. People*, 83 Ill. 154.

*Improvements already made.*

A city cannot, by accepting and adopting improvements made without being authorized by ordinance, compel property owners to pay for the work so done. *East St. Louis v. Albrecht*, 150 Ill. 506, 37 N. E. 934.

*Assessing at specified percentage*

— *Uniformity.*

A special tax for a street improvement at a specified percentage of the cost upon the right of way of a railroad in the street is not invalid as lacking uniformity, because abutting private property is assessed by frontage. *C. R. I. & P. R. Co. v. Moline*, 158 Ill. 64, 41 N. E. 877. See note 28 L. R. A. 249.

Such imposition will not be held invalid as a mere arbitrary exaction, where the public authori-



sins of the public officers who make them are both of omission and commission. The omission of some statutory requirement is perhaps the most frequent cause of vitiating assessments, but the authorities not infrequently insert therein something which is the result of their own cogitations, in-

ties have made their estimate and assessment in good faith. *Id.*

*General tax not first levied.*

It is no defense to a special assessment for laying water mains that the money to pay for the pumping works by general taxation has not been first provided. *Hughes v. Momence*, 163 Ill. 535, 45 N. E. 300.

*Assessment for work already done.*

Where the municipality has no power to make a special assessment, or in case the proceedings are made without providing for the pavement by special assessment, a proceeding to pay for work already done in that manner cannot be resorted to; but if the power exists and there is a valid ordinance under which the work is done, there is no objection to successful proceedings in pursuance of the ordinance until full payment for benefits is secured. *West Chicago Park Com'rs v. Sweet*, 167 Ill. 326, 47 N. E. 728.

*Unauthorized change of material.*

Confirmation of a paving assessment cannot be defeated on the ground that the council had made an unauthorized change in the paving material after the assessment roll had been made and filed, where there is no evidence to show that the original ordinance was not followed in making the assessment. *Galt v. Chicago*, 174 Ill. 605, 51 N. E. 653.

*Indiana.*

*Mere informalities.*

A charter provision that mere informalities of the common council in ordering an improvement or making an assessment or apportioning the cost shall not be available as a defense by the property owner, does not deprive him of any substantial right, but refers to objections which do not affect the merits of the proceeding. *Garvin v. Daussman*, 114 Ind. 429, 5 Am. St. Rep. 637, 16 N. E. 826.

*Massachusetts.*

*Contributions by public.*

There may be voluntary contributions reducing the amount of the public charge, and such contributions do not invalidate the acts of the authorities charged with the duty of adjudging whether the improvement shall be made and its details, citing *Atkinson v. Newton*, 169 Mass. 240, 47 N. E. 1029; *Parks v. Boston*, 8 Pick. 218, 19 Am. Dec. 322; *Freetown v. Bristol*, 9 Pick. 46; *Copeland v. Packard*, 16 Pick. 219; *Crocket v. Boston*, 5 Cush. 182; *Arlington v. Cutter*, 114 Mass. 344; *Dudley v. Cilley*, 5 N. H. 558; *Townsend v. Hoyle*, 20 Conn. 1; *Dillon, Mun. Corp.*, Secs. 458, 596.

*Agreement between city and owners.*

An assessment for a street open-



ing is not rendered invalid by an agreement, pursuant to statute, that the land owners release their lands, contribute one third of the cost of improvement, "being credited, however, with the betterments on land of those abutters who do not sign this proposal," and further to save the city harmless from damages which any owner who does not sign the offer may recover, "upon being subrogated to and credited with the betterments assessed or to be assessed by said city on such owners respectively," and the city agrees to assume the betterment assessments. *Atkinson v. Newton*, 169 Mass. 240, 47 N. E. 1029.

*Michigan.*

*Ambiguous facts.*

Where there is ample power to levy an assessment, it will not be assumed from ambiguous facts that there was error in the exercise of such power. *Cuming v. Grand Rapids*, 46 Mich. 150, 9 N. W. 141.

*Absence of proof of publication.*

A failure of the common council to have before it, at the time of the confirmation of the assessment, proof of publication of notice of hearing of objections thereto, will not invalidate proceedings, where the proof shows such notice was in fact given, and the plaintiff fails to show that he was injured thereby. *Shimmons v. Saginaw*, 104 Mich. 511, 62 N. W. 725.

*Members of council being taxpayers.*

It is no objection to the validity of an assessment that the members of the common council who fixed the assessing district were taxpayers, and as such, interested

parties. *Brown v. Saginaw*, 107 Mich. 643, 65 N. W. 601.

*Minnesota.*

*Wrong heading in tax list.*

A special assessment against lots for constructing sidewalks in front is not affected by the fact that in the tax-list the amount of the assessment was in a column headed, "Delinquent Road Tax," there being no claim that the owner was misled thereby. *Scott v. Hinds*, 50 Minn. 204, 52 N. W. 523.

*Filing assessment roll in wrong office.*

It is no objection to the validity of an assessment that the roll, after confirmation by the district judge, shall be filed in the office of the board of public works instead of in the court. *State v. Ensign*, 54 Minn. 372, 56 N. W. 41. *Non-assessment of street railway.*

It is not a valid objection to a special assessment for street paving that the track of a street railway company therein was not assessed, unless it be shown that such railway company, in obtaining its franchise for use of the street, had agreed to pave the portion over which it operated its cars. *State v. District Court*, 80 Minn. 293, 83 N. W. 183.

*Missouri.*

*Increase in amount over contract price.*

The fact that some small amount of work or material may have been apportioned and charged in the bill other than that called for by the contract, will not necessarily invalidate the bill; but the additional amount so assessed may, on a proper showing, be deducted. *Neenan v. Smith*, 60 Mo. 292.



*New Jersey.**Conflicting evidence.*

The assessment of benefits by commissioners who have been on the ground, examined the premises and made their report on the basis provided by charter, will not be set aside on conflicting evidence of the justice or sufficiency of such assessment. It must clearly appear that injustice has been done before an assessment will be set aside upon the facts. *State v. Passaic*, 37 N. J. L. 65.

*Technical objections.*

Where the proof shows the prosecutor to have been familiar with all the proceedings for a municipal improvement from its inception, it will not be set aside on technical objections. *Brewer v. Elizabeth*, 66 N. J. L. 547, 49 Atl. 480.

*New York.**Failure to specify minor matters.*

An assessment is not invalidated by the fact that the common council does not in express words prescribe the exact time for publication of notice for proposals, or specify the date when it will meet and take final action on the question of the improvement. *Gilmore v. Utica*, 131 N. Y. 26, 29 N. E. 841.

*Assessment of city streets by Park Board.*

An assessment for paving part of a park, under contract from the park department of a city, when such department has exclusive power to pave roads and places in the park, while the common council is in charge of streets outside the park, is not invalidated by the fact that it includes work upon streets outside the park necessary to complete the paving in the

park and to furnish it with proper drainage, and to make the connecting streets and approaches safe for travellers. *Kittinger v. Buffalo*, 148 N. Y. 332, 42 N. E. 803.

*Unequal assessment.*

Proof of facts showing merely a grossly unequal assessment for a local improvement does not permit the influence that the board adopted some erroneous principle which resulted in the injustice complained of and which justifies the intervention of the court, when appealed to through an action to vacate the assessment. *Monroe County v. Rochester*, 154 N. Y. 570, 49 N. E. 139.

*Requiring two bonds with bid.*

The irregularity of requiring two bonds, one to accompany bid and the other to accompany the contract if awarded, is an irregularity cured by the provision of the charter that every assessment authorized thereby shall be valid and effectual notwithstanding any irregularity, omission or error in any of the proceedings relating to the same. *Conde v. Schenectady*, 164 N. Y. 258, 58 N. E. 130.

*Ohio.**Change from street to canal.*

Abutting properties cannot resist an assessment to pay the costs of a street improvement because the site of the street was changed from a canal to a street without a new condemnation, or because the corporate authorities had granted the right to lay a track upon such street to a Railroad Company. The remedy of the proprietors for such change is by an action for damages. *Richards v. Cincinnati*, 31 Ohio St. 506.



jurious to the landowner, antagonistic to some principle of law, and fatal to the assessment. A number of cases are contained in the note appended, which are not properly classifiable under more general heads.<sup>52</sup>

*Furnishing material not bid upon.*

The fact that the cost of sheeting used in building a sewer was included in the assessment, without any proposal or bid having been advertized or received, was not deemed of sufficient importance to invalidate the entire assessment. *Cincinnati v. Anchor White Lead Co.*, 44 O. St. 243, 7 N. E. 11.

*Washington.*

*Test of validity of assessment.*

Each case arising under the laws for assessing abutting property to pay for street improvements must depend upon its particular facts. If it appears that an assessment has been levied by competent authority, and that it is fair, and not in excess of the benefits to accrue by reason of the improvements to be paid for, it will be sustained by the courts. It is equally the duty of the courts to restrain the collection of assessments which are shown to be mere attempts to take the property of one for the use of others without compensation to the owner. *White v. Tacoma*, 109 Fed. 32.

*Wisconsin.*

*Substantial compliance with statute.*

Unless the statute regarding the imposition of a special tax requires a literal compliance therewith in mere matters of form, a substantial compliance with all things designed to safeguard the interests of property owners satis-

fies all the demands of strict compliance. *Gleason v. Waukesha Co.*, 103 Wis. 225, 79 N. W. 249. *Same.*

Where there has been a substantial compliance with statutory requisites in regard to the imposition and collection of special taxes or local assessments, and the complainant is unable to show that any injustice has been done to him, equity will afford him no relief against such taxes or assessments. *Wells v. Western P. & S. Co.*, 96 Wis. 116, 70 N. W. 1071; *Hennesy v. Douglas Co.*, 99 Wis. 129, 74 N. W. 983; *Gleason v. Waukesha Co.*, 103 Wis. 225, 79 N. W. 249.

<sup>52</sup> *California.*

*Invalid opening of street.*

An assessment levied for the opening of a street across a private lot which has not been dedicated to the public, or condemned for public use, and of which there was no user by the public until after the grading was done, for which the assessment was levied, is invalid. *Spaulding v. Bradley*, 79 Cal. 449, 22 Pac. 47. *Assessment on one side of street only.*

Where a statute authorizes the expense of grading a street to be "assessed upon the lots and lands fronting thereon," it means that it shall be assessed upon all of the lands fronting on the work, on both sides of the street, regardless of whether more work was done on one side than the other.



The work is for the benefit of every abutting lot equally, and if the expense be assessed on the lots on only one side of the street, the assessment is void. *San Diego Inv. Co. v. Shaw*, 129 Cal. 273, 61 Pac. 1082.

#### *Illinois.*

##### *Assessing lateral service pipes against vacant lots.*

The municipal authorities laid lateral service pipes from the main supply pipes in a street to the various lots abutting on the same, assessing the cost of such lateral pipes to each lot. On the objection of the owner of several vacant lots that they were in no manner benefited thereby, it was held that in the absence of any statutory provision on the subject, the action of the municipal authorities was such an abuse of discretion as would justify the interference of the courts. *Warren v. Chicago*, 118 Ill. 329, 9 N. E. 883.

##### *Double assessment.*

Where benefits in a street opening proceeding are set off against damages to the part of the land not taken, an attempt to raise money to pay for the property taken or damaged, by the assessment of special benefits against it, is to require the owner to pay twice, and unconstitutional. *Leopold v. Chicago*, 150 Ill. 568, 37 N. E. 892.

##### *Deviation from plan and character of improvement.*

The ordinance being the authority for and basis of a special assessment for a local improvement, the work must conform substantially therewith, and any deviation therefrom which renders the improvement less beneficial to prop-

erty assessed, should entitle the owner to relief against the assessment. Any such alteration, however slight, becomes to the owner a substantial, material change. The test is not merely identity of location, but the effect produced on the assessed property. *Rossiter v. Lake Forest*, 151 Ill. 491, 38 N. E. 359.

##### *Assessment made on erroneous assumption.*

An assessment for opening a street will be set aside on appeal where it appears that it was made upon the erroneous assumption that other land was a public street, which in connection with that opened, would form a continuous thoroughfare. *Waggeman v. N. Peoria*, 155 Ill. 545, 40 N. E. 485.

##### *Change of improvement — Dirt road for macadam.*

If it can be shown that the improvement accepted by the city is practically no more than a dirt roadway, imperfectly graded, curbed and guttered, when the ordinance provides for a thoroughly graded, curbed, guttered and macadamized roadway, such facts may be shown as a defense in an application for sale. *Gage v. People*, 193 Ill. 316, 61 N. E. 1045, 56 L. R. A. 916.

#### *Indiana.*

##### *Repairing drains.*

Where under color of making repairs and removing obstructions in a public drain, the authorities depart materially from the original specifications, and widen and deepen the ditch at a sum largely in excess of the original cost, the assessment will be set aside as to those landowners who attack it



properly. *Weaver v. Lemplin*, 113 Ind. 298, 14 N. E. 600.

*Maryland.*

*Want of proprietors' consent.*

If the consent of the proprietors owning a majority of feet fronting on the street to be paved, must appear to have been given before ordering the pavement, the want of such assent will be a defense to the collection of the tax. *Henderson v. Mayor, etc.*, 8 Md. 352.

*Massachusetts.*

*Wrong principle of law.*

A special assessment may be erroneous where not laid upon estates liable thereto by reason of the adoption of a mistaken principle of law, but not by reason of a mistaken finding of fact that such estates were not specially benefited. *Lincoln v. Street Com'rs*, 176 Mass. 210, 57 N. E. 356.

*Michigan.*

*Insufficient return on tax roll.*

The tax roll of a special assessment is invalid for want of a return or certificate showing upon what basis the assessment was made. *Warren v. Grand Haven*, 30 Mich. 24; *Grand Rapids v. Blakely*, 40 Mich. 367, 29 Am. Rep. 539.

*Unjust discrimination.*

The cost of building a sewer was assessed between the city and property owners in equal proportions; and after the city and some of the owners had paid their tax in full, the assessment was declared invalid and a new assessment ordered on the basis of the property owners paying two-thirds of the cost, and exempting those who had already paid under the original assessment. This

could not be legally done, and an assessment which requires such discrimination between the properties of persons taxed cannot be sustained. It makes taxation unequal, which is unjust under any system. *White v. Saginaw*, 67 Mich. 33, 34 N. W. 255.

*Minnesota.*

*Erroneous apportionment.*

An assessment is void where it is shown that the assessing board, in apportioning benefits for a street improvement, took into consideration only the proximity of the lots to the street, without regard to their situation in other respects, or how they might be affected by the grade. *State v. Judges*, 51 Minn. 539, 53 N. W. 800, 55 N. W. 122.

*Arbitrary and illegal assessment.*

A park having been established, the assessment district extended north from the park more than a mile. By the assessing board, this district was divided by east and west lines into several sections, and assessed each lot within a particular section at the same amount, regardless of their relative distances from the park. This apportionment of benefits, being by an arbitrary and illegal rule, the proceedings were void. *State v. Brill*, 58 Minn. 152, 59 N. W. 989.

The court say, above, that "these special assessments for local improvements are drastic enough, at best, and such an arbitrary system of apportioning them cannot be sustained." *Mitchell, J. Arbitrary assessment.*

Where an assessment was made on about 3,000 feet front of property at \$5.18 a foot, of which about one-third only was paid,



judgment against delinquents applied for, but denied on jurisdictional grounds, a new assessment was made, in which property additional to that in the original assessment was included, thus lessening the amount the delinquents were finally compelled to pay by about \$1.25 per foot. It was held that an arbitrary rule of assessment was adopted, that the board did not exercise reasonable judgment, and that the assessment was void. The court say, "This arrangement operated as a penalty upon those who paid their assessments without entering into a contest with the city as to its validity, and offered a premium to those who became delinquent." *State v. District Court (Minn.)*, 104 N. W. 553.

*Assessment by usurper.*

If a person neither *de jure* nor *de facto* a public officer usurps the functions and performs the acts required by law to be done by officers who do exist, both *de jure* and *de facto*, the acts of such usurper in reference to a local improvement are invalid, and do not authorize an assessment for such improvement. *State v. District Court*, 72 Minn. 226, 71 Am. St. Rep. 480, 75 N. W. 224.

*New Jersey.*

*Failure to comply with charter.*

Where the report of the board for assessment of benefits does not show that they ascertained the expense incurred, or examined and determined what real estate should be assessed, or what proportion should be assessed to each owner, the assessment is defective in substance, and a sale of land thereunder is void. *State v. Jersey City*, 35 N. J. L. 381.

*When entire assessment invalidated.*

A decision of the appellate court in a case of assessment for special benefits for street improvements which sets aside "both the proceedings and assessment," and a rule has been regularly entered in conformity therewith, invalidates the entire assessment and is not limited in its legal effect to the prosecutors only. *Long Branch Com. v. Dobbins*, 61 N. J. L. 659, 40 Atl. 599.

*New York.*

*Failure to value property before assessment.*

Where a power is granted by legislative enactment, with a proviso annexed, the enactment is to be read as if no more power was given than is contained within the terms or bounds of the proviso. And where an assessment is limited to one-half the value of the property, as valued by general tax assessing officers, and the property is not valued at all by such officers, because exempt from taxation, an assessment against it is void. *In re Second Ave. Church*, 66 N. Y. 395.

*Arbitrary assessment.*

Where the council, without examination, and for extraneous purposes, casts upon a single piece of property the burden of an improvement whereby others are benefited, the assessment is invalid. *People v. Adams*, 88 Hun, 122, 34 N. Y. Supp. 579.

*Ohio.*

*Omission to properly advertise for bids.*

A failure to comply with the statute as to time and manner of advertising for bids, is a defect rendering the assessment invalid.



It is designed for the protection of the tax-payer. *Upington v. Oviatt*, 24 O. St. 232.

*Assessment of non-abutting property.*

Where the statute provides for the assessment of abutting property, the assessment of property which does not abut although benefited by the improvement, makes the assessment invalid. *Kelly v. Cleveland*, 34 O. St. 468.

*Texas.*

*Non-compliance with charter provisions.*

Assessing each lot its proportion of the entire expense without regard to the actual estimated expense in front of it, the charter authorizing the assessment of one-third of the actual expense. *Allen v. Galveston*, 51 Tex. 302.

*Same—Improper consideration of benefits.*

Under a charter empowering the council to determine what streets should be improved and the method of payment, and if by the abutting owners, then according to the cost of the work in front of each lot, and providing for the making of assessment rolls fixing the liability on that basis, and for notice to persons interested to contest such assessment by petition to the council, or they would be estopped from contesting the validity of the tax, such proceedings do not provide for a consideration of benefits by the council, nor estop the owner from testing the constitutionality of such assessment. *Hutcheson v. Storrie*, 92 Tex. 685, 45 L. R. A. 289, 71 Am. St. Rep. 884, 51 S. W. 848. *Washington.*

*Including work not ordered by council.*

Where the improvement ordered

by the council called for paving a 54 foot roadway the assessment therefor will be set aside when it includes the cost of sidewalks and curbing. *McAllister v. Tacoma*, 9 Wash. 272, 37 Pac. 447, 658.

*Wisconsin.*

*Arbitrary addition to cost.*

Where the assessing board added fifty per cent to the estimated cost of the work to be done in front of each lot, as benefits, and the lots so assessed were differently affected by the improvement, there was a total failure of the exercise of the judgment of the board, and the assessment was void. *Watkins v. Zwietusch*, 47 Wis. 513, 3 N. W. 35; *Johnson v. Milwaukee*, 40 Wis. 315.

*Arbitrary assessment.*

Where an assessment of benefits for grading an alley charged each lot with as many dollars as it had frontage, and the total amount closely approximated the total cost, while opposite some lots was a deep cut, and opposite others filling was necessary, the assessment was an arbitrary one, based solely on the cost of the work, and therefore illegal and void. *Kersten v. Milwaukee*, 106 Wis. 200, 48 L. R. A. 851, 81 N. W. 948, 1103.

For assessment, irregular, but not void, *State v. Blake*, 86 Minn. 37, 90 N. W. 5. For an unequal assessment, see *State v. Passaic*, 42 N. J. L. 524. For assessment not void on its face, *Dyker, etc., Co. v. Cook*, 159 N. Y. 6, 53 N. E. 690. As to sufficiency of assessment generally, under Illinois statute, see *Walker v. Aurora*, 140 Ill. 402, 29 N. E. 741.



## CHAPTER XI.

### CONFIRMATION OF THE ASSESSMENT — DAMAGES.

CONFIRMATION — In general, 623.	DAMAGES — In general, 640.
Application for confirmation, 624.	Determination of authorities on, 641.
<i>Res judicata</i> , 625.	Liability for damages, 642.
Judgment <i>in rem.</i> , 626.	When city not liable, 643.
Objections to confirmation, 627.	Damages from change of grade, 644-649.
Insufficient proof of notice, 628.	Ordinance does not cause damage, 650.
Jurisdiction to enter judgment, 629.	Damages for taking, 651-653.
Conclusiveness of judgment, 630.	Measure of — In general, 654-657.
When judgment final, 631.	Measure of — Change of grade, 658-660.
Confirmation by common council, 632.	Measure of — Taking, 661.
Collateral attack, 633-634.	To whom damages belong, 662.
Recital of jurisdictional facts, 635.	Consequential damages, 663.
Reversal of judgment — Property affected by, 636.	Interest, 664.
Judgment of sale, 637-638.	The jury, 665.
Validity of confirmation, 639.	View of premises, 666.
	Questions for jury, 667.

#### — Confirmation — In general.

623. After the completion of the assessment by the commissioners, and before it becomes operative, it must be vitalized by confirmation by the body appointed by statute for that purpose. In Illinois, it is the county court that is vested with this jurisdiction, but it is more commonly the common council of the city in which the improvement is being made that is the special tribunal for this purpose.

#### — Application for confirmation.

624. An application for judgment of confirmation of a special assessment may also include delinquent general taxes,



but this is not necessary.<sup>1</sup> In such application for the confirmation of an assessment for water supply pipes, evidence to show that a certain private water company could be compelled to lay pipes in the territory subject to the assessment is not admissible.<sup>2</sup> The loss of an order for classification by the commissioners of a drainage district is no valid objection to an application for judgment for delinquent assessments, such objection not going to the substantial justice or validity of the assessment.<sup>3</sup> Nor is it a defense to such an application that the ordinance was invalid, or the work not done in accordance therewith, where the owner has had his day in court on the judgment for the assessment.<sup>4</sup>

— *Res judicata.*

**625.** Judgment of confirmation of an assessment which is affirmed on appeal is a bar to a second judgment under a new ordinance for the same improvement, although the former ordinance be repealed.<sup>5</sup> Upon the second trial of a cause, after a decision by the appellate court on an appeal from a former judgment, the doctrine of *res judicata* applies to all questions on which the court was actually required to form an opinion and pronounce judgment on the former appeal.<sup>6</sup> Where the ordinance under which a special assessment was levied is declared void, the judgment of confirmation is also void, and, there being no hearing on the merits, the determination of benefits thereunder does not constitute a bar to a larger assessment under new proceedings.<sup>7</sup>

<sup>1</sup> McCauley v. People, 87 Ill. 123.

<sup>2</sup> Gordon v. Chicago, 201 Ill. 623, 66 N. E. 823.

<sup>3</sup> Scott v. People, 120 Ill. 129, 11 N. E. 408.

<sup>4</sup> Fisher v. People, 157 Ill. 85, 41 N. E. 615. As to what questions are matters of law for the determination of the court upon

the hearing, see Gage v. Chicago, 146 Ill. 499, 34 N. E. 1034.

<sup>5</sup> McChesney v. Chicago, 161 Ill. 110, 43 N. E. 702; Lehmer v. People, 80 Ill. 601.

<sup>6</sup> Cramer v. Stone, 38 Wis. 259.

<sup>7</sup> West Chi. Park Com'rs v. Chicago, 171 Ill. 146, 49 N. E. 427; Schertz v. People, 105 Ill. 27; People v. Fuller, 204 Ill. 290, 68



### — Judgment in Rem.

626. The judgment of the court confirming a special assessment is a judgment *in rem*, and is several against each tract of land for the amount finally assessed against it,<sup>8</sup> and a petitioner who makes a *prima facie* case in accordance with the statute is entitled to a judgment of confirmation, in the absence of testimony overcoming the same.<sup>9</sup>

### — Objections to confirmation.

627. A confirmation of a special assessment will in the absence of objections filed thereto be confirmed as a matter of course.<sup>10</sup> A property owner who makes objections to the confirmation of a special assessment should file them in writing, and if he fail to do so, the adverse party may obtain a rule requiring it to be done.<sup>11</sup> Objection that the action

N. E. 371; *Gage v. Chicago*, 193 Ill. 108, 61 N. E. 850; *Chicago v. Nodeck*, 202 Ill. 257, 67 N. E. 39. *Benefits under judgment an entirety.*

A judgment against property for special assessment benefits is one *in rem*, against the property itself as an entirety and in a gross sum for all the benefits which will accrue to the fee in remainder and the leasehold estate. The benefits cannot be apportioned. *Chicago U. T. Co. v. Chicago*, 204 Ill. 363, 68 N. E. 519. *Jurisdiction.*

If an ordinance on which an application for a judgment of confirmation is based contains sufficient allegations descriptive of the proposed improvement to challenge the attention of the court, jurisdiction attaches in the court to judicially determine as to the legal sufficiency of the description; and the decision and judgment of the court thereon, however erro-

neous, is not void, nor can it be attacked as for error in a collateral proceeding. *Perry v. People*, 206 Ill. 334, 69 N. E. 63.

<sup>8</sup> *Gibler v. Mattoon*, 167 Ill. 18, 47 N. E. 319; *Jones v. Lake View*, 151 Ill. 663, 38 N. E. 688. A proceeding to confirm is a suit at law, although a proceeding *in rem*. *In re Mt. Vernon*, 147 Ill. 359, 23 L. R. A. 807, 35 N. E. 533. And confirmation should not be refused because the contract price is less than the estimate of the cost. *Danforth v. Hinsdale*, 177 Ill. 579, 52 N. E. 372. It is but one suit, regardless of the number of defendants; there is but one trial and one judgment, although the property is to be sold separately. *People v. Gary*, 105 Ill. 332.

<sup>9</sup> *Porter v. Chicago*, 176 Ill. 605, 52 N. E. 318.

<sup>10</sup> *Mt. Carmel v. Friedrich*, 141 Ill. 369, 31 N. E. 21.

<sup>11</sup> *Hervetson v. Chicago*, 172 Ill. 112, 49 N. E. 992.



of the commissioners was not "in compliance with the ordinance or the statute," is sufficient to bring before the court the action of the commissioners in making the assessment.<sup>12</sup> Proof of the absence of a member of the board of revision does not sustain an objection that the assessment was not legally confirmed,<sup>13</sup> and evidence that different materials would be better for a street improvement, and less costly, is inadmissible.<sup>14</sup> Where the court had jurisdiction to enter a judgment of confirmation of a special assessment, an objection that the record shows the estimate of the cost of the improvement was made prior to the passage of the ordinance will not be sustained on application for judgment of sale for delinquent installments.<sup>15</sup> On an application for a judgment of sale for a delinquent special tax, only such objections can be heard or considered as affect the jurisdiction of the court to pronounce the judgment of confirmation.<sup>16</sup>

<sup>12</sup> *Jefferson Co. v. Mt. Vernon*, 145 Ill. 80, 33 N. E. 1091.

<sup>13</sup> *In re Merriam*, 84 N. Y. 596.

<sup>14</sup> *Cram v. Chicago*, 139 Ill. 265, 28 N. E. 758. Unless it be shown by the evidence that the improvement as constructed is wholly different from that provided by the ordinance and contract. *Downey v. People*, 205 Ill. 230, 68 N. E. 807.

<sup>15</sup> *People v. Colvin*, 165 Ill. 67, 46 N. E. 14.

That the original plans were changed may be objected to on application to confirm the assessment, but is too late on application for judgment of sale. *McManus v. People*, 183 Ill. 391, 55 N. E. 886.

*Error in frontage.*

In a proceeding to confirm the assessment of a special tax upon contiguous property for paving a

street upon the basis of the frontage of the property, a lot owner may show that his property assessed has a smaller frontage than that estimated by the commissioners, and that therefore the assessment is too high. *Green v. Springfield*, 130 Ill. 515, 22 N. E. 602.

*Rights of owners—Amount of benefit.*

On application to confirm a special assessment, the property owners assessed may by filing objections to the confirmation raise the question whether their premises have been assessed more or less than they will be benefited, or more or less than their proportionate share of the cost of the proposed improvement. *De Koven v. Lake View*, 131 Ill. 541, 23 N. E. 240.

<sup>16</sup> *Hull v. People*, 170 Ill. 246, 48 N. E. 984.



— Insufficient proof of notice.

628. Where the affidavit of mailing notice of application for confirmation of a special assessment is insufficient on its face to confer jurisdiction of the persons of those who did not appear, the judgment of confirmation will not conclude those property owners who did not appear, and such parties may show the want of jurisdiction on application for judgment of confirmation.<sup>17</sup> And such a judgment, though taken by default, will be reversed on appeal where the certificate of notice of assessment and final hearing shows an insufficient publication,<sup>18</sup> although a judgment of sale is not rendered void by the omission to include the jurisdictional clause contained in the statutory form of judgment that the court has obtained jurisdiction by giving the required notice, when jurisdiction is shown by a recital of the appearance of parties and a hearing of objections, the recital as to notice being necessary only when jurisdiction is obtained in that manner.<sup>19</sup>

— Jurisdiction to enter judgment.

629. Where the question of jurisdiction to enter judgment of confirmation is raised, the lack of jurisdiction must appear on the face of the record, and cannot be shown by extrinsic evidence;<sup>20</sup> but where a judgment of confirmation is regular upon its face, the validity of the assessment cannot be collaterally attacked except for matters going to the jurisdiction of the court to render the judgment.<sup>21</sup> The court is without jurisdiction to confirm an assessment based on a

<sup>17</sup> Clark v. People, 146 Ill. 348, 35 N. E. 60.

<sup>18</sup> Toberg v. Chicago, 164 Ill. 572, 45 N. E. 1010.

<sup>19</sup> Gage v. People, 213 Ill. 347, 72 N. E. 1062; Young v. People, 171 Ill. 299, 49 N. E. 503.

<sup>20</sup> Thompson v. People, 207 Ill. 334, 69 N. E. 842; Walker v. People, 202 Ill. 34, 66 N. E. 827;

Goldstein v. Milford, 214 Ill. 528, 73 N. E. 758.

<sup>21</sup> People v. Ill. Cent. R. Co., 213 Ill. 367, 72 N. E. 1069; Johnson v. People, 189 Ill. 83, 59 N. E. 515; Steenberg v. People, 164 Ill. 478, 45 N. E. 970; Gross v. People, 172 Ill. 571, 50 N. E. 334; Foster v. Alton, 173 Ill. 587, 51 N. E. 76; Glover v. People, 188



void ordinance,<sup>22</sup> nor to enter a judgment confirming an assessment against property by the description contained in a plat which has never been recorded.<sup>23</sup> Only objections going to the jurisdiction of the court to render a judgment of confirmation are available on an application for a judgment of sale.<sup>24</sup>

### — Conclusiveness of judgment.

**630.** Where the court has jurisdiction of the parties and the subject matter, a judgment of confirmation rendered by it concludes a property owner from afterwards questioning any of the proceedings had prior thereto unless they are so

Ill. 576, 59 N. E. 429; *Young v. People*, 171 Ill. 299, 49 N. E. 503; *Dickey v. People*, 160 Ill. 633, 43 N. E. 606; *Casey v. People*, 165 Ill. 49, 46 N. E. 7.

<sup>22</sup> *American Hide & L. Co. v. Chicago*, 203 Ill. 451, 67 N. E. 979. See, also, note 6, *supra*.

<sup>23</sup> *People v. Clifford*, 166 Ill. 165, 46 N. E. 770.

<sup>24</sup> *People v. Clifford*, *supra*; *Kunst v. Kochersperger*, 173 Ill. 79, 50 N. E. 168.

Where the court has jurisdiction to render judgment confirming an assessment, the land owner is concluded from questioning any prior proceedings. Otherwise, if the prior proceedings be so defective as not to authorize the court to act at all. *Shertz v. People*, 105 Ill. 27.

#### *Waiver.*

All objections not made and urged at the time of the confirmation of the assessment roll will be deemed waived, and can not be urged on application for an order for sale of lands for a delinquent assessment. There is no difference in this respect between cases

of special assessments for improving streets and assessments under the drainage acts. *Blake v. People*, 109 Ill. 504.

#### *Unreasonable ordinance.*

Where an ordinance, and the proceedings thereunder are grossly unreasonable, and clearly in excess of the powers conferred, these defenses may be set up on an application to confirm the assessment. *Bloomington v. C. & A. R. Co.*, 134 Ill. 451, 26 N. E. 366.

#### *Issue on hearing.*

The issue on the hearing of objections to the confirmation of a special assessment is, whether the objector's property is assessed more than its proportionate share of the cost of the improvement, and not whether other specified property is benefited to a greater extent.

To determine whether property is assessed more than its proportionate share in the cost of the improvement, the inquiry is, what proportion does the assessment on the objector's property bear to the assessment on all the lands, and not how does it compare with the



defective as to render it void, or reversed or annulled in a direct proceeding.<sup>25</sup> If the judgment is regular on its face, showing that every provision of the statute has been complied with, the court has jurisdiction to confirm the same,

assessment on any specified or particular property. *Clark v. Chicago*, 166 Ill. 84, 46 N. E. 730.

#### *Conclusiveness of assessment.*

An assessment is conclusive until set aside by a direct proceeding for that purpose. *Fuller v. Elizabeth*, 42 N. J. L. 427.

Under a charter which provides that, after the confirmation of the verdict of a jury that lands shall be taken, the common council shall determine what part, or that all, of the damages shall be assessed on owners or occupants deemed benefited, and the roll is then made out, reported and confirmed, such action is final and conclusive. *Brown v. Saginaw*, 107 Mich. 643, 65 N. W. 601.

<sup>25</sup> *Murphy v. People*, 120 Ill. 234, 11 N. E. 202; *People v. Green*, 158 Ill. 594, 42 N. E. 163; *Pells v. People*, 159 Ill. 580, 42 N. E. 784; *People v. Markley*, 166 Ill. 48, 46 N. E. 742; *Hull v. People*, 170 Ill. 246, 48 N. E. 984.

The confirmation of the report of commissioners is a judgment and conclusive as to all questions which might have been litigated therein, and an action to set it aside can only be maintained in case of fraud or other circumstances such as would authorize an action to set aside an ordinary judgment. *Dolan v. Mayor*, 62 N. Y. 472.

#### *Res judicata.*

Judgments of court of review sustaining the action of the trial

court in overruling objections to application for judgment of sale for the first, second and third installments of a special assessment, are *res judicata*, in subsequent applications on other installments, as to all questions raised and determined in the former proceeding, or which were involved under the issue and might properly have been raised. *Gross v. People*, 193 Ill. 260, 61 N. E. 1012, 86 Am. St. Rep. 322; *Lovell v. Long Island Drain. Dist.*, 159 Ill. 188, 42 N. E. 600.

#### *Same — Park purposes.*

When an assessment for park purposes has been made upon contiguous property, and the assessment confirmed by the circuit court, and the amount divided into yearly installments, upon application for judgment on the third yearly installment, it is too late to question the validity of the assessment, and it will be deemed *res adjudicata*. *People v. Brislin*, 80 Ill. 423.

#### *Effect of reversal.*

A decision setting aside "both the proceedings and assessment," invalidates the entire assessment, and is not limited in its legal effect to the prosecutors. *Long Branch, etc. v. Dobbins*, 61 N. J. L. 659, 40 Atl. 599; reversing S. C. 59 N. J. L. 146, 36 Atl. 482.

#### *Bar of judgment on action prematurely brought.*

A judgment confirming an assessment in an application pre-



and an objection not appearing of record, but made apparent from evidence *aliunde*, should be overruled.<sup>26</sup>

### — When judgment final.

**631.** A judgment of confirmation of an assessment is so far final that appeal on error will lie; but upon application for sale, it will be considered a part of the same proceed-

maturely brought, is not a bar to an application subsequently brought, after the cause of action has properly accrued. *Brackett v. People*, 115 Ill. 29, 3 N. E. 723.  
*Over-assessment of benefits.*

It is too late, on application for judgment against lands for special assessments to insist that the property is not benefited to the amounts assessed thereon. The judgment confirming the assessment is conclusive upon the question, and cannot be attacked collaterally. *Andrews v. People*, 83 Ill. 529; *C. & N. W. R. Co. v. People*, 83 Ill. 467; *Andrews v. People*, 84 Ill. 28.

#### *Confirming park assessment.*

Where park commissioners seek confirmation of an assessment made by them under statutory powers, it is incumbent on them to show compliance with the law, under which they have derived the power to impose the special assessment or burden. *Thorn v. West Chicago Prk. Comrs.*, 130 Ill. 594, 22 N. E. 520.

#### *Judgment by default.*

Where a judgment confirming a special assessment has been rendered by default, the rule that all except jurisdictional questions are waived, does not apply. *Markley*

*v. Chicago*, 170 Ill. 358, 48 N. E. 952.

#### *Prima facie evidence of Benefits.*

A judgment of confirmation is *prima facie* evidence that the property assessed in both original and supplementary assessment was assessed as much as it was benefited by the improvement. *Sheriffs v. Chicago*, 213 Ill. 620, 73 N. E. 367.

#### *Former judgment as defense.*

On application for judgment of confirmation of an assessment, a former judgment of confirmation under a valid ordinance can be interposed as a defense. *People v. Fuller*, 204 Ill. 290, 68 N. E. 371; *People v. McWethy*, 165 Ill. 222, 46 N. E. 187; *McChesney v. Chicago*, 161 Ill. 110, 43 N. E. 702; *Chicago v. Nicholes*, 192 Ill. 489; 61 N. E. 434.

An order confirming an assessment has the force and conclusiveness of a judgment. *Mayer v. Mayor*, 101 N. Y. 284, 4 N. E. 336.

<sup>26</sup> *People v. Illinois Cent. R. Co.*, 213 Ill. 367, 72 N. E. 1069.

Cannot be collaterally attacked in mandamus proceedings by school authorities to compel payment. *Board of Education v. People*, 219 Ill. 83, 76 N. E. 75.



ing, and the court does not lose jurisdiction until dismissal or judgment of sale.<sup>27</sup>

— Confirmation by common council

**632.** The Washington statute governing reassessment proceedings, and giving to the order of the common council confirming such proceedings the conclusiveness of a judgment of a court, is a valid enactment,<sup>28</sup> but unless made so by statute is not conclusive.<sup>29</sup>

— Collateral attack.

**633.** Judgments in local assessment proceedings have been uniformly placed upon the same basis and footing as judgments in ordinary tax proceedings. The jurisdiction of the court to render the judgment is presumed, and it cannot be collaterally attacked for defects in the proceedings anterior to the judgment, including defects which go to the jurisdiction of the city authorities to order the improvement or initiate the proceeding. If it appear the court had jurisdiction of the subject matter, and acquired jurisdiction over the property owners as directed by the charter, the judgment rendered therein is valid, and any defense of the landowner as to prior irregularities, and which might have been urged at the hearing, is not subject to collateral attack unless subsequent proceedings have rendered the judgment void.<sup>30</sup>

<sup>27</sup> *Kilmer v. People*, 106 Ill. 529.

<sup>28</sup> *Alexander v. Tacoma*, 35 Wash. 366, 77 Pac. 686.

<sup>29</sup> *Chicago v. Burtice*, 24 Ill. 489.

The confirmation of engineer's report by the council the same evening that a special committee met, pursuant to notice, to give the owners a hearing, cannot be said to have prevented a hearing, as the owners had a right to go before the council, and demand a hear-

ing, and to invoke the power of the courts to secure the right: *Brown v. Central Bermudez Co.*, 162 Ind. 452, 69 N. E. 150.

Generally as to confirmation of assessments, see *Lyman v. Gage*, 211 Ill. 209, 71 N. E. 832; *Auditor General v. Hoffman*, 132 Mich. 198, 93 N. W. 259.

*Illinois.*

<sup>30</sup> *Clark v. People*, 146 Ill. 348, 35 N. E. 60; *Meadowcroft v. People*, 154 Ill. 416, 40 N. E. 442;



**634.** There is probably no general rule laid down in special assessment proceedings that is subject to as few exceptions as this. Among the objections raised and overruled are the following: That the petition and proceedings were insufficient;<sup>31</sup> that the organization of the drainage district was irregular;<sup>32</sup> that the amount of the assessment exceeded the estimate of costs and expenses;<sup>33</sup> that the judgment of confirmation, although not void, was erroneous;<sup>34</sup> that the benefits were too much;<sup>35</sup> that the assessment was irregular;<sup>36</sup>

*West Chi. St. R. Co. v. People*, 155 Ill. 299, 40 N. E. 599; *Perry v. People*, 155 Ill. 307, 40 N. E. 468; *West Chi. St. R. Co. v. People*, 156 Ill. 18, 40 N. E. 605; *Kirchman v. People*, 159 Ill. 321, 42 N. E. 883; *Doremus v. People*, 161 Ill. 26, 43 N. E. 701; *People v. Eggers*, 164 Ill. 515, 45 N. E. 1074; *People v. Lingle*, 165 Ill. 65, 46 N. E. 10; *Hammond v. People*, 169 Ill. 545, 48 N. E. 573; *Hewes v. Glos*, 170 Ill. 436, 48 N. E. 922; *Young v. People*, 171 Ill. 299, 49 N. E. 503; *Berry v. People*, 202 Ill. 231, 66 N. E. 1072; *Chew v. People*, 202 Ill. 380, 66 N. E. 1069; *Perry v. People*, 155 Ill. 299, 69 N. E. 63, 40 N. E. 599.

#### *Indiana.*

*Stoddard v. Johnson*, 75 Ind. 20; *Ricketts v. Spraker*, 77 Ind. 371; *De Puy v. Wabash*, 133 Ind. 336, 32 N. E. 1016; *Boyce v. Tuhey*, 163 Ind. 202, 70 N. E. 531.

#### *Minnesota.*

*Hennessy v. St. Paul*, 54 Minn. 219, 55 N. W. 1123; *Duluth v. Dibblee*, 62 Minn. 18, 63 N. W. 1117; *St. Paul v. District Court*, 51 Minn. 539, 53 N. W. 800, 55 N. W. 122; *Hause v. St. Paul*, 94 Minn. 115, 102 N. W. 221.

#### *New Jersey.*

*Poilon v. Brunner*, 66 N. J. L. 116, 48 Atl. 541.

#### *Oregon.*

*Dowell v. Portland*, 13 Ore. 248, 10 Pac. 308; *Clinton v. Portland*, 26 Ore. 410, 38 Pac. 407.

#### *Washington.*

*New Whatcom v. Bellingham Bay Imp. Co.*, 16 Wash. 131, 47 Pac. 236; *S. C.*, 18 Wash. 181, 51 Pac. 360; *Heath v. McCrea*, 20 Wash. 342, 55 Pac. 432; *Annie Wright Seminary v. Tacoma*, 23 Wash. 109, 62 Pac. 444; *McNamee v. Tacoma*, 24 Wash. 591, 64 Pac. 791; *Potter v. Whatcom*, 25 Wash. 207, 65 Pac. 197; *Tacoma, &c. Co. v. Sternberg*, 26 Wash. 84, 66 Pac. 121; *Lewis v. Seattle*, 28 Wash. 639, 69 Pac. 393; *Alexander v. Tacoma*, 35 Wash. 366, 77 Pac. 686.

<sup>31</sup> *Kimball v. Kochersperger*, 160 Ill. 653, 43 N. E. 710.

<sup>32</sup> *Tucker v. People*, 156 Ill. 108, 40 N. E. 451.

<sup>33</sup> *Hammond v. People*, 169 Ill. 545, 48 N. E. 573.

<sup>34</sup> *People v. Eggers*, 164 Ill. 515, 45 N. E. 1074.

<sup>35</sup> *Wray v. Fry*, 158 Ind. 92, 62 N. E. 1004.

<sup>36</sup> *Davies v. Lake Shore & M. S.*



that the local authorities improperly accepted a public improvement, no fraud being alleged;<sup>37</sup> the insufficiency of the record in a proceeding to fix a grade;<sup>38</sup> that the assessment was not made in the name of the owners;<sup>39</sup> that a city had agreed to exempt certain property from the assessment for benefits;<sup>40</sup> that the jury sent to view the premises to be condemned were not sworn in the statutory form;<sup>41</sup> that the board of assessment declined to award the property owner a hearing, or refused to receive and consider the evidence offered the *prima facie* test fixed by statute, in the first instance, for the benefits to his property;<sup>42</sup> that the judgment for damages was improper and insufficient;<sup>43</sup> that the ordinance authorizing the improvement was insufficient;<sup>44</sup> that the assessment was inadequate to pay the costs of the improvement;<sup>45</sup> that the proper method for the construction of sewers was not adopted.<sup>46</sup>

### — Recital of jurisdictional facts.

**635.** The recital in the judgment of such jurisdictional facts as the posting, publishing and mailing of notices, is a finding by the court, and conclusive against collateral attack.<sup>47</sup> An equalization board, when properly in session,

R. Co. 114 Ind. 364, 16 N. E. 639.

<sup>37</sup> Duniway v. Portland (Ore.), 81 Pac. 945.

<sup>38</sup> Wingate v. Astoria, 39 Ore. 603, 65 Pac. 982.

<sup>39</sup> Clinton v. Portland, 26 Ore. 410, 38 Pac. 407.

<sup>40</sup> Vrana v. St. Louis, 164 Mo. 146, 64 S. W. 180.

<sup>41</sup> Goodrich v. Detroit, 123 Mich. 559, 82 N. W. 255.

<sup>42</sup> Hibben v. Smith, 158 Ind. 206, 62 N. E. 447.

<sup>43</sup> Brown v. Saginaw, 107 Mich. 643, 65 N. W. 601; Borgman v. Detroit, 102 Mich. 261, 60 N. W. 696; Scotten v. Detroit, 106 Mich. 564, 64 N. W. 579.

<sup>44</sup> Perry v. People, 155 Ill. 299, 40 N. E. 599.

<sup>45</sup> Potter v. Whatcom, 25 Wash. 207, 65 Pac. 197.

<sup>46</sup> Boyce v. Tuhey, 163 Ind. 202, 70 N. E. 531.

<sup>47</sup> West Chi. St. R. Co. v. People, 155 Ill. 299, 40 N. E. 599; Young v. People, 171 Ill. 299, 49 N. E. 503.

Judgment of confirmation cannot be collaterally impeached by showing the affidavit of mailing of notices was untrue in fact, and that the notice stated the amount of the assessment incorrectly. Meadowcroft v. People, 154 Ill. 416, 40 N. E. 442.



with due notice given, acts judicially, and its action within its jurisdiction is as conclusive as that of a court.<sup>48</sup> An assessment for sewer construction being within the jurisdiction of the city council, it cannot be declared void in a collateral attack to quiet the title to land sold for an assessment, unless it appears there was no authority over the particular improvement ordered, or the particular property assessed.<sup>49</sup> Where a public improvement, such as usually conveys with it both benefits and damages, is laid upon land under the right of eminent domain, the compensation of the owner is determined, in the absence of a statute forbidding it, by taking into account both the benefits and damages; and where in such case benefits have been assessed against property, it will be conclusively presumed as against collateral attack that the damages, if any, have been estimated and deducted from the aggregate amount of benefits.<sup>50</sup> All questions affecting assessment proceedings, not going to the jurisdiction of the municipality to make the assessment, must be taken before the city council on the hearing pending the confirmation of the assessment proceedings by that body, where the statute so requires, and appealed therefrom to the courts, before the courts have authority to inquire as to mere error therein.<sup>51</sup> And it follows, as a converse of

The recital in a default judgment of confirmation that the commissioners "have complied with all the requirements of the law as to posting a consent and notices to the owners of property assessed," etc., will sustain such judgment against a collateral attack in an application for judgment of sale for the delinquent assessment, based on the insufficiency of such notice. *Kirchman v. People*, 159 Ill. 321, 42 N. E. 883; *Perry v. People*, 155 Ill. 307, 40 N. E. 468.

<sup>48</sup> *Portsmouth Sav. Bk. v. Omaha*, 67 Neb. 50, 93 N. W. 231.

<sup>49</sup> *Jackson v. Smith*, 120 Ind. 520, 22 N. E. 431.

<sup>50</sup> *Gas Light Co. v. New Albany*, 158 Ind. 268, 63 N. E. 458.

<sup>51</sup> *Lewis v. Seattle*, 28 Wash. 639, 69 Pac. 393. And see, *New Whatcom v. Bellingham Bay Imp. Co.*, 16 Wash. 131, 47 Pac. 236; *Same v. Same*, 18 Wash. 181, 51 Pac. 360; *Heath v. McCrea*, 20 Wash. 342, 55 Pac. 432; *Annie Wright Seminary v. Tacoma*, 23 Wash. 109, 62 Pac. 444; *McNamee v. Tacoma*, 24 Wash. 591, 64 Pac. 791; *Potter v. Whatcom*, 25 Wash. 207, 65 Pac. 197; *Tacoma, &c. Co. v. Sternberg*, 26 Wash. 84, 66 Pac.



the proposition just established, that when the action of a municipal corporation in levying a special assessment is absolutely void, the proceedings are subject to collateral attack.<sup>52</sup>

— Reversal of judgment — Property affected by.

**636.** In Illinois, by express statutory enactment, a judgment of confirmation has the effect of a several judgment as to each lot or parcel of land assessed, and a reversal of such judgment has no effect upon other pieces of property not included in the appeal.<sup>53</sup>

— Judgment of sale.

**637.** A judgment of sale for unpaid installments of a special assessment must refer to the tracts contained in the delinquent list which precedes the judgment, or by setting out in the judgment a particular description of the tracts against which it is entered, or proper reference to the list for amount due, or it is void.<sup>54</sup> It must be certain in amount, and is defective where there are no characters to indicate what the columns of numerals represent, or are designed for, where there is no reference therein to the delinquent list or anything in the record from which it can be said they stand for dollars and cents, and where the judgment does not, either in terms or by reference, find or state the several amounts for which it was rendered.<sup>55</sup> Objec-

121; *Alexander v. Tacoma*, 35 Wash. 366, 77 Pac. 686.

<sup>52</sup> *Kline v. Tacoma*, 11 Wash. 193, 39 Pac. 453.

<sup>53</sup> *Kelly v. Chicago*, 148 Ill. 90, 35 N. E. 752; *Phelps v. Mattoon*, 177 Ill. 169, 52 N. E. 288; *Chicago v. Nodeck*, 202 Ill. 257, 67 N. E. 39; *Goldstein v. Milford*, 214 Ill. 528, 73 N. E. 758; *Harman v. People*, 214 Ill. 454, 73 N. E. 760.

<sup>54</sup> *Gage v. People*, 207 Ill. 615, 69 N. E. 635.

<sup>55</sup> *Gage v. People*, 213 Ill. 347, 72 N. E. 1062.

A judgment of sale simply marked "O. K.," and signed with the initials of the county judge, is not signed as required by the statute. *Gage v. People*, 219 Ill. 20, 76 N. E. 56. The absence of the dollar mark therein is fatal. *Id.* *Judgment of sale.*

Want of notice appearing on the record will defeat application for. *Phillips v. People*, 218 Ill. 450, 75 N. E. 1016.

*Application for judgment.*

The collector's report with proof of publication and notice of appli-



tions of a nature to annul the judgment of confirmation and defeat the assessment may be made upon application for judgment of sale, if the facts upon which they are based have arisen since the judgment of confirmation.<sup>56</sup>

**638.** An application for a judgment and order of sale for an unpaid special assessment is an independent proceeding, and all matters preceding such application are *res judicata*, and not open to investigation.<sup>57</sup> The failure of a special assessment to state the nature, character, locality and description of the improvement is not a proper defense in an application for judgment of sale for a delinquency, unless the failure to comply with the statute in that regard is so great as to render the ordinance absolutely void.<sup>58</sup>

#### — Validity of Confirmation.

**639.** A statutory provision requiring a special assessment to be completed and confirmed within four months after receiving an order to condemn, is mandatory, and jurisdiction is lost if the assessment be not confirmed within that time.<sup>59</sup> An agreement between a city and objecting property owner that the objector shall allow the assessment to be confirmed, and that in case the contract price of the im-

cation for judgment of sale, makes a *prima facie* case in Illinois. *People v. Lyon*, 218 Ill. 577, 75 N. E. 1017. See, also, *Sedalia v. Montgomery* (Mo. App.), 88 S. W. 1014.

Notice of delinquency or demand for payment must be shown on application for sale. *Marshall v. People*, 219 Ill. 99, 76 N. E. 70; *Nowlin v. People*, 216 Ill. 543, 75 N. E. 209. In Indiana, notice may be either verbal or written. *Ross v. Van Natta*, 164 Ind. 557, 74 N. E. 10.

The following objections cannot be urged on application for judgment of sale: That cobblestones

were not of the size called for; *People v. Bridgeman*, 218 Ill. 568, 75 N. E. 1057. Sidewalk a few inches shorter than called for, and some people thought the stone too soft; *Marshall v. People*, 219 Ill. 99, 76 N. E. 70.

<sup>56</sup> *People v. Whidden*, 191 Ill. 374, 56 L. R. A. 905, 61 N. E. 133.

<sup>57</sup> *Lehmer v. People*, 80 Ill. 601; *Gage v. People*, 213 Ill. 410, 72 N. E. 1084.

<sup>58</sup> *People v. Ryan*, 156 Ill. 620, 41 N. E. 180; *Walker v. People*, 169 Ill. 473, 48 N. E. 694.

<sup>59</sup> *State v. District Court*, 75 Minn. 292, 77 N. W. 968.



provement is less than the commissioners' estimate, or judgment against his lot shall be vacated, and judgment for the exact amount entered, does not invalidate the assessment.<sup>60</sup> But the city must act in good faith after the confirmation of the assessment, as well as before. After a special assessment has been regularly confirmed and contract let to one who has agreed to look solely to such assessment for his pay, the city cannot stay further proceedings on the improvement by order, as that would impair the obligation of the contract.<sup>61</sup> But the passage of an ordinance directing the stay of proceedings of a special assessment for a year will not prevent judgment enforcing such assessment against the lot owner, where the council subsequently directs the letting of contracts and proceeds under the same judgment of confirmation.<sup>62</sup> And an ordinance for a pavement 53 feet wide, passed after the confirmation of an assessment made pursuant to a prior ordinance for a pavement on the same street 61 feet wide, is an abandonment of the former proceeding and requires new estimate, levy of assessment and confirmation.<sup>63</sup>

## DAMAGES.

### In General.

**640.** In their anxiety to improve the cities under their respective charge without trenching on the public funds, but having in mind what easy prey the average landowner is, the system of special assessment is especially attractive to public officers having charge of public improvements. They enlarge greatly upon the subject of benefits, while touching very lightly on the momentous question of damages. Al-

<sup>60</sup> *Billings v. Chicago*, 167 Ill. 337, 47 N. E. 731.

<sup>61</sup> *Clingman v. People*, 183 Ill. 339, 55 N. E. 727.

<sup>62</sup> *Wisner v. People*, 156 Ill. 180, 40 N. E. 574.

<sup>63</sup> *Pells v. People*, 159 Ill. 580, 42 N. E. 784.

The intentional act of a city in assessing owners for paving part of a street which a railroad company was legally bound to pave is a fraud against such owners. *Chicago v. Nodeck*, 202 Ill. 257, 67 N. E. 39.



though very eminent authority has held that the board of public works of a city, acting under the sanction of an official oath, is a fair and impartial tribunal to assess damages caused to private property by a public improvement,<sup>64</sup> yet from a practical standpoint this statement is certainly open to criticism. Public officials naturally side with the corporation whose money pays them, and it is essential to a proper administration of justice that the courts should scrutinize the questions as to damages that constantly arise with at least as great care as any question that comes before them under this system.

— **Determination of authorities on.**

**641.** The determination of the city authorities as to whether property is damaged or not, is not conclusive upon the property owner. He is entitled to his day in court to obtain in an appropriate action at law all such special damages to his property, contra-distinguished from damages he suffers in common with the public, as will be occasioned by the proposed improvement.<sup>65</sup> He is entitled to the damages ascertainable by and under the rules of law, and not those which too parsimonious officials may feel it their duty to award. Where there is a total disregard of statutory provisions regarding a special assessment, it is in law a substantial error, making it unnecessary for the party complaining to show actual damage.<sup>66</sup> Abutting owners have the right appurtenant to their property of access to it over the adjacent streets and alleys, and this right is as inviolate as the right to the property itself.<sup>67</sup> Under a constitutional provision against taking or *damaging* private property for public use without just compensation, recovery may be had in all cases where private property has sustained a substantial

<sup>64</sup> *State v. Oshkosh*, 84 Wis. 548, 54 N. W. 1095.

<sup>65</sup> *Parker v. Catholic Bishop*, 146 Ill. 158, 34 N. E. 473.

<sup>66</sup> *In re Emigrant Ind. Sav. Bk.*, 75 N. Y. 388.

<sup>67</sup> *Sherlock v. Kansas City B. R. Co.*, 142 Mo. 172, 64 Am. St. Rep. 551, 43 S. W. 629.



injury from a public improvement, whether the damages are direct in their nature, as when caused by a trespass or some physical invasion of the property, or are merely consequential as in a decrease in market value.<sup>68</sup> A charter provision requiring damages to be ascertained before ordering a street to be graded is mandatory.<sup>69</sup> Where a property owner erects a house upon his lot after the confirmation of a plan fixing the grade of the street, he can recover for injury done by the grading to the land, but not for injury done to the house.<sup>70</sup> And if the injury can be shown to have been the result of the negligence or unskillfulness of the city or its employees in performing the work, then an action will lie, and the party injured will be entitled to damages.<sup>71</sup> If the grade of a street has been changed by the city without authority, the lot owner who suffers injury because of such change is not debarred by mere silence from recovering his damages.<sup>72</sup>

#### — Liability for damages.

**642.** The doctrine is well settled that municipal corporations, acting under authority conferred by the legislature to make and repair, or to grade, level and improve streets, if they exercise reasonable care and skill in the performance of the work, are not answerable to the adjoining owner for consequential damages to his premises.<sup>73</sup> But where property fronting on a public street is damaged by the method or manner adopted by the authorities in permanently grad-

<sup>68</sup> *Chicago v. Taylor*, 125 U. S. 161, 31 L. ed. 638, 8 Sup. Ct. Rep. 820.

<sup>69</sup> *John v. Connell*, 61 Neb. 267, 85 N. W. 82.

<sup>70</sup> *Groff v. Philadelphia*, 150 Pa. St. 594, 24 Atl. 1048.

<sup>71</sup> *Wegmann v. Jefferson*, 61 Mo. 55.

Where a municipal corporation in grading a street so negligently excavates the earth that the abutting land is deprived of lateral

support to such a degree that buildings and improvements thereon suffer injuries to which their own weight has not contributed, damages may be recovered therefor. *Parke v. Seattle*, 5 Wash. 1, 20 L. R. A. 68, 34 Am. St. Rep. 839, 31 Pac. 310, 32 Pac. 82.

<sup>72</sup> *Jorgensen v. Superior*, 111 Wis. 561, 87 N. W. 565.

<sup>73</sup> *Drummond v. Eau Claire*, 85 Wis. 556, 55 N. W. 1028.



ing such street, the corporation is liable to the owner of such property for the damages.<sup>74</sup> A city may be liable for damages caused by the grading of a street, even though done in accordance with the provisions of a grade ordinance, if thereby the natural drainage is destroyed, and no adequate means is provided for the escape of surface water.<sup>75</sup> It cannot avoid liability to an abutting owner for the removal of shade trees in the street in front of his property, on the ground that they were a nuisance and obstructed travel, where it assumed to act under invalid proceedings to fix a grade;<sup>76</sup> and is liable for the loss caused by a destruction of the lateral support of the land adjoining his lot, even before the adoption of the constitutional provision requiring compensation for "damaging" private property.<sup>77</sup> It is liable for damages caused to plaintiff's property by grading a street just as a private owner is, and the right to inflict damage beyond that which a private owner might have inflicted without liability does not exist. A city is authorized to grade, but without exercising the right of eminent domain is not authorized to encroach on private property when so doing. It cannot excavate to the full width of a street on a side hill, placing the slope thereof on adjoining lots, to their injury or impairment.<sup>78</sup> Where the improvement is of such an extraordinary character as to peculiarly and seriously injure the property of adjoining owners, instead of making them do the work at their own expense, it should not be done at all without compensation to them. There is no hardship in such a rule, for if the improvement is of great public util-

<sup>74</sup> *Omaha v. Flood*, 57 Neb. 124, 77 N. W. 379.

<sup>75</sup> *Ellis v. Iowa City*, 29 Ia. 229; *Ross v. Clinton*, 46 Ia. 606, 26 Am. Rep. 169; *Morris v. Council Bluffs*, 67 Ia. 343, 56 Am. Rep. 343, 25 N. W. 274; *Wilbur v. Fort Dodge*, 120 Iowa, 555, 95 N. W. 186.

<sup>76</sup> *Blanden v. Fort Dodge*, 102 Ia. 441, 71 N. W. 411.

<sup>77</sup> *Dyer v. St. Paul*, 27 Minn. 457; *Parke v. Seattle*, 5 Wash. 1; *Washburn on Easements*, Ch. 4, Sec. 1.

<sup>78</sup> *Munger v. St. Paul*, 57 Minn. 9, 58 N. W. 601; *Damkoehler v. Milwaukee*, 124 Wis. 144, 101 N. W. 706.



ity, it will not be an onerous burden for the public to bear; and if the damages are great, they should not be imposed on the individual proprietors.<sup>79</sup> A paving contractor who unnecessarily destroys or takes up shade trees is liable in damages to the owner of the property.<sup>80</sup> A city authorized to construct a levee to reclaim lands subject to overflow, constructed it across half of plaintiff's land abutting a river, narrowing the channel, and refused to continue the levee along that portion of the land which was low and subject to overflow. The city was held liable for the damages caused by the compressed and accumulated waters of the river overflowing such low banks in time of freshet.<sup>81</sup>

<sup>79</sup> Lot-owners in cities may be presumed to have purchased in contemplation of the power of local authorities to make such improvements as are ordinary and useful, at their own expense; but when the improvements are of an extraordinary character, and so peculiarly injurious to the proprietors as to result in a greater or less deprivation of the use of their property, such improvements should not be made without compensation. *Louisville v. Louisville R. M. Co.*, 3 Bush, 416, 96 Am. Dec. 243.

<sup>80</sup> *New Orleans v. Wire*, 20 La. Ann. 500.

<sup>81</sup> Plaintiff did not waive his claim for damages by having favored the work, by offering to give the right of way for the levee, or by refusing to give such right of way until the levee was so extended as to protect his low lands. *Barden v. Portage*, 79 Wis. 126, 48 N. W. 210.

*Special benefits — Meaning of term.*

"The term 'special benefits'

implies benefits such as are conferred specially upon private property by public improvement, as distinguished from such benefits as the general public is entitled to receive therefrom. . . . If the improvement should result in an increase in the value of adjacent property, which increase is enjoyed by other adjacent property owners, as to the property of each exclusively, the benefit is special, and it is none the less so because several adjacent owners derive, in like manner, special benefits, each to his own individual property. Such fact, if it exists, in no respect decreases the increment in value enjoyed by one of the adjacent property owners, and by way of offset such an increment should therefore be treated as a special benefit in favor of whomsoever it may arise." *RYAN, J.*, in *Kirkendall v. Omaha*, 39 Neb. 1, 57 N. W. 752. *Verdict where benefits less than damages.*

On application to confirm a special assessment, the jury should



— When city not liable.

**643.** The taking of an alley for a street cannot be said to damage abutting property, as the street will furnish the same access to the lots as the alley.<sup>82</sup> The lot owner is not entitled to damages for fallen fences, or grading a lot to make it conform to the grade of the pavement.<sup>83</sup> No remedy exists at common law to recover for injury and damage to abutting property caused by bringing streets into conformity with an established grade. Such liability is wholly statutory. But after a street grade has been duly established, the actual work of doing the grading without a resolution directing such work to be done, creates no new liability to an abutting owner, and the council may subsequently ratify the work already done.<sup>84</sup> Where a city, in changing the grade of a street, confines the improvement to the boundary of the street, and interferes with no private rights of air, light or access, the incidental injury to the lot-owners would be of that class of misfortunes for which no remedy is afforded by law.<sup>85</sup> A city is not liable for any damages occasioned

not in case they find the benefits to the land to be less than the assessment thereof render a general verdict for the defendant, but they should be required to report by their verdict the amount of benefits as found by them. *I. C. R. Co. v. Chicago*, 141 Ill. 509, 30 N. E. 1036.

*Verdict less than evidence — Not set aside on appeal.*

In an action against a city authorizing a lot owner to recover damages for the change of an established grade, where witnesses, whom the jury were at liberty to believe, have given evidence as to plaintiff's damages estimating them at a sum greater than the verdict, it will not be set aside on appeal as excessive. *Church v. Milwaukee*, 34 Wis. 66.

But in ordinary actions to recover damages for trespass upon the land of the plaintiff, the injury is a wrong which is to be compensated by allowing the actual damage sustained by plaintiff up to the time suit was brought. This compensation is ascertained by proving the precise and actual damage done by defendant to plaintiff's land. *McGettigan v. Potts*, 149 Pa. St. 159, 24 Atl. 198, op.

<sup>82</sup> *Fagan v. Chicago*, 84 Ill. 227.

<sup>83</sup> *Greensburg v. Young*, 53 Pa. St. 280.

<sup>84</sup> *Reilly v. Fort Dodge*, 118 Ia. 633, 92 N. W. 887.

<sup>85</sup> *Louisville v. Louisville R. M. Co.*, 3 Bush, 416, 96 Am. Dec. 243.



to an abutting property owner by cutting down the street in front of his premises, when done for the purpose of bringing the street to an established grade, which grade can be established only by a valid ordinance.<sup>86</sup> Where a village took the steps necessary to authorize it to build a certain sidewalk, and the lot owner having refused to build the walk, the doing of the work by the village before the time at which it was permitted by charter to do it, is at most a technical trespass, for which only nominal damages may be recovered by the lot-owner, no actual damage being shown.<sup>87</sup>

#### — Damages from change of grade.

**644.** A statute authorizing the recovery of damages to improved property by reason of a change of grade, should be liberally construed. The improvement of a lot “according to the grade” of the adjacent street does not require that the foundations of buildings erected thereon shall be exactly at grade, or at any invariable elevation above or below it. Property is improved according to the established grade, within the meaning of the statute, whenever it is so improved that it can be comfortably and conveniently used for the purpose to which it is devoted while the street upon which it abuts is maintained at that grade. For any change in such established, the owner is entitled to recover damages.<sup>88</sup> The damages caused an abutting lot by a change of grade are complete when the grade is changed, and do not

<sup>86</sup> Markham v. Anamosa, 122 Iowa, 689, 98 N. W. 493; Mil-  
lard v. Webster City, 113 Ia. 220,  
84 N. W. 1044; Eckert v. Wal-  
nut, 117 Ia. 629, 91 N. W. 929;  
Reilly v. Fort Dodge, 118 Ia. 633,  
92 N. W. 887; Wilbur v. Fort  
Dodge, 120 Ia. 555, 95 N. W. 186.  
*Nonsuit — Nominal damages —  
Appeal.*

<sup>87</sup> Where the plaintiff is enti-

tled to recover only nominal dam-  
ages, and upon such recovery  
would be compelled to pay de-  
fendant's costs, a judgment of  
non-suit will not be reversed.  
Benson v. Waukesha, 74 Wis. 31,  
41 N. W. 1017.

<sup>88</sup> Stevens v. Cedar Rapids  
(Ia.), 103 N. W. 363; Conklin  
v. Keokuk, 73 Ia. 343, 35 N. W.  
444.



depend upon the subsequent use of the lot.<sup>89</sup> For an unlawful change in the grade of a street a city is liable to the owner of abutting property for all damage directly and proximately caused thereby, without reference to any resulting benefit.<sup>90</sup>

**645.** Statutes allowing the benefits resulting to a landowner from the construction of highways across his land to be offset against the value of the land taken to make such improvements, and the injury done to his adjoining lands, and providing that if the benefits exceed the damages, the balance shall be assessed upon his land — are valid as an exercise of the taxing power.<sup>91</sup>

**646.** Where abutting property is damaged by change of street grade and afterward it and all other property on the street increases in value from other reasons than the change of grade, until the value of the property in question is equal to what it was before the change, the latter fact will not preclude the owner from recovering damages.<sup>92</sup> Damages may be recovered in a case where abutting property is injured by grading done in a street where no grade has been legally established.<sup>93</sup>

**647.** A plaintiff's claim for damages because of change

<sup>89</sup> Eachus v. Los Angeles, etc., Co. 103 Cal. 614, 42 Am. St. Rep. 149, 37 Pac. 750.

<sup>90</sup> Drummond v. Eau Claire, 85 Wis. 556, 55 N. W. 1028.

In trespass *quare clausum*, the plaintiff may be entitled to consequential damages. 3 Sedgwick on Damages, Sec. 927.

<sup>91</sup> Holton v. Milwaukee, 31 Wis. 27.

<sup>92</sup> Cole v. St. Louis, 132 Mo. 633, 34 S. W. 469.

Where under a city charter an award has been made to an owner for damages caused to his house and lot by the alteration of a street grade in 1873, an assess-

ment made in 1888 cannot be levied against him for benefits supposed to accrue to the same house and lot from the same alteration. The first adjudication, that the premises are damaged by the change, concludes both parties, while it stands. Davis v. New-ark, 54 N. J. L. 595, 25 Atl. 336.

In this case the court permitted the charge for curbing and flagging to stand, as being legitimate subjects for assessment, and outside of the grading proper. *Id.* p. 597.

<sup>93</sup> Richardson v. Webster City, 111 Ia. 427, 82 N. W. 920.



of a previously established grade of a street is not released because he had signed a petition for a change when the new grade actually adopted was lower than that petitioned for.<sup>94</sup> An ordinance providing for a change of grade, although passed and approved before a new charter went into effect, was published afterwards, and the liability of the city for damages caused by such change is governed by the provisions of the new charter.<sup>95</sup>

**648.** The use to which a street might be put after a change of grade does not affect the damage caused by such change of grade; and the fact that it might receive a benefit from the construction and operation of a railway thereon is immaterial on the question of damages.<sup>96</sup> A city is liable for an unauthorized change of grade which causes surface water to accumulate on an abutting lot, or discharges water from the sewers into the basement of a building.<sup>97</sup> It is no objection that under a charter provision making the city liable to any lot owner for damages caused by a change of an established grade, that the owner did the work himself in an obedience to an order duly made by the proper officers.<sup>98</sup> If a statute permits the recovery of damages resulting from an authorized change of grade of a street, and provide specific means for recovering it, other than an ordinary civil action, the statutory remedy is *exclusive*.<sup>99</sup> But an action at law will lie against a city for injuries to property caused by an unauthorized grading of the street.<sup>1</sup> And under a charter provision allowing damages for cutting and filling caused by a change of grade, it is only when it becomes necessary, by reason of the altered grade, to change

<sup>94</sup> *Luscombe v. Milwaukee*, 36 Wis. 511.

<sup>95</sup> *Smith v. Eau Claire*, 78 Wis. 457, 47 N. W. 830.

<sup>96</sup> *Eachus v. Los Angeles, etc.* R. Co., 103 Cal. 641, 37 Pac. 648.

<sup>97</sup> *Elgin v. Kimball*, 90 Ill. 356; *Addy v. Janesville*, 70 Wis. 401, 35 N. W. 931.

<sup>98</sup> *Pearce v. Milwaukee*, 18 Wis. 429.

<sup>99</sup> *Dore v. Milwaukee*, 42 Wis. 108; *Owens v. Milwaukee*, 47 Wis. 461, 3 N. W. 3.

<sup>1</sup> *Meinzer v. Racine*, 68 Wis. 241, 32 N. W. 139, S. C. 70 Wis. 561, 36 N. W. 260; *Dore v. Milwaukee*, 42 Wis. 108.



the surface of the premises, either by cutting or filling, to adjust them to the new grade, that the cost of such change of surface is to be considered in the estimate of damages.<sup>2</sup> Under a charter providing that no street shall be graded without a recommendation in writing signed by a majority of the resident owners of property situate thereon, the grading of the street by order of the council without such a recommendation renders the city liable to a lot owner for injury to his lot from such grading.<sup>3</sup>

**649.** Damages are not recoverable for a change of grade merely ordered, and not made.<sup>4</sup> One who purchases a lot on a street having an established grade, and makes improvements with reference to the natural grade, cannot recover damages resulting to the improvement by the street being worked to the established grade.<sup>5</sup> A provision in a former charter making the city liable for damages caused by a

<sup>2</sup> *Tyson v. Milwaukee*, 50 Wis. 78, 5 N. W. 914; *Church v. Milwaukee*, 31 Wis. 512; *Stowell v. Milwaukee*, 31 Wis. 523.

<sup>3</sup> *Crossett v. Janesville*, 28 Wis. 421.

<sup>4</sup> *Tyson v. Milwaukee*, 50 Wis. 78, 5 N. W. 914.

And where a change by raising an established grade was ordered in 1864, and not made; and in 1872 the grade was again changed and raised, the person who at the latter date owned the property effected, and also owned it later when the change was actually made, was entitled to the whole damage. *Id.*

A statute which declares that when a street grade has once been established, and abutting property improved in accordance therewith, and such grade is thereafter altered so as to injure the abutting property so improved, does not

apply to a case where the abutting owner improved his property without reference to the established grade, and he is entitled to no damages by the filling of the street to the new grade. *Reilly v. Fort Dodge*, 118 Iowa, 633, 92 N. W. 887.

Under a charter giving the owner of land affected by a change of grade of any street a right to compensation therefor, where such change was made after a permanent grade had been established, and "after such street shall have been actually graded to such established grade," the actual grading of the street to the grade first established is a condition precedent to the right to recover damages occasioned by the change. *Walish v. Milwaukee*, 95 Wis. 16, 69 N. W. 818.

<sup>5</sup> *Omaha v. Williams*, 52 Neb. 40, 71 N. W. 970.



change of the street grade, is inconsistent with and repealed by a new charter which contains no such provision and which repeals all acts or parts of acts inconsistent therewith.<sup>6</sup>

<sup>6</sup> *Smith v. Eau Claire*, 78 Wis. 457, 47 N. W. 830.

*Grading several years after assessment.*

"Where the grading occurs as a separate act of the public authorities, and so long after the opening of the street that the assessment of damages at the time of the appropriation, cannot include those resulting from the grading, the latter may be ascertained by a second view." *Pusey v. Allegheny City*, 98 Pa. St. 522.

*Liability for, under ordinance.*

Where a common council fixed the grade of a street by an ordinance which also provided that in case any buildings were erected on such street by any person that the faith of the city was pledged that the grade should not be altered to the injury of such person, and five years later a subsequent ordinance lowered the grade twenty feet, the city was held liable for the damage caused by the change. *Goodall v. Milwaukee*, 5 Wis. 32.

*Opinion of witness as to benefit or injury.*

In an action against a city under its charter for damages caused by a change of grade, a question asked of defendant's witnesses as to whether plaintiff's property was injured or benefited by such grading, is, in that form, inadmissible. *Church v. Milwaukee*, 31 Wis. 513.

*Failure of city to fix all grades.*

A city charter (in 1852) re-

quired the council to make a survey of the streets, etc., and, as soon as practicable thereafter, to cause the grade of *all* streets to be established, and cause profiles thereof to be made and filed, etc., and provided that should the grade so established be afterward altered, the city should be liable to lot owners for resulting damages. In 1853, and again in 1861, special ordinances were passed, fixing the grade on a certain street, and requiring lot-owners to pave upon such grade. It was held that the city was liable to a lot-owner for injuries to his lot resulting from a subsequent change of grade, though it had never complied *generally* with the charter by fixing the grade of *all* streets. *Goodrich v. Milwaukee*, 24 Wis. 422.

*Proof necessary to establish change of grade.*

In an action against a city under its charter, for damages caused by a change of grade of a street, proof of the passage of the various ordinances first establishing the grade and then changing it, with plaintiff's testimony that he graded the street in each case to conform to such ordinances, and that the grading was done, in each case, under the superintendence of the city engineer, is sufficient, without showing by the record any order of the common council to execute the grade, or any other proceedings required by the charter. *Church v. Milwaukee*, 31 Wis. 512.



— Ordinance does not cause damage.

**650.** The mere passage of an ordinance providing for change of grade of a street is not of itself sufficient to give rise to an immediate cause of action on the part of an abutting property owner, the reason for the rule being that the passage of the ordinance causes no injury, and the city may never attempt to carry it out by actually changing the level of the street.<sup>7</sup> And although the owner's right of action does not accrue until the ordinance providing for the change is followed by a physical change in the street surface, yet such owner may change his premises to correspond to such newly established grade before the actual physical change, and bring his action after the change is actually made.<sup>8</sup>

— Damages for taking.

**651.** The rule of damages for property taken under the power of eminent domain is well settled, and under this

<sup>7</sup> *Hempstead v. Des Moines*, 63 Ia. 36, 18 N. W. 676; *Stritesky v. Cedar Rapids*, 98 Ia. 373, 67 N. W. 271; *Buser v. Cedar Rapids*, 115 Ia. 685, 87 N. W. 404; *York v. Cedar Rapids (Ia.)*, 103 N. W. 791.

<sup>8</sup> *Stevens v. Cedar Rapids (Ia.)*, 103 N. W. 363; *Conklin v. Keokuk*, 73 Ia. 343, 35 N. W. 444; *Ogden v. Philadelphia*, 143 Pa. St. 430, 22 Atl. 694; *Jones v. Bangor*, 144 Pa. St. 638, 23 Atl. 252; *O'Brien v. Philadelphia*, 150 Pa. St. 589, 30 Am. St. Rep. 832, 24 Atl. 1047; *Bush v. Keesport*, 166 Pa. St. 57, 30 Atl. 1023; *Dickerman v. N. Y., N. H. & H. R. Co.*, 72 Conn. 271, 44 Atl. 228. See, also, *Walish v. Milwaukee*, 95 Wis. 16, 69 N. W. 818.

"The damage sustained by the plaintiffs was caused by the actual grading of the street, and not by the ordinance fixing the grade.

Until the physical condition of the street was changed their lot had received no actual damage for public use. The enactment of the ordinance rendered it possible that the street would at some time be reduced to that grade, but a mere paper change of grade did not affect the condition of the lot or impair its use or enjoyment. Any diminution in value that it might sustain from the mere passing of the ordinance was purely speculative and contingent upon the time when grading should be done, and would no more constitute the damage contemplated by the constitution than would a diminution in its value resulting from excessive taxation or the creating of a municipal debt. *Eachus v. Los Angeles, etc., R. Co.*, 103 Cal. 621, op. 42 Am. St. Rep. 149, 37 Pac. 750.



head only such part of the law as is applicable to special assessment proceedings will be considered. The question as to whether benefits assessed can be offset against property taken or damaged, is still an open one, depending upon the construction given by the local courts to the constitutional provisions of the various states. But in any event, the benefits sought to be set off against damages to land not sought to be condemned, must be real and not problematical. Otherwise the constitutional safe-guard is rendered of no avail to protect the citizen in the enjoyment of his property, free from being damaged for public use without just compensation.<sup>9</sup> In Ohio, it is held that compensation paid for land taken to open a street cannot be assessed back upon the lands of the owner remaining after such taking, nor the costs and expenses of the proceeding.<sup>10</sup> The Washington statute that no lot or tract of land found by the jury to have been damaged shall be assessed for benefits, relates to an entire tract no part of which has been taken by condemnation, or to a remaining tract which is actually damaged by taking a part.<sup>11</sup> The ascertainment of just damages to an owner for taking away a part of his lot, of necessity involves the consideration of the value of the whole property intact, and the value of the part not taken, after the proposed part shall have been taken.<sup>12</sup> In estimating value of land taken, refer-

<sup>9</sup> An estimate of benefits upon the basis that a proposed street is to be improved through or over a tract of land which is low, wet and marshy, so as to give ready access to all parts of it and thereby make it desirable for the location and operation of manufacturers without even a proposal on the part of the city to so construct it, and without any legal obligation whatever resting upon the city to do more than open it, is improper and cannot be received as a

set-off to the damages resulting to the part of the land not taken.

Washington Ice Co. v. Chicago, 147 Ill. 327, 37 Am. St. Rep. 222, 35 N. E. 378.

<sup>10</sup> C., L. & N. R. Co. v. Cincinnati, 62 O. St. 465, 49 L. R. A. 566, 57 N. E. 229, overruling Cleveland v. Wick, 18 Ohio St. 303; Dayton v. Bauman, 66 Ohio St. 379, 64 N. E. 433.

<sup>11</sup> Quirk v. Seattle, 38 Wash. 25, 80 Pac. 207.

<sup>12</sup> Bloomington v. Miller, 84 Ill.



ence may be had to the uses to which the land is actually applied, and its capabilities.<sup>13</sup>

**652.** One whose land is taken for a local improvement has a constitutional right to allowance of compensation for buildings erected thereon intermediate the adoption of the plan and the opening of the street.<sup>14</sup> And where a municipality commences proceedings for opening a street, and warns a lot proprietor against continuing improvements already begun, and he is thereby delayed and damaged by the loss of rents he would have received had he been permitted to finish the buildings, it is responsible to him for the damage sustained, in case of the discontinuance of the street opening proceedings.<sup>15</sup>

**653.** For the purpose of determining the damage resulting to the owner of a lot abutting a street, by reason of the impairment of his easement of access, it is immaterial whether he have the fee in the street or only an easement for its use,<sup>16</sup> while in opening a street, the jury should apportion the damage awarded among owner, mortgagee, lessee, &c., so each can receive a warrant for the specific sum to which he was entitled.<sup>17</sup> The fact that damages to one whose property is taken for public use, have not been paid, does not affect the right of the corporate authorities to make an assessment to pay the cost of doing the work.<sup>18</sup> Where land is taken for widening the channel of a navigable river, the owner cannot claim as damages the cost of so dredging or removing the soil as to give his remaining land the same water front as before; it being the purpose of such taking that such dredging and removal be done by the city, and

621; *Hyde Park v. Dunham*, 85 Ill. 569; *Green v. Chicago*, 97 Ill. 370.

<sup>13</sup> *Haslam v. G. & S. W. R. Co.*, 64 Ill. 353.

<sup>14</sup> *Matter of opening Rogers Ave.*, 29 Abb. N. C. 361.

<sup>15</sup> *McLaughlin v. Municipality* No. 2, 5 La. An. 504.

<sup>16</sup> *Eachus v. Los Angeles, etc.*, Co., 103 Cal. 614, 42 Am. St. Rep. 149, 37 Pac. 750.

<sup>17</sup> *Rentz v. Detroit*, 48 Mich. 544, 12 N. W. 694, 911.

<sup>18</sup> *Duncan v. Ramish*, 142 Cal. 686, 76 Pac. 661.



the owner being liable to an assessment for the cost thereof to an amount not greater than the benefit to him of such improvement.<sup>19</sup> And if the municipality holds the legal title to school property in trust for educational purposes, and not for general municipal purposes, it is proper and right, in a proceeding to lay out and open a street over such property to assess damages for the property so taken.<sup>20</sup>

### — Measure of — In general.

**654.** When private property is damaged by a public improvement, the measure of damages is the difference in value with the public improvement and without it, not considering general benefits shared by the general public. Special and peculiar advantage which the property receives from the improvement is to be considered in determining whether there is injury or not. In other words, special benefits to the property may be set-off against the damages sustained by the owner.<sup>21</sup> Where property is damaged by the grading of a street, the owner's measure of damages is the de-

<sup>19</sup> *Holton v. Milwaukee*, 31 Wis. 27.

<sup>20</sup> *Fagan v. Chicago*, 84 Ill. 227. *When verdict will not be disturbed.*

A verdict for damages in a condemnation proceeding will not be disturbed on appeal, where the evidence is conflicting and the jury has viewed the premises. *C. & A. R. R. Co. v. Pontiac*, 169 Ill. 155, 48 N. E. 485.

*Removing dangerous building.*

Where the commissioners took into consideration the fact that the improvement of opening an alley would remove a large barn because in "dangerous proximity to a portion of the property assessed," the advantages resulting from the removal were not of a character so remote, uncertain and conjectural

as to vitiate the assessment because they were considered. *People v. Mayor of Syracuse*, 63 N. Y. 291.

*Compensation must be made to owner.*

When a street is opened by public authority without the owner's consent, compensation must be made to such owner. This requirement is not met by showing an award to an occupant having the same surname as the owner, although intended for the latter. Compensation in fact must be shown. *Hood v. Finch*, 8 Wis. 381.

<sup>21</sup> *Lowe v. Omaha*, 33 Neb. 587, 50 N. W. 760; *Barr v. Omaha*, 42 Neb. 341, 60 N. W. 591; *Kirkendall v. Omaha*, 39 Neb. 1, 57 N. W. 752.



preciation in value of his property caused by the construction and permanent maintenance of the grade.<sup>22</sup>

**655.** It may be accepted as the general rule of damages for an illegal grading of the street that it is the difference between the value of the property before the street was cut down, and the value thereafter; and the expense of moving a house from the injured property is not improperly included when, if left, it was in danger of falling, and thereby increase defendant's liability.<sup>23</sup> For in a case where buildings on the line of the grading of a street or alley in a city are threatened with injury therefrom greatly in excess of the expense of protecting them, the owner is bound to use reasonable exertion and necessary expense in protecting them, and the damage should be measured by such expense and exertion.<sup>24</sup> Damages should include the value of improvements put on property between the time of making the report and its adoption by the council.<sup>25</sup>

**656.** In assessing benefits for a street improvement, the jury may not indulge in vague speculations or conjectures, but should only assess such benefits, if any, as it is fairly and reasonably apparent the property will receive from the proposed improvement, other than the general benefit to the community; and that nothing is to be considered as a benefit which does not enhance the value of the property.<sup>26</sup> The

<sup>22</sup> For the purpose of ascertaining the amount of damages sustained by a property owner from the grading of a street, the fact that the grade as constructed and maintained, obstructs and will continue to obstruct, the owner's passage between his property and the street, decreases the rental value, interferes with his enjoyment and possession thereof, and every other fact and circumstance that would depreciate the market value of the property in the mind of a good, faith intending purchaser thereof, are proper elements of considera-

tion. *Omaha v. Flood*, 57 Neb. 124, 77 N. W. 379.

<sup>23</sup> *Friedrich v. Milwaukee*, 118 Wis. 254, 95 N. W. 126.

<sup>24</sup> *Kansas City v. Morton*, 117 Mo. 446, 23 S. W. 127.

<sup>25</sup> *Portland v. Lee Sam*, 7 Ore. 397.

<sup>26</sup> Increased facilities for travel, enjoyed by the property owner in common with the community in general, is not a proper element to be considered by a jury in making their estimate of damage. *Friedenwald v. Mayor, etc.*, 74 Md. 116, 21 Atl. 555.



damage to property is the pecuniary loss or injury which lessens its value. Every element arising from the construction and operation of the public improvement, which in an appreciable degree, capable of ascertainment in dollars and cents, enters into the diminution or increase of the value of the particular property, is proper to be taken into consideration in determining whether there has been damage, and the extent of it.<sup>27</sup> In arriving at this, it is proper for the jury to consider what may be presented to their minds by and through their personal view and inspection of the premises, as the facts and circumstances brought to their knowledge through the medium of witnesses who testified in the case.<sup>28</sup> On a special assessment proceeding when land is restricted by statute to a particular use as for railroad purposes, and cannot be applied to any other use, the measure of the benefit which an improvement will confer on the land is its increased value for the special use to which it may be by statute restricted.<sup>29</sup>

**657.** The destruction of shade trees along the sidewalk may be considered as an element of the damage resulting to abutting property from a change of grade, or an illegal grade.<sup>30</sup> The value of the property for subdivision purposes may be shown, and its present use and future possibilities, but without regard to probable increase by reason of the improvement.<sup>31</sup> Where the landowner sues to recover damages caused by a municipality making an open stream a part of its sewer system, and the injury is a permanent one, the measure of damages is the difference between the value of the property before such injury and its market value afterwards.<sup>32</sup>

<sup>27</sup> Metropolitan W. S. E. R. Co. v. Strickney, 150 Ill. 362, 26 L. R. A. 773, 37 N. E. 1098.

<sup>28</sup> Sanitary Dist. v. Cullerton, 147 Ill. 385.

<sup>29</sup> Ill. Cent. R. Co. v. Chicago, 141 Ill. 509, 30 N. E. 1036.

<sup>30</sup> Walker v. Sedalia, 74 Mo. App. 70.

<sup>31</sup> South Park Com'rs v. Dunlevy, 91 Ill. 49; Chicago & E. R. Co. v. Jacobs, 110 Ill. 414.

<sup>32</sup> Carpenter v. Lancaster, 212 Pa. 581, 61 Atl. 1113.



— Measure of — Change of grade.

**658.** The amount of damages caused adjoining property by reason of the change of an established grade, to which grade the street has been graded, and the abutting property made to conform thereto, is usually fixed by the legislature. Under a charter giving to the lot owner the right to recover all damages, costs and charges arising from a change in the established grade of a street, to be paid by the city to any owner of a lot, parcel of land, or tenement, which may be affected or injured by such change of grade,—the damages recoverable include all necessary expenses in changing

*Non-expert evidence.*

The opinions of non-professional witnesses about the ordinary affairs of life are admissible in evidence in all cases where, from the nature of the question involved, its answer necessarily depends upon mere opinion. This is peculiarly so in questions as to value, time, distance, weight, etc. *Spear v. Drainage Com'rs*, 113 Ill. 632.

Persons who are well acquainted with the property, have considerable knowledge of the value of adjoining properties, and who own property themselves within a block or two of the property in controversy, are competent witnesses as to value. *South Omaha v. Ruthjen* (Neb.), 99 N. W. 240.

*Jury's view of premises.*

In considering the verdict of a jury on appeal, great weight will be given to the fact that the jury have examined the premises before making their verdict. *Stockton v. Chicago*, 136 Ill. 434, 26 N. E. 1095.

*Damages on appeal bond.*

In an action upon an appeal bond given on appeal from the

confirmation of a special assessment, the measure of recovery is the amount of the assessment, and nothing more, except the costs. *Kilgour v. Drainage Commissioners*, 111 Ill. 342.

As to power of legislature to fix measure of damages, see *Dorgan v. Boston*, 12 Allen, 223.

Compensation to be fixed as of the time of filing the petition, see *South Park Com'rs v. Dunlevy*, 91 Ill. 49.

*Dupuis v. C. & N. N. W. R. Co.*, 115 Ill. 97, 3 N. E. 720.

Market value — Present use, and that to which adapted, see *Kankakee, etc., Co. v. Kankakee*, 128 Ill. 173, 20 N. E. 670.

Elements of damages properly excluded, see *L. S. & M. S. R. Co. v. Chicago*, 148 Ill. 509, 37 N. E. 88, 91.

Damages — when too remote, see *Hyde Park v. Dunham*, 85 Ill. 569.

Damages — how estimated, *Portland v. Kamm*, 10 Or. 383; *Jones v. Seattle*, 23 Wash. 757, 63 Pac. 553, citing 3 *Sutherland on Dam. Sec. 1053*, 3 *Sedgwick on Dam.*, 8th Ed., Sec. 939.



the grade of the lot to make it conform properly to the new grade of the street, and the expense of repaving made necessary by the change; and it makes no difference that the lot is unimproved, and that the expense of conforming its natural grade to that finally established, has been no greater than it would have been if such final grade had been first adopted.<sup>33</sup> In determining whether or not a change of

<sup>33</sup> French v. Milwaukee, 49 Wis. 584, 6 N. W. 244.

Under a charter providing that "all damages, costs and charges" arising from a change of grade in a street "shall be paid by the city to the owner of any lot . . . injured" in consequence of such alteration, any *peculiar* or *special* benefit conferred upon plaintiff's lot (such as securing suitable drainage, not common to other lots in the neighborhood, and not increasing its market value) cannot be considered by the jury in fixing damages; but if the lot, in consequence of the changed grade, has become of greater value in common with the other property in that locality, the city is entitled to have such increase of value deducted in the estimate of damages. Church v. Milwaukee, 31 Wis. 512; Stowell v. Milwaukee, 31 Wis. 523.

Under a city charter providing that when the grade of a street has been once established, and is afterwards changed, "all damages, costs and charges arising therefrom shall be paid by the city to the owner of any lot or parcel of land, or tenement, which may be affected or injured in consequence of the alteration of such grade," in case of such change in the established grade, the owner of a lot affected thereby may recover

the expense of restoring his premises to their former position relative to the street. Church v. Milwaukee, 34 Wis. 66.

Under a charter which declares that where the *grade of a street*, once established, is afterwards changed, "all damages, costs and charges arising therefrom shall be paid by the city to the owner of any lot, or parcel of land, or tenement, which may be affected or injured" in consequence of such change, the right to damages in such case is purely statutory, is granted only to the owner of the land or building injured for injuries to the land or building itself, with costs necessary to restore it to its former usefulness, and not for injury to or suspension of the trade carried on upon the premises. Stadler v. Milwaukee, 34 Wis. 99.

In an action against a city for damages caused by the change of an established grade, where the adjacent street had been *graded down* several feet below the grade previously established, evidence as to the exact construction and situation of plaintiff's house on the premises; of the value of fruit and shade trees on the lot, the necessary grading down of which would destroy the trees and shrubbery thereon; of the estimates of



grade in the street will result in damage, it is proper to consider the cost of adjusting the property, with the buildings thereon, to the new grade, the damage to trees, if any, as well as the benefits which may accrue.<sup>34</sup> Evidence of the use to which property is devoted or for which it is suitable is admissible to ascertain damages caused abutting property by a change of grade.<sup>35</sup>

**659.** For damages caused abutting property by reason of the change of an established grade, made with due care and skill, there is no remedy at common law,<sup>36</sup> and to the statutes in each state must we turn for the measure of damages. We have seen what they are in Wisconsin,<sup>37</sup> and that is a fair representation of the general rule. But in those states whose constitutions allow compensation for property damaged for public use, the statute is not the sole authority for, nor the measure of the damage. In Illinois, the measure of damages for the change of grade is the difference or depreciation of the market value or which is the same thing, the damage less the benefits; but where the improvement so made is paid for in part by the owner of the property injured by way of special taxation, then another element necessarily enters into the computation of damages to be assessed in favor of such owner; for, unless the amount paid in order to secure the benefits set off against damage is taken into consideration and deducted from benefits by exactly that amount, damages recovered will fall short of being just

the city engineer showing the amount of excavation in front of the premises; and of the expense of lowering the house, outbuildings, etc., is admissible. *Church v. Milwaukee*, 34 Wis. 66.

Under a charter giving the lot-owner damages for change of an established grade, the city is entitled to the advantage of any *increase*, and the lot owner to additional damages for any *diminution*, in the *market value* of the

premises, caused by the change of grade. *Church v. Milwaukee*, 34 Wis. 66.

<sup>34</sup> *Seattle v. Board of Home Missions, etc.*, 138 Fed. 307; *Lewis on Em. Domain*, Secs. 217, 218g.

<sup>35</sup> *Seattle v. Board, etc., supra*. *Boom Co. v. Patterson*, 98 U. S. 403, 25 L. ed. 206.

<sup>36</sup> *Dore v. Milwaukee*, 42 Wis. 108; *Hanbner v. Milwaukee*, 124 Wis. 153.

<sup>37</sup> Note 33.



compensation.<sup>38</sup> In estimating damage to property caused by change of grade in a street, where no part of the private property is taken, the effect on the whole property should be considered, and not merely a part of it. Any general benefit, common to all other property affected by the work, should not be considered in determining whether the property is benefited as much as injured.<sup>39</sup>

**660.** If in changing the established grade, shade trees are necessarily destroyed, the effect of such destruction upon the market value of the whole property may be considered, but no distinct and separate sum can be assessed for such destruction.<sup>40</sup> But in an action for damages caused by a change of grade, the amount paid by plaintiff as a special tax on his premises for the improvement is an item of damage to be considered by the jury.<sup>41</sup> In the absence of statutory provisions on the subject, the difference in market value before and after the change of grade is the measure of damages.<sup>42</sup> The diminution in value of the property injured is a correct measure of the damages sustained. The cost of the improvements and changes necessary to restore the premises to a proper condition in relation to the new grade of the street is admissible as evidence affecting the question of the benefit to the property, but not as a substantive cause of damage.<sup>43</sup>

<sup>38</sup> *Bloomington v. Pollock*, 141 Ill. 346, 31 N. E. 146.

<sup>39</sup> *Shawneetown v. Mason*, 82 Ill. 337, 25 Am. Rep. 321.

<sup>40</sup> *Seaman v. Washington*, 172 Pa. St. 467, 33 Atl. 759.

<sup>41</sup> *Bloomington v. Pollock*, 141 Ill. 346, 31 N. E. 146.

<sup>42</sup> Upon the issue of the extent to which property is damaged by grading, evidence that the effect of the grading was to depreciate the value of the property, and the amount of the depreciation, is competent, in the absence of a spe-

cial objection as to the form of the question. *Eachus v. Los Angeles, etc., Co.*, 103 Cal. 614, 42 Am. St. Rep. 149, 37 Pac. 750.

<sup>43</sup> Persons injured by a change of grade are entitled to compensation for the net injury done them; to be made whole so far as money is a measure of compensation. This is the essential meaning of the term "just compensation," whether in reference to the constitutional guaranty, or as the basis of all general rules respecting damages. The special and pe-



— Measure of — Taking.

**661.** Where land is taken for a public improvement, the owner is entitled to the value of the land actually taken, without regard to any supposed benefits arising from the proposed improvement.<sup>44</sup> In proceedings to open and widen a street, the measure of damages is the value of the property immediately before the work was commenced, and the value immediately after the work was completed. This must be based upon the actual physical condition, discoverable by observation, and not a prospective or possible one depend-

ent benefits resulting to the owner from a change of grade must therefore be offset against the damages sustained. *Chase v. Portland*, 86 Me. 367, 29 Atl. 1104.

*Special v. General Benefits.*

All such benefits as come from the situation of the premises with reference to the change of grade, such as having a dry and pleasant street in front of his lot, and more convenient access to his store, are direct and special and must be set off against the damages, although other estates on the same street, may be benefited in like manner; but the general benefits arising from the improved facilities afforded by the street which affect equally all estates in the neighborhood, cannot be thus offset. *Chase v. Portland*, 86 Me. 367, 29 Atl. 1104.

*Instructions to jury.*

Where plaintiff in an action for damages for change of grade of street had not, at the time of the trial, adjusted his premises to such changed grade, it is not error to instruct the jury that he was entitled to recover what it would cost

him to put them in the same relative position to the street that they were in before the change of grade. *Stowell v. Milwaukee*, 31 Wis. 523.

*Damages — how estimated.*

Damages to abutting property from a change of grade should be estimated by deducting from the damages sustained the direct and peculiar benefits resulting to the tract in question, and not the general benefit that such tract would derive in common with the lands of other owners in the neighborhood. *Cole v. St. Louis*, 132 Mo. 633, 34 S. W. 469.

*Amount paid for previous grading to be considered.*

Under a city charter providing that the expense of grading a street and sidewalk in front of a lot is always chargeable to such lot, the amount paid by plaintiff for previous grading is a part of the "damages, costs and charges" which he may recover in an action for damages for altering the previously established grade. *Stowell v. Milwaukee*, 31 Wis. 523.

<sup>44</sup> *Harwood v. Bloomington*, 124 Ill. 48, 16 N. E. 91.



ing on future municipal action.<sup>45</sup> In giving evidence as to the value of land condemned, a witness may testify thereto "taking it as a part of the entire tract,"<sup>46</sup> and the purpose for which the property is used, and for which it is adapted, may be considered,<sup>47</sup> but damages cannot be allowed for injury to business caused merely by the improvement and not by the taking.<sup>48</sup> In proceedings to condemn a strip of land over lots for an alley, the measure of damages to the lots and buildings thereon is the difference in value before and after the alley is opened, and in determining that question it is proper to take into consideration any special benefits the property not taken will receive by the contemplated improvement.<sup>49</sup>

#### — To whom damages belong.

**662.** Damages caused by street improvements are a personal claim of the owner of the property at the time of the injury, and do not run with the land.<sup>50</sup> In case mortgaged property is damaged, the mortgagor is entitled to recover of the city the damages. But if the mortgagee's security be impaired by such change, it may be that equity would compel the mortgagor to apply the damages recovered upon the payment of the mortgage debt.<sup>51</sup>

#### — Consequential damages.

**663.** Where the change of grade in a street by reason of the construction of a viaduct therein is made under authority of law and with due care, the municipality is not liable for *consequential* injuries to abutting property, unless

<sup>45</sup> Markle v. Philadelphia, 163 Pa. St. 344, 30 Atl. 149.

<sup>46</sup> C., P. & M. R. Co. v. Mitchell, 159 Ill. 406, 42 N. E. 973.

<sup>47</sup> J. & S. E. R. Co. v. Walsh, 106 Ill. 253.

<sup>48</sup> San Francisco v. Kiernan, 98 Cal. 614, 33 Pac. 720; Stadler v. Milwaukee, 34 Wis. 98.

<sup>49</sup> Stockton v. Chicago, 136 Ill. 434, 26 N. E. 1095.

<sup>50</sup> Hilton v. St. Louis, 99 Mo. 199, 12 S. W. 657; Stadler v. Milwaukee, 34 Wis. 98.

<sup>51</sup> Tyson v. Milwaukee, 50 Wis. 78, 5 N. W. 914; In re Seattle, 26 Wash. 602, 67 Pac. 250.



made so by statute or the constitution.<sup>52</sup> The damages referred to in the constitution are direct and physical damages resulting from a taking of a portion of the land, and when no portion of the land is taken, the damages suffered are consequential, and condemnation proceedings are not required to be instituted to ascertain the same. It is sufficient to answer the constitutional requirement that a remedy is provided, for the recovery of such damages by an action at law.<sup>53</sup> Where the grade of a certain street over railroad tracks was raised pursuant to an agreement between the city, the railway companies, and others, and the city altered the grade in front of plaintiff's improved property, to his damage, and the necessary viaduct built by the railway companies, it was held that the city causing the work to be done was primarily liable for consequential damages, and the relations between it and the parties doing the work were immaterial to the property owner.<sup>54</sup> It is held in Pennsylvania that it is immaterial that the damages sustained are consequential, where they are to be paid by the owners of benefited property, and not by the city,<sup>55</sup> but this is a dangerous doctrine and unsupported by other authority. The true rule seems to be, that a municipal corporation making an improvement solely for the benefit of the public, under ample authority granted by the legislature, and performing the work in a circumspect and careful manner, is not answerable for consequential damages produced thereby to property in the vicinity of such improvement, no part of which is taken or used therefor.<sup>56</sup>

#### — Interest.

**664.** Interest on an award for land taken begins to run from the time possession is taken by the public, and not from

<sup>52</sup> Walish v. Milwaukee, 95 Wis. 16, 69 N. W. 818.

<sup>53</sup> Parker v. Catholic Bishop, 146 Ill. 158, 34 N. E. 473.

<sup>54</sup> Dickerman v. Duluth, 88 Minn. 288, 92 N. W. 1119.

<sup>55</sup> Wray v. Pittsburgh, 46 Pa. St. 365.

<sup>56</sup> Alexander v. Milwaukee, 16 Wis. 248.

Note.—In Arimond v. G. B. & M. Canal Co., 31 Wis. 316. the



the date of the judgment of condemnation.<sup>57</sup> It is not recoverable for the time elapsing between the initiation of the condemnation proceedings, and the payment of the money into court,<sup>58</sup> nor is it recoverable upon an unliquidated claim for damages caused by change of grade.<sup>59</sup>

### — The jury.

**665.** Under a charter which provides that in opening streets the excess of damages over benefits, if any, shall be

court, by Dixon, C. J., says, in speaking of the Alexander case, "that it was an extreme application of the doctrine of *damnum absque injuria* and that the principle of it is not to be extended to other and dissimilar cases." The Alexander case was strongly reaffirmed in Harrison v. Supervisors, 51 Wis. 645, 8 N. W. 731, and followed in Cohn v. Wausau Boom Co., 47 id. 314, 2 N. W. 546; Heth v. Fond du Lac, 63 id. 228, 53 Am. Rep. 279, 23 N. W. 495; Chase v. Oshkosh, 81 id. 313, 15 L. R. A. 553, 29 Am. St. Rep. 898, 51 N. W. 560; Colclough v. Milwaukee, 92 id. 186, 65 N. W. 1039. It is distinguished in Borchardt v. Wausau Boom Co., 54 Wis. 107, 41 Am. Rep. 12, 11 N. W. 440, and Pettigrew v. Evans, 25 id. 223, 3 Am. Rep. 50; and explained in Spelman v. Portage, 41 Wis. 144, and Smith v. Eau Claire, 78 id. 457, 47 N. W. 830. See, also, Pumpelly v. G. B. & M. Canal Co., 13 Wall. 166, 180, 20 L. ed. 557, 561, 4 L. R. A. 37n; 15 L. R. A. 556, and 20 L. R. A. 77. And see Damkoehler v. Milwaukee 124 Wis. 144, 101 N. W. 706.

<sup>57</sup> Chicago v. Palmer, 93 Ill. 125.

<sup>58</sup> Shoemaker v. United States,

147 U. S. 282, 37 L. ed. 170, 13 Sup. Ct. Rep. 361.

<sup>59</sup> Tyson v. Milwaukee, 50 Wis. 78, 5 N. W. 914.

*Agreement between city and owners.*

Contributions made by land-owners under agreement with a city, under statute authority, by which they released damages caused by taking their land for a street, and pay a part of its cost of construction, and part of the damages received by other land-owners, and the city assumes their assessments for benefits, are not voluntary gifts to be deducted from the cost of the way. Atkinson v. Newton, 169 Mass. 240, 47 N. E. 1029.

*Evidence as to damages.*

In a street opening case, evidence as to what one parcel of land involved in the proceedings, and not belonging to any of the parties, was offered for the year previous, is competent as tending to show the value of other lands in the immediate vicinity of those involved. Grand Rapids v. Luce, 92 Mich. 92, 52 N. W. 635; Perkins v. People, 27 Mich. 386. *Damnum absque injuria*. See Rigney v. Chicago, 102 Ill. 64.



laid on the whole city, and requires the jury to be freeholders resident within the city, they cannot fail to have an interest in the result which will affect their competence as jurors, and the proceedings under their verdict are entirely void.<sup>60</sup> An assessment is not invalidated because the verdict determining the necessity of proceeding is given by a panel of eleven jurors, both parties having so stipulated.<sup>61</sup> But where the statute provides that the assessment be made by a jury, or by commissioners, and six men were selected as jurors under an ordinance to that effect, the assessment made by them is invalid, a jury meaning twelve men.<sup>62</sup> It is a fatal defect, at the meeting of a jury to correct irregularities in an assessment, to select a new juror in place of one who attended at the preliminary assessment, but who failed to attend the second meeting; and such irregularity is not waived by the appearance of a party at such later meeting.<sup>63</sup>

*Liability of city for neglect.*

Where plaintiff proved the ordinance authorizing the improvement contract on which his warrants were based, the execution of the contract, the performance of the work, its acceptance by the city, and the failure of the city for four years to provide the special fund out of which it was to be paid, he made a *prima facie* case against the city, and the burden was then on it to show that its failure to provide the fund was not owing to its neglect in complying with its charter provisions, or in exercising reasonable diligence. *Jones v. Portland*, 35 Or. 512, 58 Pac. 657.

*Allowing soil in street to be removed.*

As the owner of land abutting

on a public street is the owner of the fee in the street, subject to the public easement, the soil and mineral in the street belong to him. The public easement justifies the taking and removal of material only for the construction or repair of the street; and if the contractor removes stone or other material from the street, and appropriates it to his own use, the city is liable therefor. *Rich v. Minneapolis*, 37 Minn. 423, 5 Am. St. Rep. 861, 85 N. W. 2.

<sup>60</sup> Powers' Appeal, 29 Mich. 504.

<sup>61</sup> Borgman v. Detroit, 102 Mich. 261, 60 N. W. 696.

<sup>62</sup> Bibel v. People, 67 Ill. 172.

<sup>63</sup> Gilkerson v. Scott, 76 Ill. 509.



— View of premises.

**666.** It is within the discretion of the court to permit the jury to view the premises upon the application of either party in a proceeding to confirm a special assessment.<sup>64</sup> The facts acquired by a jury from a view of the premises are not evidence.<sup>65</sup>

— Questions for jury.

**667.** In a proceeding to confirm a special assessment, the only questions to be submitted to the jury are, whether by the assessment returned, the property of the objector is assessed more than it will be benefited by the proposed improvement, and whether it has been assessed more or less than its proportionate share of the cost thereof.<sup>66</sup> Their verdict that property is specially benefited, is not conclusive as to the benefit being "local," so as to be paid for by special assessment, when that question is, by consent, reserved for decision.<sup>67</sup> The mere fact that the jury has reduced the assessment on certain property is not enough to establish a deficiency, and the court has no power to distribute the amount of such reduction as a deficiency without further proof.<sup>68</sup> On application to confirm a special assessment, the objectors have no right to ask the jury to ascertain the benefits to properties belonging to other parties, and on the question of benefits, evidence as to the necessity of the improvement is properly excluded.<sup>69</sup> Where objections to an

<sup>64</sup> *Pike v. Chicago*, 155 Ill. 656, 40 N. E. 567.

<sup>65</sup> *Rich v. Chicago*, 187 Ill. 396, 58 N. E. 306.

*By trial judge.*

Where a trial judge, by agreement of parties, views the premises with a view of determining the necessity for and reasonableness of the improvement, his finding in that regard will not be disturbed, on appeal, unless it is

clear that error was committed. *Wells v. Chicago*, 202 Ill. 448, 66 N. E. 1056.

<sup>66</sup> *Goodwillie v. Lake View*, 137 Ill. 51, 27 N. E. 15; *Kelly v. Chicago*, 148 Ill. 90, 35 N. E. 752.

<sup>67</sup> *Morgan Park v. Wiswall*, 155 Ill. 262, 40 N. E. 611.

<sup>68</sup> *Jacksonville v. Hamill*, 178 Ill. 235, 52 N. E. 949.

<sup>69</sup> *Walters v. Lake*, 129 Ill. 23, 21 N. E. 556; *Houston v. Chi-*



assessment do not involve a question of fact to be determined by a jury, the plaintiff cannot complain that the court refused to hear evidence in support of his objections before the jury.<sup>70</sup>

cago, 191 Ill. 559, 61 N. E. 396.

<sup>70</sup> Goodwillie v. Lake View, 137 Ill. 51, 27 N. E. 15.

*Jury passes on benefits only.*

When a jury is empaneled to determine the question of benefit to property, it has to do only with

that question, and cannot pass on the question as to whether the petitioner has established a legal right to a judgment of confirmation. Sweet v. W. Chi. Pk. Com'rs, 177 Ill. 492, 53 N. E. 74.



## CHAPTER XII.

### COLLECTION OF THE TAX, AND METHOD OF ENFORCEMENT.

- Personal liability, 668.
- In rem. 669-670.
- Municipal liability, 671-672.
- Cause for liability, 673.
- Liability arising from creation of special fund, 674-676.
- Reasons for non-liability, 677-678.
- Collection — In general, 679-680.
- Collection by city, 681.
- Collection by contractor, 682.
- Contract induced by fraud, 683.
- Defective or unfinished contracts, 684.
- Remedy of contractor, 685.
- Collection from property exempt from execution, 686.
- Penalties for non-payment, 687.
- Limitations, 688.
- Who may collect, 689.
- Completion of work, 690.
- Pleading, 691.
- Counterclaim — Demurrer, 692.
- Evidence — Prima facie proof, 693.
- Burden of proof, 694.
- Mandamus, 695.
- When mandamus will not lie, 696.
- Judgment of sale, 697.
- What may be shown on application for, 698.
- Form and validity of judgment, 699.
- The sale, 700.
- Collection from railroads, 701.
- When sale void — Caveat emptor, 702.
- Defense to collection proceedings, 703.
- What defenses available, 704-705.
- Defenses not available, 706.
- Liens — In general, 707.
- Priorities, 708.
- Discharge of, 709.
- Filing or establishing, 710.
- Enforcement — Parties, 711.
- Foreclosure of, 712.
- Evidence in foreclosure, 713.
- Defenses in foreclosure, 714.
- Enforcement of, 715.
- Merger, 716.
- Payment, in general — Bonds, 717.
- Payment in installments, 718.
- Payment from general fund, 719.
- When payment neither waiver nor estoppel, 720.
- Interest, 721.
- Who should make payment, 722.

#### Personal liability.

**668.** The question as to the ultimate liability for the payment of the special assessment is one that is still sharply contested in the courts, and all hope of an harmonious settlement remains in abeyance. The author is so thoroughly



imbued with the doctrine of benefit as the only legal or rational foundation for the exercise of this form of taxation that to him any attempt looking to enforce a personal liability against the owner is an illustration of the confiscatory extent to which the application of any other theory is apt to lead. No one can seriously object to the payment of a sum of money for an improvement to his property which immediately enhances it in value to the amount of exaction; but to take his property, and then obtain a judgment for deficiency against him personally must strike every one as unjust, illogical, and an exercise of the strong right arm of might.

# **In Rem.**

**669.** Proceedings for the collection of local assessments are denominated proceedings *in rem*, and no personal liability or general charge against the owner will be created other than by statute, but only a lien against the specific property assessed, and the only peril to which the owner of the lot is exposed is the loss of the lot.<sup>1</sup>

**670.** Where the value of the property is actually lessened by the improvement, as not infrequently happens, to take the property for the tax would certainly amount to a taking of private property for public use without just compensation, and the principle involved is so elementary that it would seem almost impossible for the judicial mind not to settle upon it as a thing beyond the reach of further discussion.<sup>2</sup> But many courts of the highest authority hold

<sup>1</sup> *In re Hun*, 144 N. Y. 472; *Olcott v. State*, 10 Ill. 481; *Pidgeon v. State*, 36 Ill. 249; *Mix v. Ross*, 57 Ill. 121; *Virginia v. Hall*, 96 Ill. 278; Ill. Cent. R. Co. v. Commissioners, 129 Ill. 417, 21 N. E. 925; *Hoover v. People*, 171 Ill. 182, 49 N. E. 367; *Dobler v. Warren*, 174 Ill. 92, 50 N. E. 1048; *Kelly v. Mendelsohn*, 105 La. 490,

29 So. 894; *St. Louis v. Bressler*, 56 Mo. 350; *Clinton v. Henry Co.*, 115 Mo. 557, 37 Am. St. Rep. 415, 22 S. W. 494; *St. Louis v. Koch*, 169 Mo. 587, 70 S. W. 143; *Hawthorne v. E. Portland*, 13 Or. 271, 10 Pac. 342.  
*California.*

<sup>2</sup> *Taylor v. Palmer*, 31 Cal. 240; *Gaffney v. Gough*, 36 Cal. 104.



*Illinois.*

*Brown v. Joliet*, 22 Ill. 123.

An act authorizing the recovery of the cost of building a sidewalk out of the personal property of the lot owner is unconstitutional and void. *Craw v. Tolono*, 96 Ill. 255, 36 Am. Rep. 143. *Virginia v. Hall*, 96 Ill. 278.

*Craw v. Tolono*, 96 Ill. 255, 36 Am. Rep. 143, holding there is no personal liability against the owner on account of a special assessment, was not intended to overrule *Taylor v. People*, 66 Ill. 322, and to hold that public property can be sold in such cases, nor to overrule *Higgins v. Chicago*, 18 Ill. 276, nor *Scammon v. Chicago*, 42 Ill. 192, and hold that public property is not liable to special assessment, but it was simply intended to lay down a rule in regard to special assessments of the property of private owners. *McLean Co. v. Bloomington*, 106 Ill. 209.

In *re Mt. Vernon*, 147 Ill. 359, 23 L. R. A. 807, 35 N. E. 533; Ill. Cent. R. Co. v. *People*, 161 Ill. 244, 43 N. E. 1107; *Shepherd v. Sullivan*, 166 Ill. 78, 46 N. E. 720; Ill. Cent. R. Co. v. *People*, 170 Ill. 224, 48 N. E. 215.

Appearance by lot owner and defending application for judgment of sale for unpaid special tax does not render him liable to personal judgment. *Hoover v. People*, 171 Ill. 182, 49 N. E. 367.

So much of the Illinois Sidewalk act of 1875 as purports to create a personal liability against the lot owner for a special tax assessed to pay for a sidewalk, is unconstitutional. *Hoover v. People*, 171 Ill. 182, 49 N. E. 367.

*Indiana.*

*State v. Aetna Life Ins. Co.*, 117 Ind. 251, 20 N. E. 144.

*Kentucky.*

An owner of private property cannot be required to pay, in any direct mode, for any benefit or advantage which may accrue to him from public improvements. *Sutton's Heirs v. Louisville*, 5 Dana, 28 (1837).

A charter provision authorizing personal judgment against the owner of abutting property for street improvements is unconstitutional. *Meyer v. Covington*, 103 Ky. 546, 45 S. W. 769. And see *Broadway, etc., Church v. McAtel*, 8 Bush. 508, 8 Am. Rep. 480.

*Louisiana.*

No personal liability. *Barber Asphalt Pav. Co. v. Watt*, 51 La. An. 1345, 26 So. 70.

*Moody v. Chadwick*, 52 La. An. 1888, 28 So. 361.

*Mississippi.*

*Macon v. Patty*, 57 Miss. 378, 34 Am. Rep. 451.

*Missouri.*

"If you can assess the lot of a non-resident of the city for improvements made in one of the streets in the vicinity of the lot, and sue the owner of the lot, get a personal judgment, sell the lot for less than the amount of the judgment, and collect the balance from the owner out of the other property without the city limits, you have in such case certainly taken his property and converted it to the use of the city, and if he has in such case received any just compensation within the meaning of the Constitution, it is difficult to perceive it. This would enable the city to do that by indirection



that it is competent for the legislature to make the owner personally liable for the payment of a tax, but the right to do so must not rest in implication.<sup>3</sup>

which could not be done directly. If we construe the statute in reference to these assessments to authorize a personal judgment, by which such results might follow, it would make the statute unconstitutional and void." *St. Louis v. Allen*, 53 Mo. 44; *St. Louis v. De Noue*, 44 Mo. 136; *Louisiana v. Miller*, 66 Mo. 467; *Higgins v. Ausmuss*, 77 Mo. 351; *Louisiana v. Miller*, 66 Mo. 467; *State v. Angert*, 127 Mo. 456, 30 S. W. 118; *Moberly v. Hogan*, 131 Mo. 19, 32 S. W. 1014.

*Nebraska.*

*Omaha v. State*, (Neb.) 94 N. W. 979.

*New York.*

Although the statute under which the improvement was made, provides that payment of the assessment by any party, which should by law or agreement be paid by another, the person paying may sue and recover the same—yet where the owner's name did not appear on the assessment books, no personal liability against him was created. *Mutual Life Ins. Co. v. Sage*, 41 Hun, 535.

*North Carolina.*

Personal judgment not authorized. *Raleigh v. Peace*, 110 N. C. 32, 17 L. R. A. 330, 14 S. E. 521.

*Oregon.*

*Ivanhoe v. Enterprise*, 29 Or. 245, 35 L. R. A. 58, 45 Pac. 771.

*Pennsylvania.*

The property itself, and not the owner, is debtor for the amount of

a local sewer assessment. *Wolf v. Philadelphia*, 105 Pa. St. 25.

*Virginia.*

*Green v. Ward*, 82 Va. 324; *Asberry v. Roanoke*, 91 Va. 562, 42 L. R. A. 636, 22 S. E. 360.

*California.*

<sup>3</sup> The lot owner is not held liable for work done on a street on the theory of a contract between him and the contractor who does the work. The assessment is levied and collected by virtue of the sovereign power of taxation, and its validity depends upon the same general principles applicable to taxes properly levied for ordinary governmental purposes. *Emery v. Bradford*, 29 Cal. 75.

*Emery v. Gas Co.*, 28 Cal. 345.

*Walsh v. Matthews*, 29 Cal. 123, affirming act of 1862 making the owner personally liable to the contractor. And such a demand is assignable. *Cochran v. Collins*, 29 Cal. 129. But the owner of land in a municipal corporation, bordering upon an improved street, cannot be made liable for the cost of the improvement beyond the value of his land. *Taylor v. Palmer*, 31 Cal. 240; *Beandry v. Palmer*, 32 Cal. 269.

An assessment for a street improvement made after the death of the property owner is not a claim against his estate which is required to be presented for allowance. *People v. Olvera*, 43 Cal. 492; *Hancock v. Whittemore*, 50 Cal. 522.



**Municipal liability.**

**671.** Many interesting and doubtful questions arise as to the ultimate liability of the city to pay the special assessment warrants or certificates, and the courts are as

A judgment of foreclosure of street lien providing for personal judgment after sale of the property is erroneous. *Manning v. Den.*, 90 Cal. 610, 27 Pac. 435.

*Illinois.*

Where a special assessment for public improvements has been levied upon a person's real estate, a lien is created upon his personalty from the delivery of the warrant to the collector. *Higgins v. Chicago*, 18 Ill. 276.

*Indiana.*

A personal judgment for the amount of a special assessment may be rendered against a railroad, where the statute does not permit the sale of the part specially assessed. *L. N. A. & C. R. Co. v. State*, 122 Ind. 443, 24 N. E. 350.

Where a property owner against whom street improvement assessments have been made executes a statutory waiver\*that he will make no objection to the assessments on the account of illegality or irregularity, and that he will pay all of said assessments, with interest, he thereby becomes personally liable for any deficit in the payment of such assessments, interest, and costs after the sale of the lots on foreclosure of the lien. *Wayne Co. S. B'k v. Gas City L. Co.*, 156 Ind. 662, 59 N. E. 1048.

But where in addition to the decree of foreclosure of the lien, the court rendered a personal judg-

ment against the owner, and no objections to the form or character of the judgment, or motion to modify the same, was made in the trial court, the judgment will not be reversed because of such error. *Leeds v. Defrees*, 157 Ind. 393, 61 N. E. 930.

*Iowa.*

One who sues to set aside local assessments, and offers therein to pay all legal assessments, renders himself liable to a personal judgment therefor, irrespective of statute. *Farwell v. Des Moines, etc., Co.*, 97 Ia. 286, 35 L. R. A. 63, 66 N. W. 176.

If the improvement for which the city levies a special tax is such as the statute authorizes it to make, any error or irregularity in the manner of proceeding by the city, or any officer thereof, will not defeat a recovery for the proper proportion of the value of the work from the abutting owner. *Burlington v. Quick*, 47 Ia. 222.

Under the Iowa code, execution may be issued against the owner for the amount remaining due on a special assessment, after sale of the property assessed. *Dewey v. Des Moines*, 101 Ia. 416, 70 N. W. 605. But this decision, on appeal to the U. S. Supreme Court of the United States was reversed in *Dewey v. Des Moines*, 173 U. S. 193, 43 L. ed, 665, 19 Sup. Ct. Rep. 379. The good effects of the reversal may be appreciated by



sharply divided upon this question as upon any other in connection with the entire subject. With the intention of safeguarding municipal interests, it is a common charter

reading *C. R. I. & P. R. Co. v. Ottumwa*, 112 Ia. 300, 51 L. R. A. 763, 83 N. W. 1074.

#### *Maryland.*

This state adopts as the basis of its theory that the tax is not imposed on the owner, but on the property, and although a personal action will lie against him, this does not affect the specific liability of the property. *Eschbach v. Pitts*, 6 Md. 71; *Clemes v. Mayor, etc.*, 16 Md. 208; *Dashiell v. Mayor, etc.*, 45 Md. 615. The latter case holds that where, pending proceedings, the owner dies, the heir is liable in assumpsit for the tax. The lessee under a 99-year lease, or for 99 years renewable forever, and not the owner of the fee, is the person who must assent to the paving of streets. *Holland v. Mayor, etc.*, 11 Md. 186, 69 Am. Dec. 195.

A paving tax is an improvement tax; the property is enhanced in value by the work done; the improvement is appurtenant to the land, and the person owning the land when the paving was completed was permanently benefited as a proprietor, and is liable for the amount of the tax. *Wolff v. Mayor, etc.*, 49 Md. 446.

*Gould v. Mayor, etc.*, 59 Md. 378; *Moale v. Mayor, etc.*, 61 Md. 225; *Mayor, etc., v. Ulman*, 79 Md. 469, 30 Atl. 43.

#### *Missouri.*

Under the statute of March 5, 1855, the suit to recover a special

tax is *in personam*, and authorizes a general judgment for the amount of the tax and interest, as well as a special judgment against the property. *St. Louis v. Clemens*, 36 Mo. 467.

Overruled in *Neenan v. Smith*, 50 Mo. 525, where the court say, construing the statute that the collector shall collect the special assessments by "ordinary process of law," that that term does not mean ordinary personal judgment and execution, but such process as is adapted to enforce a lien or specific charge upon the property specially assessed.

A special tax bill for street paving in a city of the third class is *prima facie* evidence of liability of the property for the charge stated in the bill; and it devolves upon the defendant, after such bill is put in evidence, to show some valid objection to its presumptive force. *Moberly v. Hogan*, 131 Mo. 19, 32 S. W. 1014. *New Jersey.*

Where a tax is lawfully assessed for a public improvement, the quota apportioned to each individual becomes a debt, and if not paid, must be recovered by the corporation in due course of law, unless where the charter authorizes proceedings of a more summary kind. *State v. Beverly*, 53 N. J. L. 560, 22 Atl. 340, and cases cited.

#### *New York.*

A statute imposing an assessment as a tax, to be enforced in



requirement that in no event, when work is ordered to be done at the expense of any lot, shall the city be held responsible on account thereof, and in case of the assessment being void for non-compliance with charter requirements, the question is as to whether the city becomes liable as a guarantor, and such liability has been strongly denied.<sup>4</sup> One

the same manner as other taxes where there is a personal liability, and authorizing suit to enforce the personal liability, is valid. *Litchfield v. Vernon*, 41 N. Y. 123.

#### *Ohio.*

Statute creating personal liability not unconstitutional. *Hill v. Higdon*, 5 O. St. 243, 67 Am. Dec. 289; *Gest v. Cincinnati*, 26 O. St. 275.

#### *Pennsylvania.*

The assessment of special benefits, being a species of taxation, and within the power of the legislature, the tax may be assessed either against the property or the owner. *In re vacation of Centre Street*, 115 Pa. St. 247, 8 Atl. 56.

"Assessment against the property itself is only a method of compelling the owner to pay and thus relieve his property from the charge or lien against it. In some cases *dicta* may be found, and perhaps decisions also, to the effect that assessments for benefits cannot be made or enforced against the owner of property benefited; but the principle is unsound, as already remarked, the remedy for the collection of such assessments or taxes, as well as every other species of tax, is a matter of legislative discretion." Opinion in above, by Sterrett, J.

A very cavalier like way of disposing of an important matter.

An act authorizing the damages for vacating a street to be assessed directly upon the owners of the property benefited, is not unconstitutional as being the taking of one man's property to pay the debts of or damage due to another, for the basis of the assessment, as well as of the compensation, must be the special benefit or the special injury to the property affected by the vacation. *Vacation of Howard St.*, 142 Pa. St. 601, 21 Atl. 974.

#### *United States.*

*Lombard v. Park Commissioners*, 181 U. S. 33; *Spencer v. Marchant*, 125 U. S. 345, 21 L. ed. 763, 8 Sup. Ct. Rep. 921; *Seattle v. Kelleher*, 195 U. S. 351, 49 L. ed. 232, 25 Sup. Ct. Rep. 44.

#### *Personal liability.*

The charter of the city of Rochester makes special assessments a personal liability which may be enforced by action. *Rochester v. Rochester R. Co.*, 109 App. Div. 638, 96 N. Y. Supp. 152.

#### *United States.*

\* *Peake v. New Orleans*, 139 U. S. 342, 35 L. ed. 131, 11 Sup. Ct. Rep. 541.

#### *Indiana.*

*Robinson v. Valparaiso*, 136 Ind. 616, 36 N. E. 644; *Porter v. Tipton*, 141 Ind. 347, 40 N. E. 802.

#### *Iowa.*

Although the ordinance under



great difficulty with these cases is the difference in the facts presented, and the further occurrence in many of them of qualifying words, which may mean much or little in future

which the cost of street improvement work is to be assessed upon the private property fronting or abutting the street, to be paid within the time and in the manner provided by city ordinance, and certificates to be issued for such work, which the contractor agrees to receive in full payment and compensation for such work, and without recourse to the city, the city is not relieved from liability thereon when the assessment it makes is entirely invalid, it not being within the contemplation of either party that the city would make an assessment against abutting property which could not be enforced. *Iowa Pipe & Tile Co. v. Callanan*, 67 L. R. A. 408, 106 Am. St. Rep. 311, 101 N. W. 141; *Ft. Dodge, etc. Co. v. Ft. Dodge*, 115 Ia. 568, 89 N. W. 7; *Bucroft v. Council Bluffs*, 63 Ia. 646, 19 N. W. 807; *Scofield v. Council Bluffs*, 68 Ia. 695, 28 N. W. 20.

#### *Kansas.*

*Casey v. Leavenworth*, 17 Kan. 189, where it was held the contractors must look exclusively to the special tax for their pay, they having become dissatisfied because of a mistake in the apportionment, causing a year's delay, and they brought suit.

#### *Kentucky.*

*Cracraft v. Selvage*, 10 Bush, 696; *Louisville v. Hexagon Tile Co.*, 103 Ky. 552, 45 S. W. 667.

#### *Michigan.*

*Goodrich v. Detroit*, 12 Mich. 279; *Second National Bank v. Lan-*

*sing*, 25 Mich. 207; *Detroit v. Michigan Paving Co.*, 36 Mich. 335; *Affeld v. Detroit*, 112 Mich. 560, 71 N. W. 151.

#### *Minnesota.*

*Lovell v. St. Paul*, 10 Minn. 290, Gil. 229.

#### *Missouri.*

*Saxton v. St. Joseph*, 60 Mo. 153; *Kiley v. St. Joseph*, 67 Mo. 491; *Keating v. Kansas City*, 84 Mo. 415; *Thornton v. Clinton*, 148 Mo. 648, 50 S. W. 295; distinguishing *Oster v. Jefferson City*, 57 Mo. App. 485; *Wheeler v. Poplar Bluffs*, 149 Mo. 36, 49 S. W. 1088; *Dalton v. Poplar Bluff*, 173 Mo. 39, 72 S. W. 1068.

#### *New York.*

*Hunt v. Utica*, 18 N. Y. 442.

#### *Ohio.*

*Creighton v. Toledo*, 18 O. St. 447.

#### *Washington.*

*Soule v. Seattle*, 6 Wash. 315, 33 Pac. 384.

Where an attempted assessment is void because of a complete failure to carry out the provisions of the charter which are conditions precedent to the exercise of the power, there can be no greater legal or equitable right in the city to be reimbursed its outlay than there is in a trespasser upon land who makes valuable improvements and is dispossessed by an ejectment suit. The court say, "It has done what it did in its own wrong, without previously qualifying itself to have reimbursement; and now to declare that because



adjudications. Such expressions as, "without wrong on contractor's part";<sup>5</sup> "where the city assumed no obligation";<sup>6</sup> "unless the city have the right to proceed to make the property holders liable";<sup>7</sup> "until the question of abutter's liability has been litigated";<sup>8</sup> "except the officers be derelict in their duty";<sup>9</sup> "or city has taken steps to make a new assessment";<sup>10</sup> "when the limit of indebtedness has been reached";<sup>11</sup> "if the city has not actually collected the money";<sup>12</sup> "if there is no failure of duty on its part";<sup>13</sup> are potent with possibilities of differentiation. There is one idea intimated throughout this class of cases, to the effect that there may be liability for negligence or breach of duty.<sup>14</sup>

the law upholds local assessments on the theory of benefits, a city which omits the steps necessary to bring it under the operation of the law shall have the same right to enforce its assessments as one which takes those steps would be to deprive the property owner of that which the charter gives him in distinct terms." *Buckley v. Tacoma*, 9 Wash. 253, 37 Pac. 441; *Thomas v. Olympia*, 12 Wash. 465, 41 Pac. 191; distinguishing *Stephens v. Spokane*, 11 Wash. 41, 39 Pac. 266; *Findley v. Hull*, 13 Wash. 236, 43 Pac. 28; *Stephens v. Spokane*, 14 Wash. 298, 44 Pac. 541, 45 Pac. 31; *German Am. Bank v. Spokane*, 17 Wash. 315, 38 L. R. A. 259, 47 Pac. 1103, 49 Pac. 542; *Seavey v. Seattle*, 17 Wash. 361, 49 Pac. 517; *Wilson v. Aberdeen*, 19 Wash. 89, 52 Pac. 524; *R. I. Mortgage & Trust Co. v. Spokane*, 19 Wash. 616, 53 Pac. 1104; *N. W. Lumber Co. v. Aberdeen*, 20 Wash. 102, 54 Pac. 935; *N. W. Lumber Co. v. Aberdeen*, 22 Wash. 404, 60 Pac. 1115; *Potter v. Whatcom*, 25 Wash. 207, 65 Pac. 197.

#### *Wisconsin.*

*Whalen v. La Crosse*, 16 Wis. 271; *Fletcher v. Oskosh*, 18 Wis. 229; *Hall v. Chippewa Falls*, 47 Wis. 267, 2 N. W. 279; *Heller v. Milwaukee*, 96 Wis. 134, 70 N. W. 1111; *Roter v. Superior*, 115 Wis. 243, 91 N. W. 651.

<sup>5</sup> *Peake v. New Orleans*, 139 U. S. 342, 35 L. ed. 131, 11 Sup. Ct. Rep. 541.

<sup>6</sup> *Robinson v. Valparaiso*, 136 Ind. 616, 36 N. E. 644.

<sup>7</sup> *Craycraft v. Selvage*, 10 Bush, 696.

<sup>8</sup> *Louisville v. Hexagon Tile Co.*, 103 Ky. 552, 45 S. W. 667.

<sup>9</sup> *Hunt v. Utica*, 18 N. Y. 442.

<sup>10</sup> *Thomas v. Olympia*, 12 Wash. 465, 41 Pac. 191.

<sup>11</sup> *German American Bank v. Spokane*, 17 Wash. 315, 38 L. R. A. 259, 47 Pac. 1103, 49 Pac. 542.

<sup>12</sup> *Seavey v. Seattle*, 17 Wash. 361, 49 Pac. 517.

<sup>13</sup> *Roter v. Superior*, 115 Wis. 243, 91 N. W. 651.

<sup>14</sup> *Keasy v. Louisville*, 4 Dana, 154, 29 Am. Dec. 395; *Louisville v. Henderson*, 5 Bush, 515; *Kemper v. Louisville*, 14 Bush, 87;



**672.** Some of the strongest expressions on the part of the courts are to be found in the cases which sustain the absolute liability of the municipality. One decision is, that if a municipal corporation which has the power to make a contract for street improvements contracts for them, and stipulates in the contract that the agreed price of the improvements shall be paid to the contractor out of funds to be realized by assessments upon abutting property, and the city has power to make the assessments, but fails to do so, or fails to make valid assessments, and thereby to provide the fund out of which the contractor may receive the price of his labor and materials, the city is primarily and absolutely liable to pay the contract price itself. In cases of this character the city becomes primarily liable, even when the contract expressly provides that the contractor shall accept the assessments in payment of the contract price, and that the city shall not be otherwise liable, whether the assessments are collectible or not.<sup>15</sup> The learned judge who wrote the opinion made use of the following language:—"One who induces a contractor to perform labor or furnish materials by the promise that a third person, who, he claims owes him a debt or duty, shall pay to the contractor the

Pearson v. Zable, 78 Ky. 170; Sewall v. St. Paul, 20 Minn. 511, Gil. 459, holding that the contractors are the agents of the city, and that the latter is liable. O'Hara v. Scranton, 205 Pa. St. 142, 54 Atl. 713; Eilert v. Oshkosh, 14 Wis. 587; Finney v. Oshkosh, 18 Wis. 210; Durkee v. Kenosha, 59 Wis. 123, 48 Am. Rep. 480, 17 N. W. 677; Barden v. Portage, 79 Wis. 126, 48 N. W. 210.

<sup>15</sup> Barber Asphalt Paving Co. v. Denver, 19 C. C. A. 139, 36 U. S. App. 499, 72 Fed. 336; Barber Asphalt Paving Co. v. Harrisburg, 29 L. R. A. 401, 12 C. C. A. 100,

28 U. S. App. 108, 64 Fed. 283, reversing same case, 62 Fed. 565; Bill v. Denver, 29 Fed. 344; Argenti v. San Francisco, 16 Cal. 256; Chicago v. People, 56 Ill. 327; Leavenworth v. Mills, 6 Kan. 288; Louisville v. Hyatt, 5 B. Mon. 199; Michel v. Police Jury, 9 La. Ann. 67; Beard v. Brooklyn, 31 Barb. 142; Reilly v. Albany, 112 N. Y. 30, 19 N. E. 508; Com. Nat. Bank v. Portland, 24 Ore. 188, 41 Am. St. Rep. 854, 33 Pac. 532; Bucroft v. Council Bluffs, 63 Ia. 646, 19 N. W. 807; Scofield v. Council Bluffs, 68 Ia. 695, 28 N. W. 20; Miller v. Milwaukee, 14 Wis. 699; Fisher v. St. Louis, 44



agreed price of the labor and materials he furnishes, cannot enjoy the fruits of the contract, and leave the contractor remediless, either because the debtor does not pay, or because the debt or duty did not exist." For street improvement bonds duly issued, the city is bound, after judgment thereon, to impose a tax upon all taxable property within its limits, to pay such bonds, and the levy is not confined to the property benefited and improved.<sup>16</sup> The liability of the city is not affected because the money was advanced from the general fund to the special street opening district, and the assessment is to repay that advance, the council having control of the various funds.<sup>17</sup> There are numerous strong and well considered cases holding the doctrine of absolute municipal liability, although many of them are qualified to such an extent as to render their ultimate meaning somewhat doubtful.<sup>18</sup>

**673.** A stipulation in a street improvement contract by

Mo. 482; *Hitchcock v. Galveston*, 96 U. S. 341, 24 L. ed. 659.

<sup>16</sup> U. S. v. *Fort Scott*, 99 U. S. 152, 25 L. ed. 248.

<sup>17</sup> *Gill v. Oakland*, 124 Cal. 335, 57 Pac. 150.

*Iowa.*

<sup>18</sup> *Ottumwa B. & C. Co. v. Ainley*, 109 Ia. 386, 80 N. W. 510.

*Kansas.*

*Leavenworth v. Mills*, 6 Kan. 288; *Garden City v. Trigg*, 57 Kan. 632, 47 Pac. 524; *Heller v. Garden City*, 58 Kan. 263, 48 Pac. 841; *Atchison v. Byrnes*, 22 Kan. 65, because of failure to levy the special tax agreed upon, and issue improvement bonds therefor.

*Kentucky.*

*Kearney v. Covington*, 1 Met. (Ky.) 339; *Louisville v. Leatherman*, 99 Ky. 213, 35 S. W. 625; *Craycraft v. Selvage*, 10 Bush, 696.

*Louisiana.*

*Cronan v. Municipality No. 1*, 5 La. An. 537; *Tournier v. Municipality No. 1*, 5 La. An. 298.

*New York.*

*Manice v. Mayor*, 8 N. Y. 120.

*North Dakota.*

*Red River, etc. Bank v. Fargo* (N. D.), 103 N. W. 390.

*Oregon.*

*Com. Nat. Bank v. Portland*, 24 Ore. 188, 41 Am. St. Rep. 854, 33 Pac. 532; *Little v. Portland*, 26 Ore. 235, 37 Pac. 911; *Jones v. Portland*, 35 Ore. 512, 58 Pac. 657; These cases went upon the ground of the neglect of the city for five years to press the trial of an injunction suit.

*Pennsylvania.*

*Addyston Pipe & Steel Co. v. Corry*, 197 Pa. St. 41, 80 Am. St. Rep. 812, 46 Atl. 1035.



which the contractor binds himself not to sue the city until it shall be finally adjudged that the property owners are not liable, is void.<sup>19</sup> Where the nature or ownership of the adjacent property is such that no steps which could have been taken would have rendered it or its owner liable, then the city must pay for the improvement, or it will have as to such work no means of executing its general power to improve all streets,<sup>20</sup> and a charter provision that the city shall in no event be liable for the cost of such an improvement without the right to enforce it against the property benefited applies only to cases where the city has authority to make improvements at the exclusive cost of the property benefited.<sup>21</sup> The city becomes liable absolutely after the money is collected and paid into its treasury;<sup>22</sup> and where such fund is collected, and from such fund the city pays certain warrants, while prior warrants drawn against it remain unpaid, such action constitutes a damage to the holder of the prior warrants, for which the city is liable.<sup>23</sup>

#### Liability arising from creation of special fund.

##### 674. Money derived by a city from special assessments

###### *Washington.*

Delay of five years in taking necessary steps. *Stephens v. Spokane*, 11 Wash. 41, 39 Pac. 266; *Stephens v. Spokane*, 14 Wash. 298, 44 Pac. 541, 45 Pac. 31; *Bank of Port Townsend*, 16 Wash. 450, 47 Pac. 896; *McEwan v. Spokane*, 16 Wash. 212, 47 Pac. 433; but overruled in *German Am. Bank v. Spokane*, 17 Wash. 315, 38 L. R. A. 259, 47 Pac. 1103, 49 Pac. 542; *Sheafe v. Seattle*, 18 Wash. 298, 51 Pac. 385; *N. W. Lumber Co. v. Aberdeen*, 22 Wash. 404, 60 Pac. 1115.

###### *Wisconsin.*

*Allen v. Janesville*, 35 Wis. 403; *State v. La Crosse*, 101 Wis. 208, 77 N. W. 167; *Uncas Nat. Bank v.*

*Superior*, 115 Wis. 340, 91 N. W. 1104.

<sup>19</sup> The court places its determination on the ground that it is to the interest of the country, as well as the parties concerned, that controversies should be determined as speedily as is consistent with the rights of those concerned. *Louisville v. Henderson*, 5 Bush, 515.

<sup>20</sup> *Craycraft v. Selvage*, 10 Bush, 696.

<sup>21</sup> *Caldwell v. Rupert*, 10 Bush, 179.

<sup>22</sup> *Hendrick v. W. Springfield*, 107 Mass. 541.

<sup>23</sup> *N. W. Lumber Co. v. Aberdeen*, 22 Wash. 404, 60 Pac. 1115.



becomes a trust fund in its custody to be applied to the redemption of warrants drawn upon such fund in the order in which the warrants were presented for payment, and the city is liable to any warrant holder whose rights have been infringed by a misapplication of such funds.<sup>24</sup> Where the city has received from the property owner the amount of taxes and special assessments levied for the specific purpose of paying for a work of local improvement, it cannot justify its refusal to redeem the warrants issued in payment of such work on the ground that the contract and taxes and assessment for the improvement were invalid because in violation of constitutional or statutory provisions designed solely for the protection of the taxpayers.<sup>25</sup> But when a street improvement contract provides that the cost shall be paid out of a special fund arising from an assessment upon the property benefited, the mere fact that the amount realized from a valid assessment according to benefits is inadequate to meet the cost of the improvement would not render the city liable for the difference out of its general fund.<sup>26</sup>

**675.** The general rule deducible from the authorities is to the effect that before a city can be required to pay from its general fund warrants drawn upon a special fund, it must appear not only that the first assessment has not been collected by the proper authorities by reason of fault on their part, but also that no steps have been, or can be taken for purpose of providing for the payment of the warrants by the making of a new assessment.<sup>27</sup> The city will not, however, be held liable for failure to provide a special fund where it has no power to construct street improvements pay-

<sup>24</sup> *Red River, etc. Bank v. Fargo* (N. Dak.), 103 N. W. 390.

<sup>25</sup> *Red River, etc. Bank v. Fargo*, *supra*.

<sup>26</sup> *Potter v. Whatcom*, 25 Wash. 207, 65 Pac. 197.

<sup>27</sup> *Stephens v. Spokane*, 14 Wash. 298, 44 Pac. 541, 45 Pac. 31. Or by failure to provide for pay-

ment until the bar of the statute of limitations intervenes. *Bank v. Port Townsend*, 16 Wash. 450, 47 Pac. 896; *Wilson v. Aberdeen*, 19 Wash. 89, 52 Pac. 524; *R. I. Mortgage & Trust Co. v. Spokane*, 19 Wash. 616, 53 Pac. 1104; *N. W. Lumber Co. v. Aberdeen*, 22 Wash. 404, 60 Pac. 1115.



able out of the general fund,<sup>28</sup> nor where the constitutional limit of indebtedness has been reached before making the contract,<sup>29</sup> nor for interest until the collection of the new assessment.<sup>30</sup> Unreasonable delay on the part of the city, for five years, to enforce the collection of the special fund to be provided under a contract providing the contractor shall look only to that fund for payment, will make it liable for damages at the suit of the holders of the warrants.<sup>31</sup> Where there is no money in the special fund with which to pay the orders drawn against it, a suit will not lie on the orders, but the remedy is by proceedings to compel the authorities to make the assessment and mandamus in such case is appropriate.<sup>32</sup>

**676.** A city may compromise with the owners of property abutting upon a street improvement and accept from them a less sum than the assessments levied against them, but in that case the city becomes liable to a warrant holder for the payment from its general fund for the amount of

<sup>28</sup> *German Am. Bank v. Spokane*, 17 Wash. 315, 38 L. R. A. 259, 47 Pac. 1103, 49 Pac. 542; *Louisville v. Leatherman*, 99 Ky. 213, 35 S. W. 625.

<sup>29</sup> *Soule v. Seattle*, 6 Wash. 315, 33 Pac. 384; *German Am. Bank v. Spokane*, 17 Wash. 315, 38 L. R. A. 259, 47 Pac. 1103, 49 Pac. 542.

<sup>30</sup> *Soule v. Seattle*, *supra*; *Uncas Nat. Bank v. Superior*, 115 Wis. 340, 91 N. W. 1004. But see *Addyston Pipe & Steel Co. v. Corry*, 197 Pa. St. 41, 80 Am. St. Rep. 812, 46 Atl. 1035.

<sup>31</sup> The contract provided that the contractor "will not compel the city by legal process or otherwise to pay for the improvement out of any other fund. The city failed for five years to press to trial an injunction suit restraining the col-

lection of the assessments necessary to make such payment. *Little v. Portland*, 26 Or. 235, 37 Pac. 911; *Jones v. Portland*, 35 Or. 512, 58 Pac. 657; *Com. Nat. Bank v. Portland*, 24 Or. 188, 41 Am. St. Rep. 854, 33 Pac. 532. But see, *contra*, *Thomas v. Olympia*, 12 Wash. 465, 41 Pac. 191.

<sup>32</sup> *Second Nat. Bank v. Lansing*, 25 Mich. 207; *Seavey v. Seattle*, 17 Wash. 361, 49 Pac. 517; *German Am. Bank v. Spokane*, 17 Wash. 315, 38 L. R. A. 259, 47 Pac. 1103, 49 Pac. 542; *Kiley v. St. Joseph*, 67 Mo. 491; *Whalen v. La Crosse*, 16 Wis. 271; *Fletcher v. Oshkosh*, 18 Wis. 229. And the city officers are adverse parties who may appeal from a judgment annulling an assessment.



the assessment remitted by it.<sup>33</sup> Where the municipality has agreed with a contractor to make certain sidewalks at a fixed price, one-third to be paid from the general fund, and the balance by the front proprietors, and it having by suit been determined that such proprietors were liable only for one-third, the city will be considered a warrantor for the balance, and held liable for that sum.<sup>34</sup>

### Reasons for non-liability.

**677.** A city is not made liable to the holders of special assessment certificates because it failed to appeal from a decision holding such certificates void because the charter failed to provide for proper notice;<sup>35</sup> nor because the charter provision empowering the city to do the work at the expense of abutting owners was rendered inoperative by reason of a failure to provide by ordinance for the mode in which the charge on the respective owners shall be determined;<sup>36</sup> nor will it be held liable as a guarantor for the collection of the special certificates which provide that the holder thereof shall "have no claim upon said city, in any event, except from the special assessment made for said work, and the collection of the same as provided by law," nor for failure to collect, if there be no failure of duty on its part;<sup>37</sup> nor because of a deficiency resulting from the fact that the assessment upon some of the lots exceeded their value;<sup>38</sup> nor because of non-compliance by the city with the statute governing such matters;<sup>39</sup> nor where by reason of the defective passage of an ordinance the special tax bills became

<sup>33</sup> *Sheafe v. Seattle*, 18 Wash. 298, 51 Pac. 385.

<sup>34</sup> *Tournier v. Municipality*. No. 1, 5 La. An. 298.

<sup>35</sup> *Roter v. Superior*, 115 Wis. 243, 91 N. W. 651.

<sup>36</sup> *Findley v. Hull*, 13 Wash. 236, 43 Pac. 28.

<sup>37</sup> *Roter v. Superior*, *supra*.

<sup>38</sup> *Creighton v. Toledo*, 18 O. St.

447. To the ordinary mind this appears to justify confiscation.

<sup>39</sup> *Wheeler v. Poplar Bluffs*, 149 Mo. 36, 49 S. W. 1088. It must be admitted that this case is contrary to the weight of authority, and apparently permits the municipality to take advantage of its own wrong.



worthless;<sup>40</sup> nor under the provisions of a contract that it will "duly and without delay collect the special assessments therefor," when the improvements were constructed on the assessment plan, and there was no attempt to construct them at the expense of the city generally.<sup>41</sup>

**678.** Where a city has in good faith adopted and carried out the plans for a sewerage system made by a competent sanitary engineer of high standing in his profession, it is not liable for the cost of additional or substituted improvements made necessary by the growth of the city.<sup>42</sup> Under the Indiana Barrett law, the liability of the city to pay the contractor is but secondary, and arises only when it has sold, assessed, collected assessments, or otherwise realized the amounts owing from the property benefited, and the contractors have not been paid.<sup>43</sup> The city binds itself only to the exercise of diligence in the collection of the assessment, and it is beyond its power to bind itself to the creation of the fund within a certain time.<sup>44</sup> Although a contractor fails to complete a street improvement within the time specified, the assessment cannot be avoided by a lot-owner who does not show himself injured thereby.<sup>45</sup> Numerous other cases on the general subject of liability will be found in the marginal note.<sup>46</sup>

<sup>40</sup> Keating v. Kansas City, 84 Mo. 415.

<sup>41</sup> N. W. Lumber Co. v. Aberdeen, 20 Wash. 102, 54 Pac. 935.

<sup>42</sup> Shannon v. Omaha (Neb.), 103 N. W. 53.

<sup>43</sup> Porter v. Tipton, 141 Ind. 347, 40 N. E. 802.

<sup>44</sup> Stephens v. Spokane, 14 Wash. 298, 44 Pac. 541, 45 Pac. 31.

<sup>45</sup> Fass v. Seehawer, 60 Wis. 525, 19 N. W. 533. There can be no recovery for loss to the business of the occupant of the lot. Stadler v. Milwaukee, 34 Wis. 98.

*Construction of contract agreement.*

<sup>46</sup> A charter provision that "any person taking any contracts with the city, and who agree to be paid from special assessments, shall have no claim or lien upon the city in any event, except from the collections of the special assessments made for the work contracted for," was not intended to preclude the courts from determining the legal effect of the contract. And where the city has no such assessment as it purports to have, the party is to be deemed



**Collection—In general.**

**679.** The method of collecting the special assessment is almost uniformly definitely prescribed by the statute which confers the authority to levy the assessments, and a strict

as not so agreeing. The condition is void and the promise single. And the last clause of the provision, "And no work to be paid for by a special assessment shall be let, except to a contractor or contractors who will so agree," is merely directory, for the contract is not declared void for want of compliance, no penalty imposed, nor the power affected. *Chicago v. People*, 56 Ill. 327.

*Promise of city to pay, after deficiency.*

When a city has power to pay the cost of a special street improvement, in whole or in part, out of its general fund, and also power to bind itself to pay any deficiency remaining after the exhausting of the special fund, its promise to do so after a deficiency is found to exist is valid under the rule governing the ratification of contracts, whereby the power to make the contract forms the basis of liability and the performance of the act furnishes the consideration. *Quaker City Nat. Bk. v. Tacoma*, 27 Wash. 259, 67 Pac. 710.

*Special assessment a trust fund.*

Money raised by special assessment, for paving certain streets is a trust fund, and cannot lawfully be appropriated by the city to pay for paving other streets, and a city applying a fund raised by assessment on land for paving certain streets to the paving of other streets, becomes indebted —

to such fund, and increases its indebtedness within the constitutional provision relating to debt limit. *Allen v. Davenport*, 107 Ia. 90, 77 N. W. 532.

*Failure of city to collect.*

If a city promise to pay a sum of money when it shall collect its demands of another, and it appear that it had no demands, or if it have and fail to use due diligence to collect them, in either case the promise may be enforced as absolute. *Chicago v. People*, 56 Ill. 327; *White v. Snell*, 5 Pick. 425, 9 Pick. 16.

*Extent of contractor's vested right.*

The vested right of a city contractor to have the city proceed to levy a special tax to pay for an improvement is not affected or impaired by a statutory change in the method of apportioning the tax among the lots subject thereto. *Palmer v. Danville*, 166 Ill. 42, 46 N. E. 629.

*Agreement — Exempt property.*

Notwithstanding a contract that the pay for work should be received from the proceeds of a special assessment, and no claim made against the city except from the proceeds thereof, yet where a part of the assessment could not be collected because of a contract by the city with the owner of the property expressly exempting it from such tax, of which agreement the contractor had no knowledge when he assented to the



compliance with the provisions of the statute must be shown to sustain a recovery, the power to collect in a summary method, by lien on the property benefited, and sale thereof

conditions of the contract, he would have his remedy against the city to recover the amount to which he was entitled. *Chicago v. People*, 56 Ill. 327. See, also, *Chicago v. People*, 48 Ill. 416.

*Effect where contractor agrees to look solely to special assessment.*

A contractor who has agreed to look solely to the proceeds of a special assessment for his pay, taking the risk of its invalidity, has no right of action against the city for an unpaid balance, in the event the assessment is set aside, unless the ordinance is void, or the city, having the power to levy a new assessment, has refused to act. *Foster v. Alton*, 173 Ill. 587, 51 N. E. 76.

*Equity.*

Where the council has power to make an assessment, equity will not assume jurisdiction, to restrain the collection thereof, under a warrant against complainant's personal property, but will leave him to his remedy at law. *Williams v. Detroit*, 2 Mich. 560.

*Assumpsit — Failure to collect assessment.*

If a municipal corporation, in dealing with individuals, assumes that it possesses corporate powers upon which the validity of its acts depends, and it turns out that it does not possess the specific powers relied on, it is not thereby excused from the performance of its obligations, if they can be performed through the agency of other powers that it

does possess. *Maher v. Chicago*, 38 Ill. 266.

In accordance with above, it was held that the city was liable on an implied contract for labor performed, no special assessment having been levied as agreed. But see *Chicago v. People*, 48 Ill. 416, distinguishing *Maher's* case as being one where the city had no power to levy an assessment.

*Construction of statute.*

A section of the Portland charter providing that if, upon the completion of any street improvement, the cost of which has been declared by the council to be a charge upon the adjacent property any assessments levied to pay therefor shall have been or may thereafter be found or adjudged to be invalid for any reason whatever, whether jurisdictional or otherwise, the city shall then have power to bring an action in the circuit court against the owners of the several parcels of land upon which the cost of such improvement has been charged, and recover from such owners their respective portions of the cost of such improvement, and of the costs and disbursements of such action, and that a lien therefor shall be declared upon the premises assessed for such improvement, is not unconstitutional as authorizing a personal judgment against the owner, and imposing upon him obligations not provided for in the charter at the time of the improvement, since it does not con-



resting solely on statutory authority.<sup>47</sup> Where the statutory proceedings necessary to authorize a special tax bill have not been observed in some particulars, the tax will be held invalid only as to what was done outside of the law.<sup>48</sup> Mere general language used in a statute giving a city power to levy local assessments will not authorize the enforcement of special tax bills against property of the state or county strictly devoted to public uses.<sup>49</sup> Special tax bills for street improvements are sustainable under the taxing power; and where that power is regularly exerted, the propriety of the special tax is not reviewable by the courts,<sup>50</sup> and legislation making them *prima facie* evidence of the liability of the owner named therein is not an encroachment on the judicial power, but is valid.<sup>51</sup> Under the principle of benefits, the enforcement of an assessment for local improvements upon property not at all benefited thereby is the taking of property without due process of law.<sup>52</sup> The determination of a municipal board as to the necessity of the construction of a sewer and the district benefited, cannot be assailed in an action to enforce an assessment therefor, on the ground that no outlet was provided for the sewage.<sup>53</sup>

**680.** Occasionally special assessments are made collectible through the same process and machinery as are general taxes,<sup>54</sup> but in practice they are usually enforceable

template a personal judgment against the property owner which may be generally enforced against his property, but authorizes the recovery of a judgment against the property owner to be enforced only against the property liable for such improvement. *Nottage v. Portland*, 35 Or. 539, 76 Am. St. Rep. 513, 58 Pac. 883.

<sup>47</sup> *Haskell v. Bartlett*, 34 Cal. 281; *State v. Beverly*, 53 N. J. L. 560, 22 Atl. 340.

<sup>48</sup> *Johnson v. Duer*, 115 Mo. 366, 21 S. W. 800.

<sup>49</sup> *Clinton v. Henry Co.*, 115 Mo. 557, 37 Am. St. Rep. 415, 22 S. W. 494.

<sup>50</sup> *Moberly v. Hogan*, 131 Mo. 19, 32 S. W. 1014.

<sup>51</sup> *St. Joseph v. Farrell*, 106 Mo. 437, 17 S. W. 497.

<sup>52</sup> *Or. & Cal. R. R. Co. v. Portland*, 25 Or. 229, 22 L. R. A. 713, 35 Pac. 452. But see *Whiting v. Townsend*, 57 Cal. 515.

<sup>53</sup> *Harney v. Benson*, 113 Cal. 314, 45 Pac. 687.

<sup>54</sup> *Highlands v. Johnson*, 24 Colo. 371, 51 Pac. 1004; *State v.*



through certificates of the municipality issued to the contractor who did the work, and by the contractor directly in an action in the nature of a foreclosure, or by the municipality through the sale of the property, in case of non-payment of the tax. In California, an action to recover an assesment levied for reclamation purposes in a swamp land district, may under the statute be prosecuted in the name of the people of the state.<sup>55</sup> To sustain such an action, for the recovery of the amount due on a special assessment against a lot owned by several persons, it is sufficient to show that the defendants were owners thereof in fee, without regard to the particular undivided interest claimed by one defendant in his answer.<sup>56</sup> An assessment for street work sought to be enforced as an entirety must stand or fall as a whole, and if it includes the cost of work not legally chargeable upon the property sought to be charged therewith, it cannot be enforced.<sup>57</sup> But where the charter does not require the completion of a street improvement before the collection of the assessment therefor, the property owners may be compelled to pay such assessment, although the work may have never been completed, owing to the exhaustion of the estimate made by the engineer.<sup>58</sup> Where a statute creates a new right, and prescribes the remedy, the statutory remedy is exclusive.<sup>59</sup>

Hobe, 106 Wis. 411, 82 N. W. 336. It was early held in Illinois, before the enactment of statutes governing the procedure, that they could be collected in an action of debt, the old remedy by distress not being necessarily exclusive. Ryan v. Gallatin Co., 14 Ill. 78; Dunlap v. Gallatin Co., 15 Ill. 7.

<sup>55</sup> People v. Hagar, 52 Cal. 171.

<sup>56</sup> Whiting v. Townsend, 57 Cal. 515.

<sup>57</sup> Partridge v. Lucas, 99 Cal. 519, 33 Pac. 1082.

<sup>58</sup> Felker v. New Whatcom, 16 Wash. 178, 47 Pac. 505.

<sup>59</sup> Clinton v. Henry Co., 115 Mo. 557, 37 Am. St. Rep. 415, 22 S. W. 494.

*Printed signature.*

In an action for foreclosure of a street assessment, *held*, the printed signature of the clerk to the resolution of intention was sufficient. Williams v. McDonald, 58 Cal. 527.

*Assignment of certificate.*

The purchaser of an assessment



**Collection by city.**

**681.** It is essential to the right of a city to collect the amount of special taxes for street improvement, to show affirmatively that the ordinance and all provisions of the charter have been complied with.<sup>60</sup> Thus where the charter requires that in order to collect from adjoining property owners the amount of an assessment taxed for opening a street, it must appear that before instituting condemnation proceedings an attempt had been made to agree with the owner for the purchase of the property, such duty is imperative and is a condition precedent to the exercise by the city of any jurisdiction to proceed.<sup>61</sup> Failure to appeal to

certificate is chargeable with notice of the records, proceedings and authority of the authority issuing same. *Talcott v. Noel*, 107 Ia. 470, 78 N. W. 39.

*Collection from owners is collection from the property.*

The collection of a special tax for a street improvement levied against the right of way of a Railroad Company from the owners of such property as provided by statute, is a collection from the property. *C. R. I. & P. R. Co. v. Moline*, 158 Ill. 64, 41 N. E. 877.

<sup>60</sup> *Hoover v. People*, 171 Ill. 182, 49 N. E. 367; *People v. Cash*, 207 Ill. 405, 69 N. E. 904; *Worthington v. Covington*, 82 Ky. 265; *St. Louis v. Ranken*, 96 Mo. 497, 9 S. W. 910; *Cole v. Skrainka*, 105 Mo. 303, 16 S. W. 491; *Spokane Falls v. Browne*, 3 Wash. 84, 27 Pac. 1077.

<sup>61</sup> *Leslie v. St. Louis*, 47 Mo. 474.

*No recovery where assessment illegal.*

Where an assessment is illegal because of attempting to charge

property with improvements for which it is not liable, there can be no recovery, in an action to foreclose such assessment, of the amount that is properly chargeable against the property. *Vancouver v. Wintler*, 8 Wash. 378, 36 Pac. 278, 685.

*Duty of city — Trustee.*

Under a statute authorizing a city to improve streets and issue bonds to pay the cost thereof, assess such cost on abutting property, and providing that such assessments shall constitute a sinking fund for the payment of the bonds, and not to be used or appropriated for any other purpose, the city, after having issued such bonds, is chargeable as a trustee with the duty of collecting and applying such assessments, and may be restrained from applying them to any other purpose. *Vickrey v. Sioux City*, 104 Fed. 164.

*Duty of city to levy tax — Charter.*

Where a charter requires the street commissioners to give the contractor for street work a certifi-



the council on account of irregularity in the assessment waives such irregularity as might have been corrected on such appeal.<sup>62</sup>

### Collection by contractor.

**682.** In bringing suit to recover on a special assessment certificate for grading a street, the plaintiff takes the onus

cate of the work done, and amount due therefor from the owner of each lot fronting on the street; and in case such amount be not paid before the time for making out the annual assessment roll, it was to be assessed upon the lot, and collected for the use of the certificate holder, as other real estate taxes are collected, and in no event, where work was ordered done at the expense of a lot, was either the city or any ward to be held responsible for the payment thereof, — it is the duty of the city to see that unpaid assessments are put upon the next annual assessment roll, and to take the prescribed steps to collect the taxes, if unpaid. *Finney v. Oshkosh*, 18 Wis. 210.

To recover the amount charged against a lot for street improvements, a substantial compliance with the law must be shown. If the work has been done in a manner satisfactory to the officer entrusted with its supervision, and has been received by the corporation and paid for, a *prima facie* case is made out. The defendant may show that there has been a neglect of duty on the part of the authorities entrusted with the execution of the work, and if this neglect or omission has injured him, such facts may constitute a

defense. *St. Joseph v. Anthony*, 30 Mo. 537.

<sup>62</sup>*McSherry v. Wood*, 102 Cal. 647, 36 Pac. 1010.

*Mere irregularity will not prevent.*

In an action by a city for the use of a contractor to recover the amount of a paving assessment, an objection that the notice of meeting of the commissioners was published twenty-nine days only, instead of thirty, was a mere irregularity which might have been availed of on an appeal from the proceedings under the ordinance, but cannot be relied on in this action. *Dashiell v. Mayor, etc.*, 45 Md. 615.

*Payment in depreciated warrants.*

Where a city is required to pay more in city warrants on account of their depreciation than it would have to in cash, for street paving, the ultimate cost of which is chargeable against the abutting lots, such fact will not affect the right of the city to enforce the collection of an assessment against the lots for the full amount paid. *Warren v. Henley*, 31 Ia. 31.

*Contract let prior to charter change.*

Where a street improvement contract was let and work partly done prior to adoption of a new charter changing the manner of assessment, such change does not



of establishing the facts that the conditions precedent were all performed; and the facts should be pleaded, to constitute a cause of action.<sup>63</sup> It is his duty to inform himself as to an ordinance on which his contract is based, and the performance of which is the basis of his claim.<sup>64</sup> He cannot recover against a city for work done under a grading contract void because the city had not taken the necessary steps to acquire the jurisdiction to make it, nor against the property owners upon assessment bills issued against them where it turns out that the work done by him was so defectively done as to be worthless. And the property owner is not precluded from making this defense because he is not a nominal party to the contract.<sup>65</sup> But where a city was empowered by its charter and ordinances to contract for the construction and repair of streets, and it entered into a contract to have such work done as the street commissioners should order, and afterwards stopped the work and prevented the issuance of special tax bills, the city was held liable on such contract for

affect the right of the city to enforce its equitable claim to reimbursement from the property owner for the contract obligations incurred by the city in such improvement. *Spokane v. Browne*, 8 Wash. 317, 36 Pac. 26.

#### *Liability of petitioners.*

Where sixteen property owners signed a petition for sinking artesian wells containing the words, "The petitioners to be responsible for all expenses that may occur in sinking said artesian wells, if a failure should take place in the attempt to procure water," and there being a failure to procure water, and an abandonment of the work, the petitioners were held responsible and not the city. *Rupert v. Mayor, etc.*, 23 Md. 184.

<sup>63</sup> *McComb v. Bell*, 2 Minn. 295, Gil. 256.

<sup>64</sup> *State v. Michigan City*, 138 Ind. 455, 37 N. E. 1041.

Where the city council let a contract for street work without observing the charter requirements, the contractor doing such work is bound to take notice of the provisions of law and limitations upon the authority of the council to contract, and cannot hold the city liable for the work done. *Johnson v. Indianapolis*, 16 Ind. 227.

<sup>65</sup> *Mayor v. Eschbach*, 18 Md. 276; *Pepper v. Philadelphia*, 114 Pa. St. 96, 6 Atl. 899. But the statement in the last case must be accepted as going to the extremest limit.



the work actually done by the order of the commissioners.<sup>66</sup>

### Contract induced by fraud.

**683.** If the council are induced by means of fraud or corruption to modify a contract, their action can by the courts be declared null and void, and the invalidity of such action is available as a defense in an action by the contractor upon the contract.<sup>67</sup> If a contractor for street improvements makes contracts with various lot owners to do their work at less than the price named in the contract, and before it is let, such private contracts are in fraud of the law under which the streets are improved. Such fraud is not a defense in an action by the contractor to recover the assessment, but the remedy of the lot owners is by appeal to the proper forum.<sup>68</sup>

### Defective or unfinished contracts.

**684.** Where a contract for street paving includes several disconnected streets, the fact that the paving on some of them is unfinished will not prevent recovery on special tax bills for work on other streets where the work has been completed.<sup>69</sup> As sureties upon a contractor's bond are entitled to stand on the original contract to insure the due performance of which the bond is given, and the contract is defective, there can be no correction of such contract on appeal to the board.<sup>70</sup>

<sup>66</sup> *Wright v. St. Louis*, 135 Mo. 144. As to effect of a mistake in a receipt for payment of an assessment, see *Wolf v. Philadelphia*, 105 Pa. St. 25.

<sup>67</sup> *Weston v. Syracuse*, 158 N. Y. 274, 43 L. R. A. 678, 70 Am. St. Rep. 472, 53 N. E. 12.

<sup>68</sup> *Nolan v. Reese*, 32 Cal. 484.

<sup>69</sup> *Neenan v. Smith*, 60 Mo. 292.

Where a city is empowered by its charter and ordinances to contract for the construction and re-

pair of streets, and entered into a contract to have done such work as the street commissioners should order, but afterwards stopped the work and prevented the issuance of special tax bills, the city is liable on such contract for the work done by the order of the commissioners. *Steffen v. St. Louis*, 135 Mo. 44, 36 S. W. 31.

<sup>70</sup> *Schwiesau v. Mahon*, 110 Cal. 543, 42 Pac. 1065.

The fact that an unusual and



**Remedy of contractor.**

**685.** Where a statute provides that a contractor who has faithfully performed his contract shall be paid the amount due thereon from a certain fund, after the assessment has been declared invalid by the highest court, if such invalidity shall appear by such decision to have been caused by the fault of the contractor, the judgment rendered in the action to foreclose the assessment and determine its invalidity is not conclusive upon the contractor in a subsequent action by him against said city to recover the amount due on the contract, as to the grounds upon which the assessment was held invalid.<sup>71</sup> If a contractor has paved the streets on both sides of a street railway track, he should not be denied the right to enforce his tax bills against the abutting owners, because of the failure of the city to force the street railway company to do the paving between, as required by the ordinance.<sup>72</sup> It has been decided that a charter provision authorizing the contractor for street grading to recover by civil action against the owner is invalid,<sup>73</sup> as well as that a local assessment may be enforced in proceedings against the one in possession under a registered title, when the statute creates a lien on the property.<sup>74</sup> Where the period of five

unsuitable season was selected by the city authorities for paving a street, thereby increasing its cost, is not a defense to an action for the assessment under a statute permitting the defense that the price paid was too high, there being nothing to show that the selection of such time of the year was an improper exercise of discretion. *Philadelphia v. Evans*, 139 Pa. St. 483, 21 Atl. 200. See *Stadler v. Milwaukee*, 34 Wis. 98.

<sup>71</sup> *Gafney v. San Francisco*, 72 Cal. 146, 13 Pac. 467.

Where money appropriated for repairs is used in macadamizing a

street, there is no such original paving as will prevent a city contractor from subsequently recovering from a property owner the contract price for laying a vitrified brick pavement duly authorized. *Philadelphia v. Hill*, 166 Pa. St. 211, 30 Atl. 1134; *Philadelphia v. Dibeler*, 147 Pa. St. 261, 23 Atl. 567.

<sup>72</sup> *Springfield v. Weaver*, 137 Mo. 650, 37 S. W. 509, 39 S. W. 276.

<sup>73</sup> *McComb v. Bell*, 2 Minn. 295, Gil. 256.

<sup>74</sup> *Kelly v. Mendelsohn*, 105 La. 490, 29 So. 894.



days is provided within which the property owners may do certain street work, has not expired, but nevertheless a contract to do such work is let, the contract was let without jurisdiction, and is void, and was not validated by a failure to appeal.<sup>75</sup> A demand for the aggregate sum due on two lots, under a street assessment, is insufficient. The demand should be on each lot, for the amount assessed thereon, and it may be made by the contractor who has assigned it as security for a loan, as the title remains in him.<sup>76</sup>

### Collection from property exempt from execution.

**686.** It is no objection to the validity of an assessment against property which by law is exempt from seizure and sale on execution, such as cemetery and school lands, that no specific statutory method of collection is provided, as the assessment may be enforced by a suit in equity; or in any case by due course of law in the institution of judicial proceedings.<sup>77</sup>

<sup>75</sup> *Burke v. Turney*, 54 Cal. 486.

<sup>76</sup> *Schirmer v. Hoyt*, 54 Cal. 280; *Foley v. Bullard*, 99 Cal. 516, 33 Pac. 1081.

*Repeal of law — Vested right — Merger.*

The repeal of the law under which a street improvement was made after the work was completed and precept ordering sale was issued, does not take away the remedy of the contractor, as his claim is merged in what is equivalent to a judgment and execution levied upon property, and is a vested right of which he cannot be deprived by the legislature. *Palmer v. Stumpf*, 29 Ind. 329.

*Dividing lot — Right of contractor — Lien.*

After the assessing board has acquired jurisdiction to proceed to

improve a street, and when the contract is made a certain portion of land abutting constitutes one lot, the contractor is entitled to have the assessment made against that lot as a whole, in one assessment, and his right may not be defeated by cutting up the lot, and selling parcels, and his lien attaches to the entire lot. *Dougherty v. Miller*, 36 Cal. 83.

<sup>77</sup> *Chicago, etc. v. Chicago*, 207 Ill. 37, 69 N. E. 580; *Lima v. Cemetery Ass'n*, 42 O. St. 128, 51 Am. Rep. 809; *Merriam v. Moody's Ex'rs*, 25 Ia. 163.

Where the statute provides that the assessments have the effect of a tax, the tax is a debt for the recovery of which a personal action against the owner will lie. *Muscatine v. C. R. I. & P. R. R. Co.*, 79 Ia. 645, 44 N. W. 909.



**Penalties for non-payment.**

**687.** The discretionary authority vested in municipalities to levy and collect taxes, in respect to the imposition of penalties for non-payment extends only to taxes for general purposes. In case of special assessment, only such penalties as are provided by statute can be imposed. A warrant to a city officer to collect a special assessment, and five per cent additional thereto, is valid, when authorized by charter.<sup>78</sup>

**Limitations.**

**688.** A municipality in making a contract for paving streets may limit the time within which actions based on the contract may be brought by the contractor. The bar of the statute upon the commencement of an action to enforce the collection of an assessment for a street improvement begins to run, not from the day the assessment is made due and payable and operative as a lien upon the property, but from the date of delinquency as provided in the ordinance providing for the levy and collection of the assessment.<sup>79</sup>

A sewer assessment, being a tax, cannot be collected as an ordinary debt by a common law action, unless such remedy is given by statute. *McKeesport v. Fidler*, 147 Pa. St. 532, 23 Atl. 799; *Lane Co. v. Oregon*, 7 Wall. 71, 19 L. ed. 101, and cases cited.

An action of assumpsit will not lie to recover a municipal assessment for paving a street. *Philadelphia v. Muklee*, 159 Pa. St. 515, 28 Atl. 360.

Nor for the construction of a sewer. *Philadelphia v. Bradfield*, 159 Pa. St. 517, 28 Atl. 360.

Note. Both above decisions went upon the ground that the legislative remedy by proceedings *in rem* was exclusive.

<sup>78</sup> *Ankeny v. Hemingsen*, 54 Ia.

29, 6 N. W. 65; *State v. Ironton*, 63 Minn. 497, 65 N. W. 935; *Williams v. Detroit*, 2 Mich. 560. But assessments for benefits cannot be enforced by fines or penalties imposed by ordinance. *Gridley v. Bloomington*, 88 Ill. 554, 30 Am. Rep. 566.

**Interest after due.**

Where execution is lawfully issued by a city to collect of a property owner an assessment for a street improvement, it is entitled to interest on the amount due, at least from the date of such execution. *Bacon v. Savannah*, 105 Ga. 62, 31 S. E. 127. When interest not recoverable, see *Seattle v. Hill*, 23 Wash. 92, 62 Pac. 446.

<sup>79</sup> *Barber Asphalt Pav. Co. v. Erie*, 203 Pa. St. 120, 52 Atl. 22;



**Who may collect.**

**689.** The assessment must be collected by the officer specially designated for that purpose. Under an act creating a district within a county, and authorizing the supervisors to levy a tax thereon for building a bridge, the property within such district cannot be assessed by, or the tax collected by, the assessor and collector elected by the county.<sup>80</sup>

**Completion of work.**

**690.** Where the work was not completed when the tax bills were made out, but was finished within two weeks thereafter, and before suit was brought, the law requiring the work shall not be a special charge against property until completed, is substantially complied with.<sup>81</sup>

**Pleading.**

**691.** A complaint to collect an assessment is bad on demurrer, unless it shows either by averment or by exhibits properly constituting a part of it, that some notice was given of the filing of the petition.<sup>82</sup> In such an action for the enforcement of a special street improvement assessment, it is not necessary that the depth and width of the improvement and the kind of material to be used should be definitely stated, when the resolutions and ordinances passed by the

Seattle v. O'Connell, 16 Wash. 625, 48 Pac. 412.

<sup>80</sup> Smith v. Farrelly, 52 Cal. 77.

<sup>81</sup> Kiley v. Cranor, 54 Mo. 54.

See, also, Weber v. Schergens, 59 Mo. 389.

<sup>82</sup> Kennedy v. State, 109 Ind. 236, 9 N. E. 778.

*Requisites of complaint.*

In an action to recover for a special assessment, the complaint alleged that the requisite petition was published for four weeks ending February 25th, and that on May 2nd thereafter the board

made an order approving the petition. *Held*, defective, as not showing a publication for four weeks next preceding the hearing, and in not showing that the board noted its approval on the petition itself. People v. Haggin, 57 Cal. 579.

Where the statute prescribes what must be averred in a complaint for the enforcement of an assessment, the statutory provisions govern. Whiting v. Townsend, 57 Cal. 515.



board, and the contract and specifications fixing these particulars are referred to.<sup>83</sup> An objection in a proceeding to enforce the collection of a special assessment for street paving, that such assessment is void because not based upon the benefit to said property, and in violation of the Fourteenth Amendment, sufficiently presents the constitutional objection, and is not subject to demurrer by reason of its generality.<sup>84</sup> In a suit on a special tax bill for paving a sidewalk in front of defendant's lot, it must appear that the charter requisites that the work was done by virtue of an ordinance duly passed, and that the city engineer, in computing the cost of the work, only charged defendant's lot in proportion to the frontage thereof; otherwise, a demurrer is properly sustained.<sup>85</sup> An allegation that the contract was obtained by a fraudulent combination among bidders will not prevent the recovery for the contract price, where the work was accepted by the authorities as a full compliance with the contract. If true, it would only reduce the amount to the extent of the actual injury sustained.<sup>86</sup>

### Counterclaim—Demurrer.

**692.** In an action by a city to recover benefits for street improvements, the defendant cannot offset a claim for ma-

<sup>83</sup> *Deane v. Indiana, etc. Co.*, 161 Ind. 371, 68 N. E. 686.

<sup>84</sup> *City Council v. Birdsong*, 126 Ala. 632, 648, 28 So. 522.

*Uniform rate on all frontage.*

An allegation in a complaint that the proper authority "made in the manner and form required by law, an assessment upon the lots and lands fronting thereon, each lot or part of a lot being separately assessed in proportion to the frontage at a rate per foot sufficient to cover the total expense of the work," sufficiently shows that the assessment for the paving work was at a uniform

rate, and on all the property fronting on the improvement. *Treanor v. Houghton*, 103 Cal. 53, 36 Pac. 1081.

<sup>85</sup> *Irwin v. Devors*, 65 Mo. 625.

<sup>86</sup> *Hubbard v. Norton*, 28 O. St. 116.

*When complaint sufficient.*

In an action to foreclose an assessment, the complaint is sufficient if it aver, in connection with the assessment attached to it as an exhibit, that the different acts preceding and up to the assessment required by the statute to be done by the board have been rightfully done. *Van Sickle v. Belknap*, 129



terials furnished the contractor who had charge of making the improvements.<sup>87</sup> An answer to a claim of tax title that the land was not liable to taxation, without specifying the ground of exemption, is bad on demurrer.<sup>88</sup>

### Evidence—Prima facie proof.

**693.** Evidence of the assessment roll and of one witness that the property was benefited to the full extent of the

Ind. 558, 28 N. E. 305; Dugger v. Hicks, 11 Ind. App. 374, 36 N. E. 1085, 37 N. E. 284; Becker v. Baltimore & O. R. Co., 17 Ind. App. 324, 326, 46 N. E. 685; Helm v. Witz (Ind.), 73 N. E. 846.

<sup>87</sup> New Whatcom v. Bellingham, etc. Co., 16 Wash. 138, 47 Pac. 1102.

<sup>88</sup> Johnson v. Oshkosh, 21 Wis. 186.

#### *Oral return of demand.*

Where the city marshal hands back a bill of costs which he had attempted to collect, with an oral statement that he had made demand for payment, but was unable to collect it, is not a return, and therefore not amendable. People v. Record, 212 Ill. 62, 72 N. E. 7; Biggin's Est. v. People, 193 Ill. 601, 61 N. E. 1124.

#### *When demand for payment unnecessary.*

Where a special assessment is levied against unknown owners, a demand for payment is unnecessary. Whiting v. Townsend, 57 Cal. 515.

#### *What complaint must allege.*

In an action to recover on contractor's certificate of assessment, the complaint must allege notice of the award of the contract was

duly published. Himmelmann v. Townsend, 49 Cal. 150.

#### *Joinder of actions.*

Two causes of action for enforcing liens for two different improvements of one street, affecting the same lots, but made at different times and under separate contracts, cannot be joined in one suit. Dyer v. Barstow, 50 Cal. 652.

#### *Joinder of actions.*

Two assessments for reclamation purposes in a swamp land district made on the same land at different times may be recovered in the same action. Dyer v. Barstow, 50 Cal. 652, is not a parallel case. Swamp, etc. District v. Feck, 60 Cal. 403.

#### *Joinder of actions.*

If several tracts of swamp land, of the same owner, be separately assessed under one assessment, the assessments on the several tracts, if recoverable, may be recovered in one action. People v. Hagar, 52 Cal. 171.

#### *Joinder of plaintiffs.*

Land owners may join in objecting to an application for judgment of sale for a drainage assessment where the objections as to each are identical, and there is nothing to show that confusion or



assessment is *prima facie* sufficient.<sup>89</sup> Statutory provisions making the assessment, warrant, etc., *prima facie* evidence of plaintiff's rights to recover on his contract, is a rule of evidence, and not of pleading. It is therefor competent for defendant to disprove the presumption thus arising, by proving that the contract was prematurely let.<sup>90</sup> A special tax bill makes the owner *prima facie* liable for the amount of the debt charged, and constitutes a valid claim until rebutted. It is presumptively legal.<sup>91</sup> Upon application for judgment to enforce collection of a special assessment, the want of competent proof of making the assessment will prevent a judgment.<sup>92</sup>

### Burden of proof.

**694.** In a suit to enforce a special assessment lien, in which defendant relies on the invalidity of the ordinance

embarrassment will be thereby produced. *People v. Keener*, 194 Ill. 16, 61 N. E. 1069.

#### *Parties defendant.*

Where assessments made against several lots of plaintiff are made by one course of void proceedings, and tax sale certificates of various lots are held by different persons, such holders are proper defendants in an action for equitable relief. *Watkins v. Milwaukee*, 52 Wis. 98, 8 N. W. 823.

<sup>89</sup> *Chicago U. T. Co. v. Chicago*, 207 Ill. 607, 69 N. E. 803. And see *Chicago U. T. Co. v. Chicago*, 207 Ill. 544, 69 N. E. 849.

<sup>90</sup> And evidence that written objections were filed ten days before the authorities had made the order to advertise for bids made by owners of more than half the frontage affected, was sufficient to displace such *prima facie* proof of regularity, and throw the burden

of proof on plaintiff. *Burke v. Turney*, 54 Cal. 486.

<sup>91</sup> *Neenan v. Smith*, 60 Mo. 292; *Tuttle v. Polk*, 92 Ia. 433, 60 N. W. 733.

<sup>92</sup> *Honore v. Chicago*, 62 Ill. 305. *Protest against proposed work — presumption.*

Where in an action to foreclose an assessment for macadamizing a street, an issue was raised by the pleadings as to whether a majority of the property owners had protested against the proposed work, and on the trial the court excluded the written protest from any evidence, but the plaintiff admitted the names of the protesters and the number of front feet owner by each, findings waived and judgment recovered in favor of the plaintiff, it was held that it would be presumed that a majority of the property owners on the line of the work, did not pro-



creating the assessment district, the burden of proof is on the defendant to establish that fact.<sup>93</sup> So, too, the burden of proof as to the invalidity of tax certificates or special assessment proceedings is on those attacking them.<sup>94</sup>

### **Mandamus.**

**695.** Where the municipal authorities neglect or refuse to do something which it is their duty to do, and some one has a pecuniary interest in the performance by them of such duty, mandamus is usually a proper remedy to compel them to comply with the law, and perform such duty. Thus while county property may not be sold to enforce a special assessment against it, yet the money should be paid out of the county treasury, and *mandamus* would lie to compel such payment, after judgment at law has been entered.<sup>95</sup> It lies to compel city officers to deliver to a street contractor the special assessment certificates against abutting property, as required by his contract,<sup>96</sup> or to compel the comptroller,

test. *Alameda, etc. Co. v. Williams*, 70 Cal. 534, 12 Pac. 530.

#### *When relevant.*

In a *scire facias* for a municipal claim, evidence that the widening of the street was not called for by any reason, except as a public improvement, should be received. *Craig v. Philadelphia*, 89 Pa. St. 265.

In this case, the property assessed was rural property and farm land, and the evidence was intended to show the improvement would produce no local advantage, and so bring it within the rule in *Hammett's case*.

#### *When irrelevant.*

In an action to enforce an assessment for benefits caused by improving a ditch, evidence that other land through which the ditch

passed was not assessed, although benefited, is irrelevant. *Goodrich v. Minonk*, 62 Ill. 121.

<sup>93</sup> *Kansas City, P. & G. R. Co. v. Waterworks Imp. Dist.*, 68 Ark. 376, 379, 59 S. W. 248.

<sup>94</sup> *Tuttle v. Polk*, 92 Ia. 433, 60 N. W. 733; *Argentine v. Simmons*, 54 Kan. 699, 39 Pac. 181.

<sup>95</sup> *McLean Co. v. Bloomington*, 106 Ill. 209; *Olney v. Harvey*, 50 Ill. 453, 99 Am. Dec. 530; *People v. Board*, 50 Ill. 213.

<sup>96</sup> And his claim against the city is not converted into a money demand by such neglect to deliver. *Whalen v. La Crosse*, 16 Wis. 271; *Alton v. Foster*, 207 Ill. 150, 69 N. E. 783; *People v. Pontiac*, 185 Ill. 437, 56 N. E. 1114; *Pontiac v. Talbot Paving Co.*, 48 L. R. A. 326, 36 C. C. A. 88, 94 Fed. 65.



or other ministerial officer, to sign a contract after an appropriation regularly made, when his duties so require;<sup>97</sup> or to compel the common council to levy a tax in a special improvement district for the completion of the improvement therein, under a constitutional act so providing.<sup>98</sup> The contractor can compel a city by mandamus to levy a new assessment to pay for a completed improvement, the first assessment having been set aside because of defects in the ordinance which were subject to amendment, and the city has refused to take any steps in the matter.<sup>99</sup> If the contractor agrees to be paid from special assessments made or to be made, and to take all risks of their invalidity, he has no cause of action against the city for balance due, if the assessment be invalid in whole or in part, but may bring mandamus to make a new assessment.<sup>1</sup> Where a municipal contract for a local improvement provides for payment only through a special assessment, the remedy of the contractor is by mandamus; but where the municipality disables itself from the contract in such action on its part as makes void, and, therefore, uncollectible, an assessment, or refuses to perform the contract on its part, the remedy is by action against the city for breach of the contract.<sup>2</sup> Where the contract provided that no payment should be made thereon "until the cost of the work shall have been assessed upon and collected from the tax-payers liable," and after its construction only a part of the money was collected and nothing further done to

<sup>97</sup> Commonwealth v. George, 148 Pa. St. 463, 24 Atl. 59, 61.

<sup>98</sup> Little Rock v. Board of Improvements, 42 Ark. 152.

<sup>99</sup> People v. Pontiac, 185 Ill. 437, 56 N. E. 1114. This decision was based on the law of 1889, in force while the proceedings were pending.

<sup>1</sup> Farrell v. Chicago, 198 Ill. 558, 65 N. E. 103.

<sup>2</sup> Weston v. Syracuse, 158 N. Y.

274, 43 L. R. A. 678, 70 Am. St. Rep. 472, 53 N. E. 12.

*When equity may intervene.*

The holder of a warrant drawn on a special fund to be raised from street improvement assessments may by mandamus compel the city officers to proceed with the collection of the assessments; and if this remedy be inadequate, a court of equity may make and enforce them. Ger. Am. Bank v. Spokane,



collect it, the contractor was entitled to mandamus requiring the city authorities to collect the tax.<sup>3</sup>

### When mandamus will not lie.

**696.** Where an ordinance for street work provides the payment of all the work shall be by special assessments, and as to part of the street the proceeding is abandoned, payment for the land actually taken will not be compelled in any other manner, and *mandamus* will not lie to compel payment therefor, out of the general fund; <sup>4</sup> nor to compel the issuance of a special assessment certificate for street work done under a void contract; <sup>5</sup> nor to compel payment of interest claimed as delinquent.<sup>6</sup> Abutting owners will not be permitted to waive their right to injunction or mandamus to compel a hearing on the engineer's report for a street improvement assessment until the same is approved, and then make the denial of a hearing available as a defense in an action to collect the assessment.<sup>7</sup>

### Judgment of sale.

**697.** A judgment ordering a sale of several lots for the total tax assessed against them is unauthorized. Judgments for special taxes are *in rem*, and can lawfully operate only against the particular lot or tract of land against which the tax is assessed.<sup>8</sup> It is essential to the right of a city to recover a judgment for a special sidewalk tax that it affirmatively prove compliance with the ordinance, and that the application may include general and special tax.<sup>9</sup> Application for judgment of sale of land for an unpaid special

17 Wash. 315, 38 L. R. A. 259,  
47 Pac. 1103, 49 Pac. 542.

<sup>3</sup> *People v. Mayor*, 144 N. Y.  
63, 38 N. E. 1006.

<sup>4</sup> *People v. Hyde Park*, 117 Ill.  
462, 6 N. E. 33.

<sup>5</sup> *Gray v. Richardson*, 124 Cal.  
460, 57 Pac. 385.

<sup>6</sup> *Tacoma Paving Co. v. Tacoma*,  
26 Wash. 84, 66 Pac. 121.

<sup>7</sup> *Shank v. Smith*, 157 Ind. 401,  
55 L. R. A. 564, 61 N. E. 932.

<sup>8</sup> *Hoover v. People*, 171 Ill. 182,  
49 N. E. 424.

<sup>9</sup> *People v. Sherman*, 83 Ill. 165;  
*People v. Cash*, 207 Ill. 405, 69  
N. E. 904.



assessment, and a sale thereunder, must be made by some general officer having authority to receive State and county taxes.<sup>10</sup> And where a *prima facie* case is made upon such application, it is for the owner to point out any valid objections, and not for the authorities to show the tax was legally assessed, the presumption being in favor of the authorities. And there is no difference in this respect also between a special assessment and any other tax authorized by law.<sup>11</sup> The fact that the street was opened before petition for condemnation is filed is no objection.<sup>12</sup> But where the statute provides that an application for judgment shall not be made until after the expiration of a certain time, an application made before such time, is prematurely brought and will not sustain a judgment.<sup>13</sup> In an action brought on a street assessment, in which it is admitted by the pleadings that several defendants are owners of the lots, it is erroneous to order judgment for the amount of the assessment against only one of the defendants.<sup>14</sup> Where it has been judicially determined that land has been assessed beyond the benefit conferred, the court may, upon proper pleadings, refuse to set aside the assessment in toto, and give judgment for the city, in a suit to collect the assessment, for the proper amount.<sup>15</sup> Although the collector's notice of application for judgment may have been deficient in not stating that an order of sale would be asked, yet where personal notice to the owner was given, and he appeared and filed objections, this was sufficient to give the court jurisdiction.<sup>16</sup>

<sup>10</sup> Webster v. Chicago, 62 Ill. 302; Otis v. Chicago, 62 Ill. 299.

<sup>11</sup> People v. Givens, 123 Ill. 352, 15 N. E. 23.

<sup>12</sup> Gage v. People, 163 Ill. 39, 44 N. E. 819.

<sup>13</sup> Bowman v. People, 137 Ill. 436, 27 N. E. 598, 600.

<sup>14</sup> Clark v. Porter, 53 Cal. 409.

<sup>15</sup> Walsh v. Sims, 65 O. St. 211, 62 N. E. 120.

<sup>16</sup> Goodrich v. Minonk, 62 Ill. 121.

*What sum is "properly chargeable."*

Under a statute authorizing the court to render judgment against the property owner, notwithstanding



**What may be shown on application for.**

698. Everything which shows that a special assessment ought not to be collected, and which cannot be interposed at the time of the application for judgment of confirmation, or an irregularity arising after confirmation, can be urged as a defense to the application for judgment of sale, and proper relief granted. And if the city should attempt to enforce payment of assessments at a time and under circumstances that would be unjust and inequitable, a court of equity would afford adequate relief.<sup>17</sup> But upon an application for judgment of sale for a fourth installment, the validity of the judgment for the first three installments cannot be questioned. The latter application is an independent proceeding.<sup>18</sup>

**Form and validity of judgment.**

699. A judgment of sale is fatally defective when it is impossible to ascertain with accuracy from anything in the judgment or the schedules attached, the amounts adjudged against the various properties, or where it does not conform as nearly as may be to the form provided by statute, or

ing defects or irregularities in the proceedings, the sum "properly chargeable," and for which judgment should be rendered is not the amount of benefits accruing to him from the improvement, but that proportion of the entire assessment that would have been chargeable to him had the assessment been properly made. *Cincinnati v. Bickett*, 26 O. St. 49.

*Special assessment cannot be collected out of lands not assessed.*

A special assessment is a charge upon the specific lands benefited and not against the owner thereof, and judgment cannot be taken on the assessment against other lands of such owner, though im-

mediately adjoining those assessed. *Dempster v. People*, 158 Ill. 36, 41 N. E. 1022.

<sup>17</sup> *Harris v. Chicago*, 162 Ill. 288, 44 N. E. 437; *Church v. People*, 174 Ill. 366, 51 N. E. 747.

<sup>18</sup> *Gage v. People*, 213 Ill. 410, 72 N. E. 1081.

*Prior assessment in bar.*

Upon application to enforce a special assessment for opening a street, and a prior opening and assessment therefor is urged in bar, it is necessary the record should show the first assessment conformed to the statute, as otherwise it would not be binding on the city. *Forsythe v. Chicago*, 62 Ill. 304.



which finds nothing to be due, and fixes no amount, either by reference to the delinquent list, or otherwise.<sup>19</sup> A judgment against lands for taxes is fatally defective unless there is some character or word which indicates the amount or sum for which the numerals are employed in the report of the collector on which the judgment is rendered.<sup>20</sup> And a judgment for a special assessment depends upon and must be governed by the same principles.<sup>21</sup> But such a judgment is not invalidated because of an evident mistake in the warrant for the collection of a special assessment, where the land owner was not misled and the warrant was correctly described in the notice.<sup>22</sup>

### The sale.

**700.** A legal assessment is the foundation of the authority to sell. An assessment which is made without jurisdiction, or is otherwise illegal, will not be aided by ratification

<sup>19</sup> *Gage v. People*, 205 Ill. 547, 69 N. E. 80; *McChesney v. People*, 205 Ill. 547, 69 N. E. 80; *Gage v. People*, 207 Ill. 61, 69 N. E. 635; *Gage v. People*, 207 Ill. 377, 69 N. E. 840; *Gage v. People*, 213 Ill. 410, 72 N. E. 1084.

<sup>20</sup> *Lawrence v. Fast*, 20 Ill. 338, 71 Am. Dec. 274; *Lane v. Bommelmann*, 21 Ill. 143; *Dukes v. Rowley*, 24 Ill. 222; *Eppinger v. Kirby*, 23 Ill. 521, 76 Am. Dec. 709.

<sup>21</sup> *Pittsburgh, Ft. W. & C. R. Co. v. Chicago*, 53 Ill. 80.

<sup>22</sup> *Young v. People*, 155 Ill. 247, 40 N. E. 604.

#### *Presumption in favor of judgment.*

A decree for plaintiff in an action to foreclose a street assessment lien recited that the action was dismissed as to some of the defendants, on appeal by the defendant. *Held*, that as all pre-

sumptions are in favor of the correctness of proceedings in courts of general jurisdiction, and as the consent of the defendants would have justified the order, it will be presumed such consent was given, in the absence of anything in the record to show to the contrary. *Parker v. Altschul*, 60 Cal. 381.

#### *Judgment against county.*

A general judgment cannot be rendered against a county to enforce a tax for a street improvement made in a court house square and assessed against the court house property. *Clinton v. Henry Co.*, 115 Mo. 557, 37 Am. St. Rep. 415, 22 S. W. 494.

#### *Res judicata.*

A decree declaring void an assessment for a public improvement is not a bar to a subsequent action by the city to collect the cost of



by the council or provisions for redemption,<sup>23</sup> although, when the charter permits, lands legally sold under an execution for "benefits," in grading cases, may be redeemed as well as under special tax bills for street improvements.<sup>24</sup> The sale of land for an unpaid assessment is the execution of a naked power, and every requirement of the statute imposing the liability, and prescribing the procedure to enforce it, which is for the security of the owner, or for his benefit, must be strictly conformed to.<sup>25</sup> Thus where the charter requires a written report by the commissioners of assessment, an omission to make the same, invalidates a sale.<sup>26</sup> When a statute gives a new power, and at the same time provides the means of executing it, those who claim the

the work from the property benefited. *Thomas v. Portland*, 40 Or. 50, 66 Pac. 439.

*Want of notice.*

Where the record of a special assessment proceeding shows on its face that a proper notice was sent, the judgment cannot be impeached by the owner by a showing that, in point of fact, no notice was sent him by mail. *Clark v. Kerns*, 146 Ill. 348, 35 N. E. 60.

<sup>23</sup> *State v. Jersey City*, 36 N. J. L. 188; *Stebbins v. Kay*, 123 N. Y. 31, 25 N. E. 207.

<sup>24</sup> *Bryant v. Russell*, 127 Mo. 422, 30 S. W. 107.

<sup>25</sup> *State v. Jersey City*, 36 N. J. L. 188.

<sup>26</sup> *State v. Jersey City*, 44 N. J. L. 136.

*City purchasing is a trustee.*

Where a city has performed the duties prescribed by its charter for collecting unpaid special assessments, and bids in the property at the tax sale in the absence

of any other bidder, it does not become liable for the amount of the certificate assessed against such property, but holds the tax certificate as a trustee for the benefit of the person to whom such assessment was due, and would be liable only in case it should sell the certificate or collect the amount due on it from the owner of the lot. *Finnery v. Oshkosh*, 18 Wis. 210.

*Redemption from second sale.*

And where a lot was bid off to the city for unpaid taxes, including a special assessment, and the year following was again sold to city for ordinary taxes, and the latter certificate sold by it to a third party, the owner of the certificate issued for the special assessment must redeem from the second sale, or lose his lien against the party claiming thereunder. It is not the duty of the city to preserve the lien of the certificate. *Fletcher v. Oshkosh*, 18 Wis. 229.



power can execute it in no other way.<sup>27</sup> The power given by a city charter to levy and collect a special tax does not carry with it the power to collect such tax by sale of the property upon which it is assessed;<sup>28</sup> nor will such power be inferred from an express charter provision that the collection of taxes may be enforced in such manner as may be provided by city ordinance; but in such case the city would have the right to enforce collection by proceedings in due course of law.<sup>29</sup> And power given to a municipal corporation to sell lands for taxes will not authorize a sale for a mere assessment of benefit.<sup>30</sup> The sale may be made only by the officer pointed out in the statute.<sup>31</sup> Where work has been done under an ordinance providing for the collection of the bills by suit at law, another ordinance attempting to enforce collection by levy and sale, is retroactive and void.<sup>32</sup> Taxes levied on the property of an entire ward for a local improvement are within the purview of a statute directing the sale of lands for nonpayment of taxes.<sup>33</sup>

<sup>27</sup> *Anderson, etc. Corporation v. Gould*, 6 Mass. 44, 4 Am. Dec. 80; *Mix v. Ross*, 57 Ill. 121.  
*Old and new remedies.*

Existing remedies, either statutory or common law, will not be regarded as taken away by subsequent statutes granting new remedies, unless such purpose is expressed or *clearly* implied. *Goodrich v. Milwaukee*, 24 Wis. 422.

<sup>28</sup> *McInerny v. Reed*, 23 Ia. 410; *Merriam v. Moody's Ex'rs*, 25 Ia. 163; *Leavenworth v. Laing*, 6 Kan. 274.

<sup>29</sup> *Merriam v. Moody's Ex'rs*, 25 Ia. 163; *Paine v. Spratley*, 5 Kan. 525; *Leavenworth v. Laing*, 6 Kan. 274.

<sup>30</sup> *Sharp v. Johnson*, 4 Hill, 92, 40 Am. Dec. 259; *Sharp v. Speir*, 4 Hill, 76.

<sup>31</sup> *Hills v. Chicago*, 60 Ill. 86; *Hemingway v. Chicago*, 60 Ill. 324; *Chicago v. Habar*, 62 Ill. 283; *Brown v. Chicago*, 62 Ill. 289.

<sup>32</sup> *Fowler v. St. Joseph*, 37 Mo. 228.

<sup>33</sup> *Howes v. Racine*, 21 Wis. 510.  
*Non-adjacent lot — liability.*

Where by statute assessments for street improvements can be made only against lots bordering upon the street, the liability of other lots back from the bordering lot within 150 feet of the street improvement, arises only in the event that the bordering lots against which the whole assessment must be levied, fail to sell for a sum sufficient to pay the assessment, and then only for the deficit, in the order fixed by stat-



**Collection from railroads.**

**701.** Unless specially provided by statute, it is generally held by the courts that an execution sale of the road-bed, right of way, or other portion of a railway which would be disabled thereby from performing the functions and duties due to the public, will not be permitted.<sup>34</sup> But in Illinois, the collection of special taxes levied upon a railroad right of way may be enforced by the sale of that portion specially taxed.<sup>35</sup> Under the Iowa statute it is provided that a special assessment against railway property for a street improvement shall be a debt due from the railway. A sewer assessment may be levied on parcels of land aside from that made use of in carrying on business peculiar to the railroad.<sup>36</sup>

**When sale void—Caveat emptor.**

**702.** Where an owner of property, a part of which has

ute. *Terre Haute v. Mack*, 139 Ind. 99, 38 N. E. 468.

*Sale of undivided interest—Notice.*

As the collector has no right to sell an undivided interest in land for payment of tax assessed against it, an advertisement that he will do so, invalidates a sale made thereunder. *Wall v. Wall*, 124 Mass. 65.

*When part of tax illegal, sale is void.*

Where land is sold for non-payment of taxes charged thereon, and some part of such tax is illegal, the sale is void. *Younglove v. Hackman*, 43 O. St. 69, 1 N. E. 230.

*Macadam tax.*

Although a macadam tax is merely a special assessment for improvements, yet it is such a tax that when certified by the city clerk to the county clerk and placed on the county tax roll, the

property against which it is assessed may be sold for such tax and a tax deed may be executed upon such sale, which deed, if sufficient in form will be *prima facie* valid. *Sanger v. Rice*, 43 Kan. 580, 23 Pac. 633.

<sup>34</sup> *Gue v. Tide Water Canal Co.*, 24 How. 263; *Yellow River Imp. Co. v. Wood Co.*, 81 Wis. 562, 17 L. R. A. 92, 51 N. W. 1004; *State v. Anderson*, 90 Wis. 550; *Lake Shore & M. S. R. Co. v. Grand Rapids*, 102 Mich. 374, 29 L. R. A. 195, 60 N. W. 767; *Detroit, G. H. & M. R. Co. v. Grand Rapids*, 106 Mich. 13, 28 L. R. A. 793, 58 Am. St. Rep. 466, 63 N. W. 1007.

<sup>35</sup> *C. & N. W. R. Co. v. Elmhurst*, 165 Ill. 148, 46 N. E. 437.

<sup>36</sup> The roadbed or right of way or other property so connected with the operation of the railroad as that its loss by conveyance or sale would necessarily dismember



been condemned for a street, has been awarded damages in excess of benefits, a sale of an uncondemned part of such property for an assessment for the improvement is void.<sup>37</sup> A purchaser at a void assessment sale is a mere volunteer, and cannot recover back what he has voluntarily paid out. The doctrine of *caveat emptor* applies, and a contractor holding warrants for work done under a void assessment, who buys in the land at the sale thereof, is subject to the same rule.<sup>38</sup>

### Defenses to collection proceedings.

**703.** Any act of omission or commission in the prescribed course of procedure by which the burden upon the land owner is improperly increased will avoid the enforcement of the tax, if proper and timely steps are taken. It is in the actual performance of the work under the contract that defenses and objections perhaps most frequently arise, and some of the most vexatious problems presented. Under the

and break up the entirety and utility of the road as line of travel and commercial intercourse, are not liable to seizure and sale for unpaid special assessments. *Minn. & St. L. R. Co. v. Lindquist*, 119 Iowa, 144, 93 N. W. 103.

#### *Cemetery property.*

A cemetery cannot be subjected to sale to pay improvements on adjacent streets, where the purchasers can make no use of it without violating a statute against the desecration of graves. *Louisville v. Nevin*, 10 Bush, 549, 19 Am. Rep. 78.

#### *School property.*

It is no objection to the validity of a special assessment for street improvements against school property that it cannot be sold to enforce the collection of such assessment. *Chicago, to use, etc. v.*

*Chicago*, 207 Ill. 37, 69 N. E. 580.

<sup>37</sup> *Gaston v. Portland*, 41 Ore. 373, 69 Pac. 34, 445.

<sup>38</sup> *Dowell v. Portland*, 13 Or. 248, 10 Pac. 308; *Keenan v. Portland*, 27 Or. 544, 32 Pac. 2.

#### *Sale for less than amount of tax.*

The city treasurer may not sell land for less than the total amount adjudged against it for an unpaid special assessment; and a purchaser at such sale, who pays less than the full amount charged, acquires no interest in the property as against the true owner. *Security Trust Co. v. Heyderstaedt*, 64 Minn. 409, 67 N. W. 219.

#### *Sale of too much land.*

A levy and sale of 47 feet of a lot under an execution against 20 feet only, is clearly illegal and void. *Brumby v. Harris*, 107 Ga. 257, 33 S. E. 49.



charter of Chicago, any defense is allowable in a proceeding to collect an assessment which shows that the assessment ought not to be collected,<sup>39</sup> but this rule is too equitable to meet all legislative views. Property owners, not being parties to the contract for a public improvement, can only insist upon the invalidity of its provisions on application for sale, in so far as it is shown the same were likely to or did prejudice their interests or impose burdens upon them which they would not otherwise have suffered;<sup>40</sup> and it has been held that it is no defense to the enforcement of an assessment that the work and material were not such as the contract called for, or that the contract was not completed according to its terms.<sup>41</sup> Slight deviations from the

<sup>39</sup> *Chicago v. Burtice*, 24 Ill. 489.

*Legislative omnipotence over.*

Municipal claims for paving and other public improvements are a species of taxation, and the property owner has only such rights of contest and defense as the legislature chooses to allow him. *Seranton v. Jermyn*, 156 Pa. St. 107, 27 Atl. 66. This is very narrow doctrine, and fortunately is not an accurate statement of the law as generally held.

<sup>40</sup> *Wells v. People*, 201 Ill. 435, 66 N. E. 210.

Owners of property adjacent to a street improvement are not, in any sense, parties to a contract between the contractor and the proper municipal authority; they are brought into relations with the proceedings only when the assessment is issued. *Dyer v. Barstow*, 50 Cal. 652; *Emery v. San Francisco Gas Co.*, 28 Cal. 345; *Himmelmänn v. Steiner*, 38 Cal. 175; *Himmelmänn v. Spanagel*, 39 Cal. 389.

<sup>41</sup> *Mayor, etc., v. Raymo*, 68 Md. 569, 13 Atl. 383; *Dixon v. Detroit*, 86 Mich. 516, 49 N. W. 628; *Motz v. Detroit*, 18 Mich. 515; *Harper v. Grand Rapids*, 105 Mich. 551, 63 N. W. 517.

*Work improperly performed.*

The fact that the work was not performed substantially according to contract, but has been accepted by the proper authorities, is not a valid excuse for refusal to pay the special assessment, nor available on application for judgment of sale. *People v. Whidden*, 191 Ill. 374, 56 L. R. A. 905, 61 N. E. 133.

*Same.*

But this rule does not extend to cases where the improvement authorized is changed for another, or where the city authorities accept a different improvement from the one for which the assessment was levied. *People v. Whidden*, 191 Ill. 374, 56 L. R. A. 905, 61 N. E. 133; *Pells v. People*, 159 Ill. 580, 42 N. E. 784, as where a 61 foot pavement assessment was aban-



contract will not avail the taxpayer, but such is not the law where the work done is materially different from that authorized by the ordinance, especially where the cost is materially increased, or the result is a damage to the adjacent property, and not a benefit.<sup>42</sup> Municipal authorities cannot bind the tax-payers by accepting a mixture of clay, gravel, limestone and slag, which will not sustain an ordinary load in wet weather, as compliance with an ordinance providing for a macadamized road, and tax-payers may defend on this ground on application for judgment of sale.<sup>43</sup> If a contract for street improvement includes a kind of work not specified in the resolution of intention, the contractor may recover for such work as is named in the resolution, if it can be separated from the other and ascertained.<sup>44</sup> But where work which the authorities have power to let is included with work for which they have no power to contract, in one job, upon one bid, and under one contract, the entire contract is void.<sup>45</sup>

done after confirmation, and a 53 foot pavement substituted.

*Same.*

The remedy for imperfect construction of a free gravel road is upon the contractor's bond. *Goodwin v. Commissioners*, 146 Ind. 164, 44 N. E. 1110.

<sup>42</sup> *Haisch v. Seattle*, 10 Wash. 435, 38 Pac. 1131; *Eustace v. People*, 213 Ill. 424; 72 N. E. 1089.

<sup>43</sup> *Gage v. People*, 200 Ill. 432, 65 N. E. 1084.

<sup>44</sup> *Beaudry v. Valdez*, 32 Cal. 269.

"The passage and publication of the resolution of intention are the acts by which the City Council acquires jurisdiction; and by those acts they acquire jurisdiction to make only such improvements as they describe in the resolution, and they cannot, therefore, lawfully

cause work other than that which is described to be performed. But if they do, it does not necessarily follow that the entire proceedings are void. If the work described in the resolution can be separately traced through the entire proceedings, and does not become so mixed up with that which is not specified in the resolution as not to be distinguishable from it, the proceedings are valid as to the former, and invalid only as to the latter."

*Id.*, by *Sanderson, J.*

Where the illegal portion of a tax can be separated from the legal portion, the court will not quash the whole assessment, but only the illegal part. *Walker v. Dist. of Col.*, 6 Mackey, 352.

<sup>45</sup> *Nicholson Pavement Co. v. Fay*, 35 Cal. 695.



**What defenses available.**

**704.** Where the obligation to pay for a street pavement has by statute been imposed upon a street railway company, an abutting owner can set up such statute as a defense to an action brought by the city to recover the cost of the original paving.<sup>46</sup> A defense to a *scire facias* sur a municipal claim for paving a street which avers that the street had been previously graded and macadamized at the expense of the abutting owners, was in good order and needed no repair when the paving claimed for was done, is insufficient where the city has the primary right to determine the kind of paving, unless it also aver that the city approved of the previous paving.<sup>47</sup>

**705.** That the name of the owner of property specially assessed is omitted from the advertisement for delinquents,

*Sufficient averment of non-performance.*

"Where an ordinance for grading provides it shall be done in accordance with plan, profile and specifications prepared by city engineer, and that no departure from the plans, profile and specifications shall be allowed unless authorized by city councils," an affidavit of defense in an action to recover the cost of such grading which avers that the grading "was not done according to the grade established by ordinance, but according to another grade established by the city engineer without authority," is sufficient. *Seranton v. Bush*, 160 Pa. St. 499, 28 Atl. 926.

*When claim of non-performance available.*

Under the St. Joseph charter the defense that a street improvement was not executed in a good and workmanlike manner is only available (in a special tax suit) by way of reduction of the recovery,

and upon tender of the value of the work actually done. *Barber Asphalt P. Co. v. Ullman*, 137 Mo. 543, 38 S. W. 458.

*When alteration not injurious.*

Where an ordinance and the contract based thereon provide for paving a street "with asphalt from curb to curb," an abutting owner is not relieved from his share of the cost by the fact that the city, after the contract was made, arranged with a street railway company which was bound to pave the portion of the street between its outer rails and one foot on each side thereof, to pave its portion with stone. *Erie v. Piece of Land*, 171 Pa. St. 610, 33 Atl. 378.

<sup>46</sup> *Philadelphia v. Market Co.*, 161 Pa. St. 522, 29 Atl. 286; *Philadelphia v. Bowman*, 166 Pa. St. 393, 31 Atl. 142.

<sup>47</sup> *Philadelphia v. Baker*, 140 Pa. St. 11, 21 Atl. 238.



is a sufficient objection.<sup>48</sup> A lot owner is liable for no part of the cost of a street improvement, where only part of the work contracted for was performed by the contractor, and received and paid for by the city.<sup>49</sup> An objection to an application for judgment of sale for an unpaid installment, that the city has collected enough on former installments to pay all costs and expenses, is well taken in the trial court, and, if proven, will not justify judgment of sale for a delinquent installment not needed.<sup>50</sup>

### Defenses not available.

**706.** That the improvement is not completed is no de-

<sup>48</sup> Gage v. People, 205 Ill. 547, 69 N. E. 80.

<sup>49</sup> Henderson v. Lambert, 14 Bush, 24.

*Assessment in wrong name.*

An assessment for a sewer is against the property, and not against the owner of the property, and it does not follow that plaintiff was not compensated for land taken for the construction of a sewer because the assessment for the construction thereof was made in the wrong name. Gas Light Co. v. New Albany, 158 Ind. 268, 63 N. E. 458.

<sup>50</sup> People v. McWethy, 177 Ill. 334, 52 N. E. 479.

*City's account of expense.*

The property owner has a right that the city shall keep an account showing what moneys have been expended for the improvement for the making of which he has been assessed, and he may show that the city treasurer's account of the expenses of a local improvement are incorrect, and that part of the charges were not embraced in the ordinance nor payable from the assessment fund.

People v. McWethy, 177 Ill. 334, 52 N. E. 479.

*Arbitrary overassessments of benefits.*

On application for judgment upon a special assessment, it is competent to prove as a defense that "the commissioners in making said assessment, knowingly and willfully assessed objector's real estate at more than its proportion of benefits, to be conferred by said improvement;" and that the "commissioners assessed certain real estate benefited, for an amount grossly and very much less than it was benefited, and, in so doing, increased the benefits assessed against objector's real estate." Southerin v. Chicago, 56 Ill. 429.

*What affidavit for misrepresentation must contain.*

An affidavit of defense for misrepresentations as to character of pavement, or an allegation of defects therein, must show by whom the misrepresentations were made, or the connections of the officers or agents of the city or the contractor, therewith, and also show



fense to an application for sale on a delinquent installment, since a property owner has his remedy by *mandamus* to compel the city to complete the improvement as provided

in what the defects consist, and that the paving in front of plaintiff's premises is defective. *Harrisburg v. Baptist*, 156 Pa. St. 526, 27 Atl. 8.

*Opening street to less than established width.*

Where an ordinance provides generally that no street less than thirty feet wide shall be accepted for public use, and a later ordinance provides for paving a certain street if it be properly opened, and it appears that such street is thirty feet wide on the public plan, but as been opened to a less width, and not accepted for public use, the city cannot recover the expense of the paving from the abutting owners. *Philadelphia v. Ball*, 147 Pa. St. 243, 23 Atl. 564.

*Allowing owner to do the work. Owner's knowledge of invalidity of proceedings.*

An order of the common council to change the grade of a street and fill up to the new grade was void for irregularities in the proceedings. Plaintiff, acting under the order, filled the street to the new grade in front of his own lot abutting thereon. In an action against the city for such filling, *Held*, 1. That if plaintiff did the work knowing the order was void, he could not recover.

2. If he did the work believing the proceedings to be legal, by his failure to appeal from the assessment of benefits and damages, he must be presumed to have been

satisfied therewith, it being there decided the benefits were a full compensation for the work.

3. If he did the work without taking steps to ascertain whether the proceedings were regular, he must still be held to have accepted the benefits to the property as full compensation. *Owens v. Milwaukee*, 47 Wis. 461, 3 N. E. 3.

Where a street improvement ordinance provides that the adjoining property owners be given the privilege of doing the work in front of their property, proof of failure to give such opportunity will defeat an action on a special tax bill against one of such owners. And a mere newspaper advertisement for proposals for doing such work will not amount to such offer, unless made to that effect by the terms of the ordinance. *Leach v. Cargill*, 60 Mo. 316.

*Legal and illegal items blended.*

Where it appears that an assessment sought to be enforced against a property owner is made up of different items or elements, all blended together, some of which are illegal and others legal, he may resist the payment of the whole, in the absence of some statute which modifies the general rule. *Poth v. Mayor*, 151 N. Y. 16, 45 N. E. 372.

*Unconstitutional act.*

Where proceedings are had under an unconstitutional act, consents given thereunder bind no one, and the right to assert such



by the ordinance.<sup>51</sup> Where the taxing power has been called into action in the mode provided by law for the purpose of paying for a local improvement, such as grading or paving a street, the fact that such improvement did not benefit, but damaged the property sought to be charged with the tax bill, is no defense to an action on the latter.<sup>52</sup> But this opinion is somewhat beyond the limit in the direction towards which it tends, and if followed to its legitimate re-

unconstitutionality cannot be waived. *Lyon v. Tonawanda*, 98 Fed. 361.

*Omission of notice — Collateral attack.*

The omission to give a notice to abutting owners which is required by statute, avoids the assessment, and may be shown collaterally in an action brought by the municipality to enforce the collection of the assessment. *Daly v. Gubbins*, (Ind.) 73 N. E. 833.

*Deduction for repairs.*

Where a contract provided for making the improvement so perfectly that it should remain in repair for seven years, and during the same and following year extensive repairs became necessary, the expense thereof, whether completed or not, should be deducted from the assessment against the abutting owners in an action by the contractors on the assessment. *Hastings v. Columbus*, 420 St. 585.

*When grantor not liable.*

Where a deed was executed Sept. 17, and warranted the lots conveyed to be free and clear from all judgments, assessments, taxes, liens, etc., the grantor is not liable for the expense of a sidewalk authorized by ordinance dated Sept. 13, but not due until

Nov. 1, and therefore not a lien before that time. *Tull v. Royston*, 30 Kan. 617, 2 Pac. 866.

<sup>51</sup> *Lawrence v. People*, 188 Ill. 407, 58 N. E. 991.

<sup>52</sup> *Keith v. Bingham*, 100 Mo. 300, 13 S. W. 683.

The court say, "the party injured might have his action (on a proper showing) under the constitution for such injury," citing *Householder v. Kansas City*, 83 Mo. 488.

*Inability of court to change assessment.*

In an action to enforce an assessment for reclamation purposes, while it is true that the trial court is without power to change the assessment, yet the defendant cannot complain of this because the court may declare the assessment invalid in so far as it purports to create a charge against his land. *Reclamation District v. Evans*, 61 Cal. 104.

*Failure to register tax bills.*

The Missouri statute requiring the city clerk to register all special assessment tax bills is merely directory, and his failure to do so is no defense. *Field v. Barber A. P. Co.*, 117 Fed. 925.

*Over-assessment of others.*

Property owners cannot complain of the excessive assessment



sult would permit confiscation, and throw around the process the sheltering mantle of the law. The enhancement in value of the property assessed is the limit to the amount assessed permitted by either law or logic.

### Liens—In general.

**707.** A city has no lien for its taxes, and has no power to impose penalties for non-payment unless such power be conferred by statute.<sup>53</sup> And it cannot create, nor can the courts sustain, liens on land for street improvements or special assessments except under express statutory authority.<sup>54</sup> Where, at the time of the improvement of the street, the charter conferred no power to impose its cost upon the abutting property, a subsequent legislative act giving a lien

of others. *Denver v. Londoner*, 33 Colo. 104, 80 Pac. 117.

#### *Mere irregularities.*

Mere irregularities in the proceedings to collect cannot be inquired into on injunction. *Parker v. Challiss*, 9 Kan. 155.

#### *Not an original pavement.*

An affidavit of defense to a paving assessment that the paving "was not an original pavement," without a statement as to when or with what material the street was previously paved, is insufficient. *Harrisburg v. Baptist*, 156 Pa. St. 526, 27 Atl. 8.

#### *Delay in completion.*

In an action to foreclose an assessment lien, it is not a sufficient defense that the city had the work performed under a bid made five years prior to its acceptance and the work done under it, unless it be shown he was prejudiced by such delay. *Philadelphia v. Hood*, 211 Pa. 189, 60 Atl. 721.

#### *False representations — Examination of records.*

Persons contracting with a public corporation are chargeable with notice of its contractual powers, and the facts necessary to exercise them, and where the proper petition has not been filed, they cannot be heard to say that they were induced to enter into contract by false representations as to such petition, and the power of the city to make the improvement. *Swift v. Williamsburgh*, 24 Barb. 427.

#### *Street improvement bonds — Duty of city.*

See *Jewell v. Superior*, 67 C. C. A. 623, 135 Fed. 19.

<sup>53</sup> *Johnson v. Dist. of Col.*, 6 Mackey, 21; *Jefferson City v. Whipple*, 71 Mo. 519.

<sup>54</sup> *Eagle Mfg. Co. v. Davenport*, 101 Ia. 493, 38 L. R. A. 480, 70 N. W. 707; *Cemansky v. Fitch*, 121 Ia. 186, 96 N. W. 754; *Philadelphia v. Greble*, 38 Pa. St. 339; *Mauch Chunk v. Shortz*, 61 Pa.



upon the abutting property for the cost of the improvement, is unconstitutional.<sup>55</sup> A valid lien attaches to the property regardless of its ownership.<sup>56</sup> But special assessments upon public property, such as parks, for street purposes, create no lien on such property, it being merely a mode of determining what proportion of the cost of the improvement should be paid by the public.<sup>57</sup>

### Priorities.

**708.** A lien for public taxes and assessments is upon the property, and is paramount to all liens acquired by personal contract, when so provided by statute. There is no difference in this respect between taxes for street improvements and general taxes. Both are levied under the sovereign power of the state, and both are levied under the theory that they are for the general good, and the same powers for enforcing their collection are generally given. Such lien is superior to all other liens, prior or otherwise.<sup>58</sup> Although

St. 399; *Wabash E. R. Co. v. Commissioners, etc.*, 134 Ill. 384, 10 L. R. A. 285, 25 N. E. 781.

<sup>55</sup> *Bellevue v. Peacock*, 89 Ky. 495, 25 Am. St. Rep. 552, 12 S. W. 1042.

<sup>56</sup> *Rosetta Gravel, etc., Co. v. Jollisaint*, 51 La. An. 804, 25 So. 477.

<sup>57</sup> *West Chi. Park Com'rs v. Chicago*, 152 Ill. 392, 38 N. E. 697.

<sup>58</sup> *Wilson v. Bank*, 121 Cal. 631, 54 Pac. 119; *German S. & L. Soc. v. Ramish*, 138 Cal. 120, 69 Pac. 89, 70 Pac. 1067; *O'Dea v. Mitchell*, 144 Cal. 374, 77 Pac. 1020; *Dressman v. Bank*, 100 Ky. 571, 36 L. R. A. 121, 38 S. W. 1052; *Morey v. Duluth*, 75 Minn., 221, 77 N. W. 829.

The lien of a special assessment, like that of a general tax, attaches to the land itself, irre-

spective of the interests of various owners, and is paramount to all other claims or liens against the property. *Wabash E. R. Co. v. Commissioners, etc.*, 134 Ill. 384, 10 L. R. A. 285, 25 N. E. 781.

The lien upon land for a special assessment levied against it, may be made by the legislature paramount to all other interests therein. *Morey v. Duluth*, 75 Minn. 221, 77 N. W. 829; *Provident Institution for Savings v. Jersey City*, 113 U. S. 506, 28 L. ed. 1102, 5 Sup. Ct. Rep. 612.

Lien of general taxes is superior to that of a special assessment, although some of the deferred payments have not matured. *Balard v. Ross*, 38 Wash. 209, 80 Pac. 429. In Indiana, when lots primarily liable do not meet the assessment, the statute fixes a lia-



the lien of a prior recorded mortgage is superior to that of a special assessment,<sup>59</sup> it is within the power of the legislature to change the rule, and make the mortgage lien secondary to that of the assessment.<sup>60</sup> The lien of a special assessment certificate is subordinate to the lien of the state for all taxes which have been or may be levied under general laws, without respect to the time when the state lien accrues.<sup>61</sup> The

bility on lots secondarily liable without a separate assessment. *Mullen v. Clifford* (Ind. App.), 76 N. E. 1009. A lien cannot be enforced until the property owner is in default. *Gage v. People*, 219 Ill. 634, 76 N. E. 834. The enforcement of the lien against the land is the usual method of enforcement. *People v. Brown*, 218 Ill. 375, 75 N. E. 989. A warrant issued by mistake against the wrong person creates no lien. *Voris' Ex'rs v. Gallaher*, 251 Ky. L. R. 1001, 87 S. W. 775. And if the statute authorizes a correction within a certain time, failure to apply for correction within such time bars the holder's rights. *Id.* The lien is not continued beyond the time of its expiration by a *scire facias* insufficient to support a judgment because of defective service. *Philadelphia v. Cooper*, 212 Pa. 306, 61 Atl. 926.

#### *Defenses.*

Mere irregularities, such as delay in letting the contract for five years after the bid was submitted will not constitute a defense to the foreclosure of a lien in the absence of a showing that the property owner suffered injury in consequence. *Philadelphia v. Hood*, 211 Pa. 186, 60 Atl. 721.

<sup>59</sup> *State v. Loveless*, 133 Ind. 600, 33 N. E. 622; *Cook v. State*, 101 Ind. 446; *State v. Aetna Life*

*Ins. Co.*, 117 Ind. 251, 20 N. E. 144.

<sup>60</sup> *Chase v. Trout*, 146 Cal. 350, 80 Pac. 81; *Seattle v. Hill*, 14 Wash. 487, 35 L. R. A. 372, 45 Pac. 17.

A mortgage lien is inferior to that existing in favor of a contractor for construction of a sewer under a valid ordinance therefor. *Dressman v. National Bank*, 100 Ky. 571, 36 L. R. A. 121, 38 S. W. 1052; *Dressman v. Simonin*, 104 Ky. 693, 47 S. W. 767.

#### *Lien of prior mortgage.*

Where the city has acquired the fee of mortgage property, and taken possession and opened and improved a public street thereon, and assessed the cost against abutting property, without first extinguishing the mortgage lien, the objection that the assessment was prematurely made does not affect the validity of the judgment, although it might have been urged against the confirmation of the assessment. *Morey v. Duluth*, 75 Minn. 221, 77 N. W. 829.

For a case where a mortgage takes precedence of street improvement liens except such as were contemplated when the mortgage was recorded, see *Lincoln v. Lincoln St. Ry. Co.*, 67 Neb. 469, 93 N. W. 766.

<sup>61</sup> *White v. Knowlton*, 84 Minn. 141, 86 N. W. 755.



lien of street paving certificates inferior in point of time to a lien based on certificates issued for curbing the same street, is not rendered superior by a statute providing that special assessments for paving, curbing and sewerage streets shall be a lien on the abutting property from the commencement of the work, to remain until fully paid, and shall have precedence over all other liens except ordinary taxes.<sup>62</sup> A paving tax is a lien on the real estate prior to that of mechanics or judgment creditors.<sup>63</sup>

### Discharge.

**709.** A municipal lien for laying water pipe is not discharged by a sheriff's sale, subject to a subsequent mortgage, under a junior judgment, although the proceeds were more than sufficient for its payment.<sup>64</sup> If an assessment be erroneously discharged of record, its lien cannot be restored so as to affect bona fide purchasers, or others standing in a similar relation, whose transactions were entered into in ignorance of the error, and in reliance upon the truth of the record.<sup>65</sup> But the foreclosure of a junior assessment lien

<sup>62</sup> Des Moines, etc., Co. v. Smith, 108 Ia. 307, 79 N. W. 77.

<sup>63</sup> Pennock v. Hoover, 5 Rawle, 291.

#### *Limitations.*

An assessment is, by statute, a lien on the lot in the nature of a mortgage; and requires the same length of time to bar an action as is required to bar an action on a mortgage or judgment. Mayor v. Colgate, 12 N. Y. 140.

<sup>64</sup> Northern Liberties v. Swain, 13 Pa. St. 113.

<sup>65</sup> Curnen v. Mayor, etc., 79 N. Y. 511.

#### *Liability of purchaser of land.*

One who purchases at an appraised value land upon which there is an apparent tax lien, the

amount of which has been deducted from the appraisement, will be presumed to have assumed and agreed to pay the same, and he is estopped to maintain an action in equity to set aside the assessment lien. Eddy v. Omaha, (Neb.) 101 N. W. 25.

#### *Duty of purchaser—Notice.*

Taxation, whether general or special, is not enforceable under rules applicable to a vendor's lien against a bona fide purchaser for value, but one buying property after the completion of a public improvement thereon is put upon notice as to whether it has been paid. Seattle v. Kelleher, 195 U. S. 351, 49 L. ed. 232, 25 Sup. Ct. Rep. 44.



does not extinguish prior liens of the same kind, unless the holders of such prior liens are made parties to the foreclosure suit.<sup>66</sup>

### Filing or establishing.

**710.** In a proceeding to fix upon property a lien *in invitum*, every requirement that could be of benefit to the person to be charged must be strictly complied with.<sup>67</sup> There is no authority for filing a lien for a sewer assessment where the statute simply directs that the assessment shall be a lien on the property, but gives no specific right to file it.<sup>68</sup> An unpaid street assessment against one who was the owner when proceedings were commenced is *prima facie* valid and a lien, although such assessments are required to be made "to the owner or occupant," and a change of ownership occurred, but of which the assessors had no notice prior to confirmation of the assessment.<sup>69</sup> But no tax or assessment is a lien or incumbrance within the meaning of a covenant against them until the amount is ascertained and determined.<sup>70</sup> A special tax or assessment, which the statute makes a lien upon real estate, does not partake of the nature of an ordinary debt, is not assignable, and a person claiming as assignee thereof from the city cannot enforce its collection.<sup>71</sup> Where property was transferred by deed, with a

<sup>66</sup> Wood v. Brady, 68 Cal. 78, 5 Pac. 623, 8 Pac. 599.  
*Payment.*

An assessment cannot be vacated as being a lien on the property where it has been paid before making the application to vacate. *In re Lima*, 77 N. Y. 170.  
*Covenant against liens.*

A covenant against liens and incumbrances is a covenant *in præsentia*, not relating to those which may thereafter attach, and does not include an assessment theretofore made, but the lien whereof has not yet attached; and the term

"lawful claims" does not mean mere charges, or what may ripen into liens. *Cemansky v. Fitch*, 121 Iowa, 186, 96 N. W. 754.

<sup>67</sup> Schwiesau v. Mahon, 110 Cal. 543, 42 Pac. 1065.

<sup>68</sup> McKeesport v. Fidler, 147 Pa. St. 452, 23 Atl. 799.

<sup>69</sup> Morange v. Mix, 44 N. Y. 315.

<sup>70</sup> Harper v. Dowdney, 113 N. Y. 644, 21 N. E. 63.

<sup>71</sup> The decision goes upon the theory that the power to levy and collect taxes exists by virtue of the sovereign authority in the



covenant that it was free from all charges, assessments and incumbrances, and an assessment against the property was not confirmed until two days after the date of the deed, and the assessment was not recorded as required by statute for some weeks thereafter, yet a provision that no assessment should be a lien until recorded did not affect the covenant, and the vendor was bound by its terms.<sup>72</sup>

### Enforcement—Parties.

**711.** A lien for a street assessment cannot be enforced without making parties of all the property owners, and serving them all with summons, and the holder of a mortgage lien

state, and is conferred by it on the city, to be by it exercised, not delegated to others. *McInerny v. Reed*, 23 Ia. 410.

Equity will not imply an assignment of a claim where it is legally incompetent for the parties to make an express contract of a similar nature; hence an assignment of a tax from a city to a purchaser at a tax sale, void for want of power in the corporation to make it, will not be implied from the fact of sale. *Id.*

<sup>72</sup>*De Peyster v. Murphy*, 66 N. Y. 622.

#### *When action maintainable.*

An action cannot be maintained to enforce a street improvement lien unless the lien existed at the time of the commencement of the action. *Reis v. Graff*, 51 Cal. 96; *People v. O'Neil*, 51 Cal. 91.

#### *When lien attaches.*

Under the charter of St. Louis, the lien of a special tax for street improvements commences from the date of the assessment of the tax by the city engineer, after the completion of the work. *Anderson v. Holland*, 40 Mo. 600.

#### *Lien is several, not joint.*

When a street improvement is legally done in front of land owned by one person, but divided into several lots, each lot is subject to a lien for the work done in front of it; and the lien is not joint on the whole property. *Permell's Appeal*, 2 Pa. St. 216.

#### *Deposit of amount—when not payment.*

The deposit with the city of the amount of a municipal lien by the landowner pending an appeal, so that he could give a clear title to his premises, is not a payment thereof; but if his appeal be successful, the city must return him the amount so deposited. *Murtland v. Pittsburgh*, 189 Pa. St. 371, 41 Atl. 1113.

#### *Life tenant should pay—not remainderman.*

Tax bills for improvement of street surface, constituting liens on the abutting property, must be paid by the life tenant of such property; he is not entitled to contribution from the remainderman. *Reyburn v. Wallace*, 93 Mo. 326, 3 S. W. 482.



is a proper, but not a necessary party thereto.<sup>73</sup> The personal representatives of the deceased lot owner are not necessary parties defendant, in an action to foreclose the lien of a street assessment pending the settlement of his estate. His heirs or devisees are the only necessary defendants.<sup>74</sup>

### Foreclosure of.

**712.** Where the statute makes an unpaid special assessment a lien against the property, but provides no way in which the lien can be foreclosed, it will be presumed the legislature intended to leave the mode to be regulated by the general laws applicable to other cases for the enforcement of liens.<sup>75</sup> Proceedings to foreclose a street assessment lien under the California statute is not strictly a proceeding *in rem*, but the decree therein is *in personam*, the measure of satisfaction being the interest of the defendants in the land, and the decree does not bind interest in the land of any persons not parties to the action. A *prima facie* case for the plaintiff is made by the introduction in evidence of the assessment, diagram, warrant, return and engineer's certificate.<sup>76</sup> A complaint to foreclose the lien of a street assessment, which shows an assessment sufficient in form to give the board jurisdiction to order the work done, need not negative by way of anticipation any facts constituting mat-

#### *When not released.*

The lien of an unpaid assessment is not released because of the payment by the district of the indebtedness caused by the improvement. *Hammond v. People*, 169 Ill. 545, 48 N. E. 573.

<sup>73</sup> *Hancock v. Bowman*, 49 Cal. 413; *Kurtz v. Gardner*, 18 Wash. 332, 51 Pac. 397.

<sup>74</sup> *Phelan v. Dunne*, 72 Cal. 229, 13 Pac. 662.

#### *All parties in interest.*

In an action to enforce a street assessment lien, where all the defendants were joint owners of the

lot in question, and as such were necessary parties, it was error to permit plaintiff at the trial to dismiss as to some of the defendants, and refuse to allow defendant's counsel time to show that such parties were interested in the premises. *Harney v. Applegate*, 57 Cal. 205.

<sup>75</sup> *Craycraft v. Selvage*, 10 Bush, 696.

<sup>76</sup> *Wood v. Curran*, 99 Cal. 137, 33 Pac. 774; *Dowling v. Hibernia S. & L. Soc.*, 143 Cal. 425, 77 Pac. 141.



ter of defense, and need not allege that the work was not already done in front of the lot described in the complaint.<sup>77</sup> Where the suit to foreclose the lien is brought in the same manner as a mortgage is foreclosed, the owner who has not signed a waiver may contest in such suit the amount of his assessment.<sup>78</sup> In an action to foreclose street assessments, a decree providing that the city might purchase the lands at the foreclosure sale is not erroneous, when its charter authorizes the city to purchase, receive, hold and enjoy real and personal property and dispose of the same for the public benefit, and the legislature has further authorized cities to bid in property in default of other bidders, when sold for special assessments.<sup>79</sup> And in a similar action by a town, plaintiff should be non-suited when the proof does not show the contract entered into for the improvement of the street, and there is nothing in the assessment roll introduced in evidence authenticating it in any way as a warrant for the collection of assessments for the proposed improvement.<sup>80</sup> An attorney's fee in the foreclosure of a lien for a public improvement is not unconstitutional when authorized by statute, it being within the power of the state to provide a penalty for delay in discharging a proper obligation.<sup>81</sup> And it is a general rule in actions for the foreclosure of special assessment liens that where it appears illegal items of charge are included, but these illegal elements are capable of exact computation, and are severable from the legal items, the court may in its conclusions of law deduct and disallow the

<sup>77</sup> *Perine v. Lewis*, 128 Cal. 236, 60 Pac. 422, 772.

<sup>78</sup> *Indianapolis v. Holt*, 155 Ind. 222, 57 N. E. 966, 988, 1100.

Under the Indiana statute providing for appeals from special assessments, a street improvement lien cannot be foreclosed while such appeal is pending. *City Bond Co. v. Bruner*, 34 Ind. App.

659, 73 N. E. 711; *City Bond Co. v. Wells*, 34 Ind. App. 675, 73 N. E. 713.

<sup>79</sup> *New Whatcom v. Bellingham, etc., Co.*, 16 Wash. 131, 47 Pac. 236.

<sup>80</sup> *Hamilton v. Chopard*, 9 Wash. 352, 37 Pac. 472.

<sup>81</sup> *Brown v. Central Bermudez Co.*, 162 Ind. 452, 69 N. E. 150.



former items, and the property owner is then in no position to complain.<sup>82</sup>

### Evidence in foreclosure.

**713.** In an action to foreclose the lien of a street assessment under a statute providing that all proceedings shall be presumed to be regular and duly done or taken, until the contrary is shown, the assessment roll, if regular on its face, is *prima facie* proof of the facts necessary to the case. Want of notice of the improvement is a matter of defense.<sup>83</sup> In the absence of such a statute, it is necessary to prove by competent evidence *dehors* the complaint, every step in the statutory schemes that leads up to and clothes the board of trustees with power to make a valid assessment.<sup>84</sup>

### Defense in foreclosure.

**714.** In an action to foreclose a street assessment lien, the omission of the proper officer to sign the record of the return of the warrant, is fatal to the action.<sup>85</sup> Where a legislative act dividing cities of a state into seven classes is unconstitutional and void, a municipal lien for a street paving, in a city of the fifth class, under such act, is unauthorized and void.<sup>86</sup> A street assessment imposes no lien

<sup>82</sup> *Ross v. Van Natta*, 164 Ind. 557, 74 N. E. 10.

*Indebtedness beyond constitutional limit.*

In an action by a contractor against a property owner for the foreclosure of a street assessment lien, the question as to whether or not the city at the date of entering into the contract for the improvement was indebted beyond the constitutional limit, and did not have money in its treasury sufficient to pay its part of the cost thereof, cannot arise. *Hughes v. Parker*, 148 Ind. 692, 48 N. E. 243.

<sup>83</sup> *Seattle v. Smith*, 8 Wash. 387, 36 Pac. 280.

<sup>84</sup> *Pittsburgh, etc., R. Co. v. Fish*, 158 Ind. 525, 63 N. E. 454.

*Conclusiveness of judgment of confirmation.*

On a bill in equity to foreclose a lien under the drainage act of May 29, 1879, the judgment confirming the assessment is conclusive on parties in interest, except for want of jurisdiction. *Riebling v. People*, 145 Ill. 120, 33 N. E. 1090.

<sup>85</sup> *Witter v. Bachman*, 117 Cal. 318, 49 Pac. 202.

<sup>86</sup> *Shoemaker v. Harrisburg*, 122



without a substantial compliance with statutory requirements; and where on the face of the assessment it appears that the property is charged with a portion of the expense which the statute requires shall be imposed on other property, the assessment is invalid for any purpose.<sup>87</sup> The assessment and diagram for a street improvement must contain a sufficient description of the lot, or the court will not enforce a lien thereon;<sup>88</sup> and any variance between the original and recorded documents sufficient to prevent notice being given by an inspection of the record as to what property should be subjected to the lien, is material, and vitiates the lien.<sup>89</sup> Nor will a lien be enforced where the council has omitted to make the assessment required by statute.<sup>90</sup> But where the only defense was one purely technical, failure to appeal as provided by charter constitutes a waiver by defendant of such defense.<sup>91</sup> The defendant in a foreclosure action cannot set up a counterclaim for the value of a strip of land which it was alleged had been taken possession of by the city for street purposes.<sup>92</sup>

### Enforcement of.

**715.** The collection of a special assessment which by statute is made a lien upon the real estate on which it is assessed, may be reached by the enforcement of such lien in a court of equity.<sup>93</sup> And although a city has sold the property without authority, it may by a suit in equity, notwithstanding the void sale, enforce its lien and collect the tax.<sup>94</sup>

Pa. St. 285, 16 Atl. 366; *Berg-haus v. Harrisburg*, 122 Pa. St. 289, 16 Atl. 365.

<sup>87</sup> *Ryan v. Altschul*, 103 Cal. 174, 37 Pac. 339.

<sup>88</sup> *Himmelmann v. Bateman*, 50 Cal. 11.

Above decision is under a statute requiring the warrant, assessment and diagram to be recorded, and "when so recorded, the sev-

eral amounts assessed shall be a lien upon the land, lots, etc."

<sup>89</sup> *Labs v. Cooper*, 107 Cal. 656, 40 Pac. 1042.

<sup>90</sup> *Laakmann v. Pritchard*, 160 Ind. 24, 66 N. E. 153.

<sup>91</sup> *Dyer v. Parrott*, 60 Cal. 551.

<sup>92</sup> *Vancouver v. Wintler*, 8 Wash. 378, 36 Pac. 278, 685.

<sup>93</sup> *McInerny v. Reed*, 23 Ia. 410.

<sup>94</sup> *Id.*



They may be enforced by precept issued by order of the council, or by foreclosure of lien and sale of property, where both modes are authorized by statute.<sup>95</sup> To create a lien for taxes on real estate, it must be described so it can be located and found, and the action to enforce it cannot be maintained unless the lien existed at the time of the commencement of the action.<sup>96</sup> Where two or more lots are separately assessed for a local improvement, each lot is chargeable only with the amount assessed against it. If a judgment be rendered for enforcing liens thereon, the amount for which each lot is liable should be stated, and it should order a sale of each lot, or such portion as may be necessary to satisfy the amount.<sup>97</sup> It is error to enter judgment against all defendants but one, who had not been served, but whom the complaint showed to be a party in interest; because the case as to such defendant is not disposed of, and there is no statutory authority to enforce the lien in the absence of an interested party.<sup>98</sup> In Arkansas, a lien against a railroad for a special assessment is enforceable by a sale of so much of the railroad as lies within the state, as a unit; but not by the sale of so much thereof as lies within the assessment district, and a substantially similar decision has been made in Illinois.<sup>99</sup> It is a purely statutory question. The burden of establishing the validity of the lien for special taxes is upon him who seeks to enforce it.<sup>1</sup>

### Merger.

**716.** Where a city buys in at a tax sale for delinquent taxes property on which there is a lien for an unpaid special

<sup>95</sup> *Martin v. Wills*, 157 Ind. 153, 60 N. E. 1021.

<sup>96</sup> *People v. C. & A. R. Co.*, 96 Ill. 369; *Sanford v. People*, 102 Ill. 374.

<sup>97</sup> *Brady v. Kelly*, 52 Cal. 371.

<sup>98</sup> *Diggins v. Reay*, 54 Cal. 525.

<sup>99</sup> *Kansas City, P. & G. R. Co.*

*v. Waterworks Imp. District*, 68 Ark. 376, 382, 59 S. W. 248; *Wabash E. R. Co. v. Commissioners*, 134 Ill. 384, 10 L. R. A. 285, 25 N. E. 781.

<sup>1</sup> *Smith v. Omaha*, 49 Neb. 883, 69 N. W. 402; *Leavitt v. Bell*, 55

Neb. 57, 75 N. W. 524; *Equitable*



assessment, such lien merges in the title acquired by such purchase.<sup>2</sup>

### Payment—In general—Bonds.

**717.** The time and manner of the payment of assessments for the improvement of a street, after they have been made in conformity to law, is a matter within the legislative discretion, and its action in that respect ought not to be disturbed by the courts unless it is manifestly unjust and oppressive.<sup>3</sup> Where the statute permits, cities may issue bonds to pay for the building of sidewalks, although the money to pay such bonds is to be collected from special assessments upon the abutting property, and such bonds are not necessarily invalid because of illegality in the levy of the assessment.<sup>4</sup> Improvement bonds issued to anticipate installments of a special assessment, are not negotiable in the sense that a purchaser thereof is invested with any right

Trust Co. v. O'Brien, 55 Neb. 735, 76 N. W. 417; Merrill v. Shields, 57 Neb. 78, 77 N. W. 368; Grant v. Bartholomew, 58 Neb. 839, 80 N. W. 45.

<sup>2</sup> Schneider v. Detroit, 135 Mich. 570, 98 N. W. 258.

As to when lien attaches, see Mayor v. Dowdney, 54 N. Y. 186.

Where lien not discharged after sale of the property, see, Mayor, etc., v. Colgate, 12 N. Y. 140.

For a case illustrating the extent to which a statutory lien may extend, see Voris v. Pittsburg, etc., Co., 163 Ind. 599, 70 N. E. 249.

For a case holding that objections to the regularity of the assessment, not going to the jurisdiction, are not available in foreclosure action, see Aberdeen v. Lucas, 37 Wash. 190, 79 Pac. 632.

As to estoppel in such actions, see Voris v. Pittsburg, 163 Ind.

599, 70 N. E. 249; C. C. C. & St. L. R. Co. v. Porter (Ind.), 74 N. E. 260.

<sup>3</sup> Ladd v. Gambel, 35 Or. 393, 59 Pac. 113.

<sup>4</sup> Wyandotte v. Zeitz, 21 Kan. 649; People v. Flagg, 46 N. Y. 401; Horn v. New Lots, 83 N. Y. 101, 38 Am. Rep. 402; State v. La Crosse, Wis., N. W. Bonds held void, see Creed v. McCombs, 146 Cal. 449, 80 Pac. 679.

A bonding act providing that in certain cities, where property is improved at the expense of abutting property, the owners thereof whose assessments exceed \$25 may pay such assessments in installments, and the city may issue interest-bearing bonds therefor is a valid enactment. Ladd v. Gambel, 35 Or. 393, 59 Pac. 113; Stratton v. Oregon City, 35 Or. 409, 60 Pac. 905.



superior to that of the contractor to whom the bonds were issued.<sup>5</sup>

### Payment in installments.

**718.** Legislation dividing payment of special assessments into five parts, with interest at five per cent on deferred payments, does not infringe the personal right of any property owner by compelling him to pay interest absolutely, where the statute further provides that any installment, or the whole assessment, may be paid at any time.<sup>6</sup> An assessment is not invalidated by a commissioner acting in excess of his authority in fixing the exact date for payment of installments,<sup>7</sup> nor is the irregular division of an assessment into installments sufficient ground for refusing application for judgment of sale.<sup>8</sup> An objection that a special assessment was divided into installments in a manner not authorized by law must be made in the proceeding had to confirm the assessment, and comes too late on application for judgment of sale,<sup>9</sup> but the objection that the assessment was not divided into installments as required by law does not render the assessment void.<sup>10</sup>

### Payment from general fund.

**719.** Where its finances will permit, a city may pay for street paving from its general fund, in the absence of statutory prohibition; and it may lawfully contract to pay the cost of such improvement in front of property so nearly valueless as to render an assessment thereon unavailing without affecting the validity of assessments against abutting prop-

<sup>5</sup> *National Bank v. Petterson*, 200 Ill. 215, 65 N. E. 687.

<sup>6</sup> *Wilmette v. People*, 214 Ill. 107, 73 N. E. 327; *Gage v. Chicago*, 216 Ill. 107, 74 N. E. 726.

<sup>7</sup> *Hackett v. State*, 113 Ind. 532, 15 N. E. 799.

<sup>8</sup> *Glover v. People*, 194 Ill. 22, 61 N. E. 1047.

<sup>9</sup> *O'Neil v. People*, 166 Ill. 561, 46 N. E. 1096.

<sup>10</sup> *People v. Markley*, 166 Ill. 48, 46 N. E. 742; *Delamater v. Chicago*, 158 Ill. 575, 42 N. E. 444.



erty for other portions of the work.<sup>11</sup> Where an assessment ordinance provides the proportion to be paid by the owners, declaring the assessment a lien on the property, and providing for the mode of collection, the city may pay the contractors, and levy the assessment in installments, thereby lessening the burden of the property-holders.<sup>12</sup>

**When payment neither waiver nor estoppel.**

**720.** Where a tax payer voluntarily pays a special assessment levied against his property, he thereby waives any irregularity in the publication of the notice of confirmation. The objection is not to the regularity of the proceedings, but that they did not become operative.<sup>13</sup> The payment of the first installment of a special assessment is not a waiver of the right to appeal within the statutory period, nor does it prevent the owner, if not otherwise estopped, from objecting to compulsory payment of the remaining installments under a void description of the property.<sup>14</sup> But where one is chargeable with notice of all proceedings for levying a special assessment for a street improvement, and thereafter pays the amount of such assessment without protest, the payment is voluntary,<sup>15</sup> and the defense of illegal-

<sup>11</sup> Ottumwa B. & C. Co. v. Ainley, 109 Ia. 386, 80 N. W. 510.

<sup>12</sup> Elkhart v. Wickwire, 121 Ind. 331, 22 N. E. 342.

<sup>13</sup> State v. District Court, 40 Minn. 5, 41 N. W. 235. The court say in their opinion in this case, "It was immaterial whether the board assessed the damages at nothing, and the benefits at \$40, or the damages at, say, \$50, and the benefits at \$90. Equally in either case there would be an assessment of benefits and damages." This opinion does not coincide with those which hold the assessing officers to a strict compliance with statutory provisions, espe-

cially in making assessments of benefits and damages. Where the board are required by statute to make an assessment of both benefits and damages, that they have done so should appear on the assessment roll, and not merely the balance between the two findings. See Lieberman v. Milwaukee, 89 Wis. 336, 61 N. W. 1112; Kerstens v. Milwaukee, 106 Wis. 200, 48 L. R. A. 851, 81 N. W. 948, 1103.

<sup>14</sup> Markley v. Chicago, 167 Ill. 626, 48 N. E. 1056; Upton v. People, 176 Ill. 632, 52 N. E. 358.

<sup>15</sup> Shirley v. Waukesha, 124 Wis. 239, 102 N. W. 576; Pabst



ity of the assessment is waived, and the owners estopped to prosecute a reassessment in equity, although the assessment proceedings are confessedly invalid.

### Interest.

**721.** Where no authority is given by statute, interest on the assessment cannot be collected. The taxing power must be strictly exercised and the particular sum only assessed.<sup>16</sup> A statute authorizing the common council to fix the rate of interest upon improvement bonds is sufficiently complied with when the ordinance providing for the issue of such bonds names the rate of interest they shall bear.<sup>17</sup> But interest on money borrowed by a municipality, under due authority, for making a public improvement, is properly included as an item of the cost thereof;<sup>18</sup> and where a special assessment draws interest at a certain specified rate, a decree predicated upon a tax lien draws interest at the same rate.<sup>19</sup>

Brew. Co. v. Milwaukee, (Wis.), 105 N. W. 563.

<sup>16</sup> Chicago v. People, 56 Ill. 327; Commissioners v. County of Hudson, 44 N. J. L. 570; Wall v. Portland, 35 Or. 89, 56 Pac. 654.

An assessment for public improvements carries no interest unless imposed by statute, and when given in form of a penalty for default, must not be subject to doubtful construction or extended beyond the terms of the act. State v. Farrier, 47 N. J. L. 75.

<sup>17</sup> Scott v. Hayes, 162 Ind. 548, 70 N. E. 879.

<sup>18</sup> Davis v. Newark, 54 N. J. L. 144, 23 Atl. 276.

<sup>19</sup> Lincoln St. R. Co. v. Lincoln, 61 Neb. 109, 84 N. W. 802.

### Miscellaneous cases on payments.

#### Penalty for non-payment.

A taxpayer who neglects or re-

fuses to pay any portion of his assessment, and litigates all of it must pay such penalties and interest as are fixed by law upon such portions of the assessment as are held to be valid. Power v. Detroit, (Mich.) 102 N. W. 288.

#### Payment by mistake.

Where payment of a special assessment, though by mistake, has been accepted, neither the collector nor other municipal authorities have power to determine the ownership of the land or the rights of parties therein. Hudson v. People, 188 Ill. 103, 80 Am. St. Rep. 166, 58 N. E. 964.

#### Payment by mistake — Revivor.

If a special assessment be paid by mistake, it cannot be revived by refunding the amount paid so as to subject the land to sale. Hudson v. People, 188 Ill. 103, 80 Am. St. Rep. 166, 58 N. E. 964.



**Who should make payment.**

**722.** One who has the actual and exclusive possession of land under an easement, with the right to hold it forever, must pay the taxes on the land, and not he who holds

*Payment in cash or on time.*

An assessment against lot owners for laying a Nicholson pavement cannot be impeached because the bid provides for a payment of three dollars a square yard, or two dollars and a half if paid in cash as soon as the pavement is laid. *Dean v. Borschenius*, 30 Wis. 236.

*Payment in part by general taxation.*

Where a public improvement is directed to be paid for in part by special assessment, and in part by general taxation, the question of what is the proper portion to be charged on the general public is wholly immaterial, upon application for confirmation and the courts are without power to review the decision of the local authorities in such matter. *Leitch v. La Grange*, 138 Ill. 291, 27 N. E. 917.

*Limit of Plaintiff's Relief.*

In proceedings to vacate an assessment for local improvements, the plaintiff has no right to relief beyond the amount of his legal injury. And if he has voluntarily paid a portion of the assessment before such proceedings are instituted, the assessment can be vacated only so far as it remained a lien on his property. *In re Hughes*, 93 N. Y. 512.

*Payment by municipality — warrants.*

Village warrants are not negotiable instruments in the sense of

the law merchant, so that, when held by a bona fide purchaser, evidence of their invalidity or defenses against the original payee would be excluded. Nor is the village estopped to deny liability thereon. *Wall v. Monroe Co.*, 103 U. S. 77, 26 L. ed. 432; *Field v. Highland Park (Mich.)*, 104 N. W. 393; *Miner v. Vedder*, 66 Mich. 101, 33 N. W. 47.

*When re-payment unnecessary.*

Re-payment to the purchaser of the amount paid by him at the tax sale is not a condition precedent to the owner's right to have the tax sale set aside, or to enjoin the issue of a tax deed on such sale, where the tax is illegal and void. *Boals v. Bachmann*, 201 Ill. 340, 66 N. E. 336.

*Who must make payment.*

A covenant in a lease for twenty years, to pay "all taxes and assessments, whether in the nature of taxes now in being or not, which may be payable or assessed in respect of the premises, or any part thereof, during said term," binds the covenantor to pay the whole amount of an assessment for altering a street on which the premises abut. *Codman v. Johnson*, 104 Mass. 491.

*Paying for work already done.*

Corporate authorities may levy special assessments for work already done in good faith by them, or under their direction, in anticipation of such an assessment. *Ricketts v. Hyde Park*, 85 Ill. 110.



the empty title.<sup>20</sup> And where the lessee of property covenants to pay all taxes and assessments of every kind whatsoever, which should be imposed upon the property, he is liable for the amount of a special assessment for street improvement purposes.<sup>21</sup> A special assessment for flagging of sidewalks is not in the nature of an annual tax to be paid entirely by the tenant for life, of the premises possessed.

*Same.*

But not when the assessment is sought to be made for work done by private persons on their own account, and for which the city was under no obligation to make compensation. *Pease v. Chicago*, 21 Ill. 500; *Peck v. Chicago*, 22 Ill. 578.

*When liability accrues.*

The liability of abutting owners for the expense of a street improvement under a specific statute, accrues when the order making the improvement is passed, and is not affected by a subsequent repeal of the statute. *Jones v. Boston*, 104 Mass. 461.

*Excess payment by one no benefit to another.*

The fact that one abutting owner by mistake paid more than his share to cost of a street improvement does not inure to the benefit of others, and permit a reduction in the assessments properly chargeable to them. *Young v. Borzone*, 26 Wash. 4, 66 Pac. 135, 421.

*Payment in one installment.*

Under a statute regulating street opening proceedings, and providing that "the assessment shall be made and the amount levied and collected in the same manner and by the same officers and proceedings, as near as may

be, as is provided in the charter of the municipality for assessing, levying and collecting the expense of a public improvement when a street is graded," and the charter provides that assessments for grading shall be made in four parts, and that where bonds are issued to pay for three-fourths thereof they shall be made payable in one, two and three annual installments, an assessment for opening a street may be made payable in one payment, as the charter provisions controls payment for grading only. *Power v. Detroit (Mich.)*, 102 N. W. 288.

<sup>20</sup> *Muscatine v. Chicago, R. I. & P. R. Co.*, 79 Ia. 645, 44 N. W. 909.

<sup>21</sup> *Oswald v. Gilbert*, 11 Johns. 443; *Des Moines v. Dorr*, 31 Ia. 89.

When the covenant of warranty contained in the deed, on the sale of a city lot, read "Except maturing street assessments on F. avenue which the grantee assumes and agrees to pay," it is construed to mean that the grantor was relieved from any liability on the assessment, but not that the contract should inure to the benefit of the municipality, and the grantee is not estopped to deny the invalidity of the assessment. *Bell v. Norwood*, 8 Ohio C. C., N. S. 435.



Nor is it such a permanent improvement that he should not be required to contribute anything, but it should be apportioned between him and the remainderman.<sup>22</sup> But a tenant for life under a will requiring him to pay "all taxes" does not thereby have cast upon him the burden of paying the principal of an assessment for paving the street in front of the devised premises.<sup>23</sup> A special assessment is a charge upon the land and not against the owner, and the payment of the assessment, even though by mistake, discharges both the land and the owner from liability therefor; — and this is true whether the payment be made by the owner or a stranger.<sup>24</sup> When there is a valid assessment against land appearing of record at the time grantee acquires title, and of which they must be deemed to have had constructive notice, they must be held to have received the benefits resulting from the improvement, and to have taken the land subject to the consequent burden.<sup>25</sup>

<sup>22</sup> *Peck v. Sherwood*, 56 N. Y. 615.

<sup>23</sup> *Chamberlin v. Gleason*, 163 N. Y. 214, 57 N. E. 487.

<sup>24</sup> *Hudson v. People*, 188 Ill. 103, 80 Am. St. Rep. 166, 58 N. E. 964.

<sup>25</sup> *Seattle v. Hill*, 23 Wash. 92, 62 Pac. 446.

When the question is raised as to whether the owner has been paid for the land, see *Boynton v. People*, 159 Ill. 553, 42 N. E. 842.



## CHAPTER XIII.

### DUTIES, RIGHTS AND REMEDIES OF THE TAX PAYER.

- Estoppel — In general, 723.  
Estoppel by municipality, 724.  
Estoppel by signing petition, 725.  
Estoppel to deny jurisdiction, 726.  
When landowner estopped, 727-728.  
Active participation in causing improvement, 729.  
Acceptance of improvement, 730.  
Unconstitutionality of statute, 731.  
Taking action before completion of work, 732.  
Elements of estoppel — jurisdiction, 733.  
When grantee not estopped, 734.  
When landowner not estopped, 735.  
Laches, 736.  
Waiver and acquiescence, 737.  
Fraud, 738-740.  
Tax deeds and certificates, 741.  
Purchaser at tax sale — In general, 742.  
Caveat emptor, 743.  
Subsequent purchaser, 744.  
Certiorari — In general, 745.  
When writ will issue, 746-747.  
Action of court, 748.  
When writ will not issue, 749.  
Assessment for benefits, 750.  
Laches, 751.  
To whom writ directed, 752.  
Answer to petition, 752a.  
Pleading and practice, 753.  
When court will not interfere, 754.  
Appeal — Regulation by statute, 755.  
When allowable, 756.  
What matters considered on, 757.  
When appeal exclusive remedy, 758-759.  
When appeal not exclusive remedy, 760.  
Waiver, 761.  
Burden of proof, 762.  
Mandamus, 763-764.  
Quo warranto, 765.  
Trespass, 766-768.  
Recovery back — In general, 769-770.  
Facts outside the record, 771.  
Failure of jurisdiction, 772.  
Ignorance or coercion, 773.  
Abandoning work — Failure of consideration, 774.  
Unconstitutional assessment, 775.  
Voluntary and compulsory payments, 776.  
Who may recover, 777.  
Mistakes in payment, 778.  
Limitations, 779.  
When no recovery, 780.  
Vested rights, 781.  
Assessment valid on its face, 782.  
Assessment invalid on its face, 783.



Rule alike as to taxes and assessments, 784.	Assessment in excess of benefits, 795-796.
Authority of city to refund, 785.	Fraud, 797.
Recovery because of failure of consideration, 786.	Nuisance, 798.
Equity — In general, 787-789.	Adequate remedy at law, 799.
Injunction — When premature, 790.	Payment or tender, 800-801.
Cloud on title, 791.	When equity will not interfere, 802-803.
Apparent defect, 792.	Burden of proof, 804.
Extrinsic evidence, 793.	Parties, 885.
Failure to make timely objection, 794.	Pleadings, 806-807.
	De minimis, 808.
	Application of equity principles to facts, 809-815.

### Estoppel — In general.

**723.** During the last few years the question of estoppel has taken a large and increasing part in the decision of questions involving the validity of special assessments, and the enforcement or collection of the same. The trend of judicial decision is to be less technical than formerly, and to require at least reasonable diligence in asserting their rights upon the part of property owners before the improvements are completed.<sup>1</sup> But there is a very wide difference, not only in the actual decisions of the courts, but in the favor with which the doctrine of estoppel is regarded; and with the recent multiplication of reassessment statutes, which practically are made to cover all mistakes, errors or omissions, save those which go to the jurisdiction, it may well be a much mooted question as to whether courts, in their natural desire to prevent the evasion of the payment of a just claim on merely technical grounds, are not going to the other extreme, and preventing recoveries on grounds yet more technical.<sup>2</sup> The general rule is to the effect, that

<sup>1</sup> *Denver v. Campbell*, 33 Colo. 495; *Clinton v. Portland*, 26 Or. 162, 80 Pac. 142; *Lord v. Bayonne*, 65 N. J. L. 127, 46 Atl. 701; *Lewis v. Albertson*, 23 Ind. App. 147, 53 N. E. 1071; *Arnold v. Ft. Dodge*, 111 Ia. 152, 82 N. W. 410, 38 Pac. 407.

<sup>2</sup> "Equity recognizes and tolerates estoppels but does not encourage them; she admits them into her domains, but they are usually



where there is ground for interference or intendment, it will be against the estoppel and not in its favor.<sup>3</sup>

### — Estoppel of municipality.

**724.** A municipality will be estopped under substantially the same conditions as an individual.<sup>4</sup> It cannot escape liability for paying for property taken by asserting the invalidity of its own assessment roll,<sup>5</sup> or that a street was not

regarded as undesirable aliens having little in common with the other members of her family. Before saying to a suitor that his rights have been destroyed by his own act, a court of equity should be certain of the rectitude of its position." *Lyon v. Tonawanda*, 98 Fed. 362.

"While there is some merit in the contention that a tax-payer should not be permitted to stand by while valuable improvements are in progress redounding to the benefit of his property, and then, when called upon to pay his share of the expense, be heard to object that the municipal authorities had no jurisdiction, yet he is not estopped by such conduct, if free from laches. If he is charged with notice of what the law contains, he may well be permitted to assume that the city council will not proceed with an improvement without observing the law. The law does not make it incumbent upon him, in order to preserve his rights, to protest against an improvement, or to make inquiry whether the council has complied with statutory prescriptions, but it does, in our opinion, very clearly and in mandatory terms, enjoin upon the council to proceed only upon a petition signed by those

owning a certain definite proportion of the foot frontage. While it is true that he who objects to an assessment to pay for accomplished improvements presumably benefiting his property may not always be deserving of unalloyed sympathy, we think that, to hold him estopped, as a general rule, from basing an objection on the sufficiency of the petition at any stage of the proceedings, would result more often in hardship and injustice, than would a rule, in our opinion wholly in harmony with the statute as well as the authorities, that the council in making the improvement acts at its peril." *Morse v. Omaha*, 67 Neb. 426, 93 N. W. 734.

<sup>3</sup> *Taylor v. Patton*, 160 Ind. 4, 66 N. E. 91.

<sup>4</sup> *Portland v. Bituminous P. Co.*, 33 Or. 307, 44 L. R. A. 527, 72 Am. St. Rep. 713, 52 Pac. 28. It will not be estopped by a judgment of confirmation that has been vacated on appeal. *Freeport St. R. Co. v. Freeport*, 151 Ill. 451, 38 N. E. 137.

<sup>5</sup> *Chicago v. Wheeler*, 25 Ill. 478, 79 Am. Dec. 342; *Wright v. Butler*, 64 Mo. 165.

The burden of proving an estoppel against a property owner from alleging the invalidity of a special



legally laid out or dedicated when it has accepted it and taken possession.<sup>6</sup> And although a person receiving a benefit from a street improvement authorized by an attempted but illegal incorporation of the town may be estopped by his acts to deny his liability as against those who actually did the work, the town cannot, by subsequent re-incorporation take advantage of such estoppel.<sup>7</sup> If the mayor of a city direct the building of sidewalks and crossings, he will not be heard to deny that the streets upon which the work was done were public streets.<sup>8</sup> On general principles, a city should be estopped to deny the validity of a contract into which it has entered, after the council has decided and declared that the petition for the work was good, or from denying its liability to the contractor,<sup>9</sup> although the question has been decided to the contrary.<sup>10</sup>

— Estoppel by signing petition.

**725.** It is a very general requirement in city charters that street improvements may be initiated by petition of property owners interested, and in some it is expressly provided that one who petitions for an improvement cannot challenge the validity thereof, or collect damages for injury to his property caused thereby. But the courts are quite widely at variance as to how far the petitioner is actually estopped, although by both weight and number of authority it is generally held that the petitioner is not estopped to challenge the validity of the assessment, or the certificate issued to pay for it. There is no presumption that by asking for the improvement he desired it done other than according to law, or that he intended to bind his property for

assessment is upon the municipal officer asserting the claim. *Bell v. Norwood*, 8 Ohio C. C., N. S. 435.

<sup>6</sup> *Leavenworth v. Laing*, 6 Kan. 274; *Omaha v. Clarke*, 66 Neb. 33, 92 N. W. 146

<sup>7</sup> *Medical Lake v. Smith*, 7 Wash. 195, 34 Pac. 835.

<sup>8</sup> *Richie v. S. Topeka*, 38 Kan. 368, 16 Pac. 332.

<sup>9</sup> *Sleeper v. Bullen*, 6 Kan. 300.

<sup>10</sup> *Wheeler v. Poplar Bluffs*, 149 Mo. 36, 49 S. W. 1068.



more than his share of a legal assessment.<sup>11</sup> But he may be estopped from claiming insufficient notice of the presentation of the petition,<sup>12</sup> or the power of the council to do the paving for which he petitions.<sup>13</sup> It has, however, been held that if a petitioner had actual knowledge of the work being done, thought it was beneficial, and made no objections, he and his successors in interest will be estopped even to the extent of challenging the jurisdiction of the city to make the improvement.<sup>14</sup> But this case goes to the extreme, although there are other cases which uphold the theory of estoppel after completion of the work, by presumed acquiescence.<sup>15</sup>

### — Estoppel to deny jurisdiction.

**726.** The rule maintained by the courts with practical unanimity is, that where in proceedings for the levy of a special assessment, the local authorities act without jurisdiction from the beginning, one whose property is benefited by the improvement may deny the validity of the proceedings, although he made no objection while the work was in

<sup>11</sup> *McLauren v. Grand Forks*, 6 Dak. 397, 43 N. W. 710; *Mayor, etc., v. Porter*, 18 Md. 284, 79 Am. Dec. 686; *Steckert v. E. Saginaw*, 22 Mich. 104; *Grant v. Bartholomew*, 58 Neb. 839, 80 N. W. 45; *Wakeley v. Omaha*, 58 Neb. 245, 78 N. W. 511; *Batty v. Hastings*, 63 Neb. 26, 88 N. W. 139; *Birdseye v. Clyde*, 61 O. St. 27, 55 N. E. 169; *Audrey v. Dallas*, 13 Tex. Civ. App. 442, 35 S. W. 726. But see *Motz v. Detroit*, 18 Mich. 495.

<sup>12</sup> *Hackett v. State*, 113 Ind. 532, 15 N. E. 799.

<sup>13</sup> *Harrisburg v. Baptist*, 156 Pa. St. 526, 27 Atl. 8; *Bidwell v.*

*Pittsburgh*, 85 Pa. St. 412, 27 Am. Rep. 662; *McKnight v. Pittsburgh*, 91 Pa. St. 273; *Dewhurst v. Allegheny*, 95 Pa. St. 437; *Ferson's Appeal*, 96 Pa. St. 140; *Pepper v. Philadelphia*, 114 Pa. St. 96, 6 Atl. 899. And a protest against the methods adopted by the council is unavailing as a defense against the paving claim. *Harrisburg v. Baptist*, *supra*.

<sup>14</sup> *Wingate v. Tacoma*, 13 Wash. 603, 43 Pac. 874.

<sup>15</sup> *Ball v. Tacoma*, 9 Wash. 592, 38 Pac. 133; *Seattle v. Hill*, 23 Wash. 92, 62 Pac. 446; *Vaile v. Independence*, 116 Mo. 333, 22 S. W. 695.



progress, although after jurisdiction is acquired he might be estopped to question mere irregularities.<sup>16</sup>

— When landowner estopped.

**727.** Where work has been done and the assessment therefor made at the instance and request of the owners of the property, and pursuant to an act, in form, at least, of the legislature, and in strict compliance with its provisions and the petition for the improvement, there is an implied contract arising from such facts that the party at whose request and for whose benefit the work has been done will pay for it in the manner provided for by the act under which the work was done. And an assessment made under such circumstances is not violative of the principles of the Fourteenth Amendment.<sup>17</sup> When jurisdiction of the subject-matter and person of the owner of the property to be charged appears, irregularities and defects in proceedings for public improvements prosecuted under color of the statute cannot be urged for the first time after completion of the work to defeat the contractor's lien.<sup>18</sup>

<sup>16</sup> *Starr v. Burlington*, 45 Ia. 87; *Strout v. Portland*, 26 Or. 294, 38 Pac. 126; *Smith v. Minto*, 30 Or. 351, 48 Pac. 166; *California Imp. Co. v. Moran*, 128 Cal. 373, 60 Pac. 969; *Leavenworth v. Laing*, 6 Kan. 274; *Verdin v. St. Louis*, 131 Mo. 26, 33 S. W. 480, 36 S. W. 52; *Canfield v. Smith*, 34 Wis. 381.  
*Contra.*

Appearing and remonstrating against a proposed improvement because of the large expenditure involved estops the persons so appearing from raising the question of the want of jurisdiction on the part of the city, although the proceedings were invalid by reason of the insufficiency of the no-

tice given. *Barlow v. Tacoma*, 12 Wash. 32, 40 Pac. 382.

In consequence of their remonstrance, the time for payment was extended two and one half years, the parties withdrew their remonstrance, and the court held that this act conferred jurisdiction.

<sup>17</sup> *Shepard v. Barron*, 194 U. S. 553, 48 L. ed. 1115, 24 Sup. Ct. Rep. 737.

<sup>18</sup> *Ross v. Stackhouse*, 114 Ind. 200, 16 N. E. 501; *Willard v. Albertson*, 23 Ind. App. 162, 53 N. E. 1076, 54 N. E. 446; *Lewis v. Albertsen*, 23 Ind. App. 147, 53 N. E. 1071; *Baker v. Clem*, 102 Ind. 109, 26 N. E. 215; *Pennsylvania Co. v. Cole*, 132 Fed. 668.



**728.** It must be confessed that the weight of numbers, and perhaps also of authority, leans towards a rather strict and technical application of the doctrine of estoppel, and is to the effect that one who stands idly by while the work is being prosecuted, with full knowledge by himself or agent, that large expenditures are being made which may benefit his property, or who participates in the illegal acts of officers, or fails to appear at the proper time, and present his objections, will not be afforded the relief he claims in courts of either law or equity,<sup>19</sup> except on grounds going to the jurisdiction. And it has been held in a very recent case that one who remonstrates against the doing of

*California.*

<sup>19</sup> *Lent v. Tillson*, 72 Cal. 404, 14 Pac. 71; *Harney v. Benson*, 113 Cal. 314, 45 Pac. 687; *Duncan v. Ramish*, 142 Cal. 686, 76 Pac. 661; *Cummings v. Kearney*, 141 Cal. 156, 74 Pac. 759; *O'Dea v. Mitchell*, 144 Cal. 374, 77 Pac. 1020.

*Connecticut.*

*New Haven v. Fair Haven & W. R. Co.*, 38 Conn. 422, 9 Am. Rep. 399; *Fair Haven & W. R. Co. v. New Haven*, 77 Conn. 667, 60 Atl. 667, 60 Atl. 651. But see *State ex rel. Anderson v. Milwaukee St. Ry. Co.*, 90 Wis. 550.

*Indiana.*

*Ross v. Stackhouse*, 114 Ind. 200, 16 N. E. 501; *De Puy v. Wabash*, 133 Ind. 336, 32 N. E. 1016; *Taylor v. Patton*, 160 Ind. 4, 66 N. E. 91.

*Iowa.*

*Ford v. Des Moines*, 80 Ia. 626, 45 N. W. 1031; *Farwell v. Des Moines, etc., Co.*, 97 Ia. 286, 35 L. R. A. 63, 66 N. W. 176; *Arnold v. Fort Dodge*, 111 Ia. 152, 82 N. W. 495.

*Kansas.*

*Ritchie v. S. Topeka*, 38 Kan. 368, 16 Pac. 332; *Gilman v. Fox*, 10 Kan. 509.

*Massachusetts.*

*Atkinson v. Newton*, 169 Mass. 240, 47 N. E. 1029.

*Michigan.*

*Byram v. Detroit*, 50 Mich. 56, 12 N. W. 912, 14 N. W. 698; *Lundborn v. Manistee*, 93 Mich. 170, 53 N. W. 161; *Goodwillie v. Detroit*, 103 Mich. 283, 61 N. W. 526; *Fitzhugh v. Bay City*, 109 Mich. 581, 67 N. W. 904; *Gates v. Grand Rapids*, 134 Mich. 96, 95 N. W. 998; *Nowlen v. Benton Harbor*, 134 Mich. 401, 96 N. W. 450.

*New Jersey.*

*State v. Dunellen*, 50 N. J. L. 565, 15 Atl. 529; *State v. Rutherford*, 52 N. J. L. 501, 20 Atl. 60.

*Ohio.*

*Carry v. Gaynor*, 22 O. St. 584; *Quinlan v. Myers*, 29 O. St. 500.

*Oregon.*

*Wilson v. Salem*, 24 Or. 504, 34 Pac. 9, 691; *Clinton v. Portland*, 26 Or. 410, 38 Pac. 407.



street work alleging, in a general way, that all proceedings theretofore taken are null and void, but who has knowledge that the only defect is that the petition was signed by the executors of certain estates instead of by the heirs at law, which defect could easily have been remedied, is estopped by his silence, and cannot have the assessment thereafter levied to pay for such improvements set aside.<sup>20</sup> And estoppels have been enforced against the land-owner in the following cases, for reasons stated: Failure to appeal from assessment;<sup>21</sup> paying a fixed sum to the city as his share of a street improvement estops from claiming the contract is neither legal nor authorized;<sup>22</sup> the acts of the predecessor in the title, if sufficient to bar him, as a party cannot for value assign a contract and assessment, and then claim their invalidity;<sup>23</sup> standing by and agreeing to and encouraging the work;<sup>24</sup> executing written waiver of objections to illegality of assessments;<sup>25</sup> objecting to second judgment of confirmation, and being sustained, estops from denying validity of first judgment on subsequent application for sale;<sup>26</sup> omission to object before council that an error

*Washington.*

*Ferry v. Tacoma*, 34 Wash. 652, 76 Pac. 277; *New Whatcom v. Bellingham, etc., Co.*, 18 Wash. 181, 51 Pac. 360.

*Wisconsin.*

*Owens v. Milwaukee*, 47 Wis. 461, 3 N. W. 3; *State v. La Crosse*, 101 Wis. 208, 77 N. W. 167.

*United States.*

*Treat v. Chicago*, 64 C. C. A. 645, 130 Fed. 443; *Shepard v. Barron*, 194 U. S. 553, 48 L. ed. 1115, 24 Sup. Ct. Rep. 737.

<sup>20</sup> *Stewart v. Detroit*, 137 Mich. 381, 100 N. W. 613, citing *Farr v. Detroit*, 136 Mich. 200, 99 N. W. 19.

<sup>21</sup> *McVerry v. Boyd*, 89 Cal. 304, 26 Pac. 885.

<sup>22</sup> *Floyd v. Atlanta Bk. Co.*, 109 Ga. 779.

<sup>23</sup> *Callender v. Patterson*, 66 Cal. 357, 5 Pac. 610; *Cummings v. Kearney*, 141 Cal. 156, 74 Pac. 759.

<sup>24</sup> *Cluggish v. Koons*, 15 Ind. App. 599, 43 N. E. 158; *People v. Many*, 89 Hun, 138, 35 N. Y. Supp. 78.

<sup>25</sup> *Richcreek v. Moarman*, 14 Ind. App. 370, 42 N. E. 943. Or releasing damages, *Tacoma Land Co. v. Tacoma*, 15 Wash. 133, 45 Pac. 733.

<sup>26</sup> *Berry v. People*, 202 Ill. 231, 66 N. E. 1072.



was made in estimating number of square feet of paving;<sup>27</sup> permitting judgment of confirmation in court of record estops assertion, in collateral proceeding, that the ordinance was insufficient;<sup>28</sup> judgment for defendant being rendered in suit attacking assessment, plaintiff may not bring another action of same nature, though on different ground;<sup>29</sup> where the grantor participated in election of improvement commissioners, grantee cannot deny validity of tax;<sup>30</sup> objections to methods provided by aldermen in their discretion, in the absence of fraud or collusion;<sup>31</sup> failure to object that two contiguous parcels were not separately assessed;<sup>32</sup> where the grantor accepted the award and acquiesced in the proceeding;<sup>33</sup> where owners of rural property protest against paving by frontage, not because it is rural property, but on other grounds, they cannot set up the defense that it was rural property in an action to collect the assessment;<sup>34</sup> a church joining in a petition to pave a street, the frontage owned by it being necessary to make up the required amount in number and interest, cannot claim exemption from the assessment;<sup>35</sup> one having notice of proceedings, and who is in default at hearing as to benefits, cannot afterwards insist that no benefits be assessed;<sup>36</sup> one who petitions for the issue of improvement bonds, which the city was without authority to issue, will not be assisted in

<sup>27</sup> *Marshalltown L. P. & R. Co. v. Marshalltown*, 127 Iowa, 637, 103 N. W. 1005. And an allegation that the paving taxes are "in many other respects irregular, invalid and without authority of law," is insufficient to raise the question.

<sup>28</sup> *Gage v. Parker*, 103 Ill. 528.

<sup>29</sup> *Ross v. Portland*, 105 Fed. 682.

<sup>30</sup> *Columbus v. Slyh*, 44 O. St. 484, 8 N. E. 302.

<sup>31</sup> *Warren v. Barber Asphalt*

*Paving Co.*, 115 Mo. 572, 22 S. W. 490.

<sup>32</sup> *Auditor General v. Maier*, 95 Mich. 127, 54 N. W. 640.

<sup>33</sup> *Tingue v. Port Chester*, 101 N. Y. 294, 4 N. E. 625.

<sup>34</sup> *Pepper v. Philadelphia*, 114 Pa. St. 96, 6 Atl. 899.

<sup>35</sup> *In re Broad Street*, 165 Pa. St. 475, 30 Atl. 1007.

<sup>36</sup> *Trigger v. Drainage District No. 1*, 159 Ill. 230; *Annie Wright Seminary v. Tacoma*, 23 Wash. 109, 62 Pac. 444.



equity; <sup>37</sup> acquiescence in special tax bill when presented; <sup>38</sup> failure to file objections when required; <sup>39</sup> where no question is raised as to the exception of certain property from assessment, and no effort made to have the authorities act on the matter, the courts will not intervene; <sup>40</sup> payment of an invalid special tax without protest constitutes a waiver on the part of the property owner of all errors which might have been insisted upon to defeat the tax, no matter what form of action may be brought. <sup>41</sup>

— **Active participation in causing improvement.**

**729.** Active participation in causing an improvement to be made will estop the party so engaged from denying the validity of the assessment; but to create an estoppel merely by silence, it must be shown that the owner has knowledge, First, that the improvement was being made; Second, that the authorities intended to assess the cost on the abutting property; Third, that the defect in the proceedings which would render such an assessment invalid, existed, and which he would be estopped from asserting; Fourth, that some special benefit must have accrued to the owner's property, distinct from the benefits enjoyed by the citizens generally. <sup>42</sup>

— **Acceptance of improvement.**

**730.** The acceptance of an improvement by the common council, in the manner provided by statute, after completion of the work, is conclusive upon the property owner so far as the character of the work and materials used is con-

<sup>37</sup> Covington v. Nadand, 103 Ky. 455, 45 S. W. 498. Wis. 239, 102 N. W. 576; Pabst Brew. Co. v. Milwaukee (Wis.),

<sup>38</sup> Clemens v. Mayor, etc., 16 Md. 208. 105 N. W. 563; Harwood v. Donovan, 188 Mass. 487, 74 N. E. 914.

<sup>39</sup> Jerome v. Chicago, 62 Ill. 285. <sup>42</sup> Tone v. Columbus, 39 O. St. 281, 48 Am. Rep. 438; People v. Weber, 164 Ill. 412; 45 N. E. 723;

<sup>40</sup> Denver v. Dumas, 33 Col. 94, 80 Pac. 114; Denver v. Hallett, Id. Hawthorne v. Portland, 13 Or. 271, 10 Pac. 342.

<sup>41</sup> Shirley v. Waukesha, 124



erned, in the absence of fraud.<sup>43</sup> A married woman, with reference to her property affected by a street improvement, is subject to the same liability of estoppel as if sole, but not where it belongs to her by legal right, and not as her separate estate.<sup>44</sup>

### — Unconstitutionality of statute.

**731.** The principles of estoppel apply as well when the proceedings of a corporation are assailed on the ground of the unconstitutionality of the statute under which they are had, as when attacked upon other grounds, unless such proceedings, or the purpose to be accomplished, is illegal *per se*, or *malum prohibitum*. Want of power in the corporation may be waived, or an estoppel may be created by failure to assert it at the proper time.<sup>45</sup>

<sup>43</sup> *Emery v. Bradford*, 29 Cal. 75; *Cochran v. Collins*, 29 Cal. 129; *Lux & L. Stone Co. v. Donaldson*, 162 Ind. 481, 68 N. E. 1014; *Holloran v. Morman*, 27 Ind. App. 309, 59 N. E. 869; *De Puy v. Wabash*, 133 Ind. 336, 32 N. E. 1016; *Cason v. Lebanon*, 153 Ind. 567, 55 N. E. 768; *Darnell v. Keller*, 18 Ind. App. 103, 45 N. E. 676; *Bloomington v. Phelps*, 149 Ind. 596, 49 N. E. 581; *Gorman v. State*, 157 Ind. 205, 60 N. E. 1083; *Cooley on Taxation*, (3d Ed.); *Elliott on Roads and Streets* (2nd. Ed.) Nor can such owner set up a counterclaim, in a suit to recover amount of assessment, that he is damaged by failure of the contractor to perform the work according to contract. *Lux & L. Stone Co. v. Donaldson*, *supra*.

<sup>44</sup> *Tone v. Columbus*, 39 O. St. 281, 48 Am. Rep. 438; *Johnson v. Duer*, 115 Mo. 366, 21 S. W. 800.

<sup>45</sup> *Tone v. Columbus*, *supra*; *Mott v. Hubbard*, 59 O. St. 199, 53 N. E. 47.

Where an act for the construction of a levee, and authorizing bonds to be issued, to be paid by special assessment on property benefited, is pronounced unconstitutional, the bonds and the assessment fall with the act, and land-owners are not estopped to deny its invalidity. *O'Brien v. Wheelock*, 184 U. S. 450, 46 L. ed. 636, 22 Sup. Ct. Rep. 354.

*Assessment to pay improvement bonds.*

Although the statute under which a street improvement was made proves to be unconstitutional, and bonds of the city have been negotiated to pay for the improvement, the abutting owners and all who have participated in causing the improvement to be made, are estopped from denying the validity of an assessment made in accordance with the act to pay



— Taking action before completion of work.

**732.** As a necessary corollary to what has preceded, action on the part of the property owner must be reasonably prompt, so that no false conclusions may be drawn from his inaction. If he object to the power of the council to order the work done, or denies the validity of a provision in the ordinance under which the work is done, requiring the contractor to employ only *bona fide* residents of the city, as being prejudicial to his property rights as increasing the cost of the work, he must act in time to stay the work *in limine*.<sup>46</sup>

— Elements of estoppel — Jurisdiction.

**733.** The essential elements of an estoppel are lacking where there is nothing to show that the party claiming relied upon his adversary's acts or was misled thereby, and silence is not usually such an element. An estoppel by conduct never extends beyond the reasonable inferences to be drawn from such conduct.<sup>47</sup> While an abutting owner is presumed to know of the invalidity of a statute under which the improvement is proceeding, a presumption of knowledge does not exist, as to one who is silent merely, with regard to the illegality of the proceedings of the council, or public officers, which he has a right to assume are regular, until he has knowledge to the contrary.<sup>48</sup>

said bonds. *State v. Mitchell*, 31 Ohio St. 592.

<sup>46</sup> *Palmer v. Stumph*, 29 Ind. 329; *Hellenkamp v. Lafayette*, 30 Ind. 192; *Lafayette v. Fowler*, 34 Ind. 140; *Chadwick v. Kelley*, 187 U. S. 540, 47 L. ed. 293, 23 Am. St. Rep. 175.

When landowner estopped to object to misdescription, see *Muscantine v. C. R. I. & P. R. Co.*, 79 Ia. 645, 44 N. W. 909.

As to facts constituting estop-

pel, see *Chester v. Bullock*, 187 Pa. St. 544, 41 Atl. 452.

<sup>47</sup> *Lyon v. Tonawanda*, 98 Fed. 361; *Hutchinson v. Omaha*, 52 Neb. 345, 72 N. W. 218; *Hall v. Moore*, 3 Neb. (Unof.) 574, 92 N. W. 294; *Steckert v. E. Saginaw*, 22 Mich. 104; *Northport v. Northport T. S. Co.*, 27 Wash. 543, 68 Pac. 204.

<sup>48</sup> *Tone v. Columbus*, 39 O. St. 281, 48 Am. Rep. 438.



But whatever the delay in asserting his rights, short of absolute laches, it may be accepted as an almost universal rule that the landowner is not estopped to set up facts which, if proven, show the authorities have proceeded without jurisdiction, or have acted beyond it. Thus one may show such a departure from constitutional methods as makes the proceedings void,<sup>49</sup> or that jurisdiction was not acquired because of the insufficiency of the petition,<sup>50</sup> or to deny that a tax was ever levied.<sup>51</sup> There is no estoppel against the plaintiff under a void assessment because of the payment of an installment of the tax by one under whom plaintiff claims title,<sup>52</sup> nor is he bound to appear before the council to make objections where the improvement is unauthorized, and the tax invalid and void.<sup>53</sup>

#### — When grantee not estopped.

**734.** One who buys real estate, and from the agreed purchase price the amount of a special tax was deducted and retained by the vendee, is not estopped from denying the validity of such taxes in an action for the balance of the agreed purchase price, in the absence of an agreement between the parties that such amount should be so deducted and retained. One of the prime factors of an estoppel is mutuality as to the parties concerned.<sup>54</sup> And where property is conveyed "subject to incumbrances," the grantee is privileged to assert their invalidity, whether special assessment liens or otherwise.<sup>55</sup>

<sup>49</sup> *Howell v. Tacoma*, 3 Wash. 711, 28 Am. St. Rep. 83, 29 Pac. 447.

<sup>50</sup> *State v. Stockton*, 61 N. J. L. 520, 39 Atl. 921; *Miller v. Amsterdam*, 149 N. Y. 288, 43 N. E. 632; *Zeigler v. Hopkins*, 117 U. S. 683, 29 L. ed. 1019, 6 Sup. Ct. Rep. 919.

<sup>51</sup> *Hall v. Moore*, 3 Neb. (Unof.), 574, 92 N. W. 294.

<sup>52</sup> *Fitzgerald v. Sioux City*, 125

Ia. 396, 101 N. W. 268; *Carter v. Cemansky*, 126 Ia. 506, 102 N. W. 438.

<sup>53</sup> *Carter v. Cemansky*, *supra*. *Gallaher v. Garland*, 126 Iowa, 206, 101 N. W. 867.

<sup>54</sup> *Omaha v. Gsanter*, 4 Neb. (Unof.) 52, 93 N. W. 407.

<sup>55</sup> *Batty v. Hastings*, 63 Neb. 26, 88 N. W. 139; *Orr v. Omaha*, 2 Neb. (Unof.) 771, 90 N. W. 301; *Walsh v. Sims*, 65 O. St.



— When landowner not estopped.

**735.** Where he has by no act misled the contractor, nor done anything to induce the belief he would pay for the work, but has protested against the work from the beginning, equity will aid him after the completion of the work; <sup>56</sup> where the contractors are requested by the owner to proceed, and says they shall be paid, and they proceed to completion, not relying on such statements, but because of their contract with the city, the owner is not liable to the contractors; <sup>57</sup> an abutting owner is not estopped to complain of illegal grading of a street and removal of shade trees in front of his premises because, with a view of saving the trees, he urged those in charge of doing the work to make as little cut in the street as possible; <sup>58</sup> nor because he appeared before the council and requested a different kind of paving, which was ordered by an insufficient vote; <sup>59</sup> nor

211, 62 N. E. 120; Gill v. Patton, 118 Ia. 88, 91 N. W. 904; Carter v. Cemansky, 126 Ia. 506, 102 N. W. 438. And where the assessment is wholly invalid, neither plaintiff nor any grantor is required to bring action to set it aside. Nor is he bound to give notice of such invalidity to any one. Harrison v. Sauerwein, 70 Ia. 291, 30 N. W. 571.

*Duty of landowner.*

Under a charter giving the proper authorities the power to change the grades of streets, it is not necessary for a lotowner to watch the proceedings, and instanter commerce *mandamus* or other proceedings if he discover a departure from the prescribed course of conduct, or be in peril of forfeiting his legal rights. Jorgenson v. Superior, 111 Wis. 561, 87 N. W. 565.

*Owner's knowledge of non-liability.*

Where a levee was constructed near plaintiff's land, but did not touch it, and such land was not legally assessable therefor, the fact that the owner had knowledge of the construction of the ditch, and that his land was to be assessed, does not bar his right to enjoin the collection of the assessment, although he wait until the work is completed. Wright v. Thomas, 26 O. St. 346.

<sup>56</sup> Verdin v. St. Louis, 131 Mo. 26, 33 S. W. 480, 36 S. W. 52; see also Keyes v. Neodesha, 64 Kan. 681, 68 Pac. 625; Tallant v. Burlington, 39 Ia. 543.

<sup>57</sup> Sleeper v. Bullen, 6 Kan. 300.

<sup>58</sup> Blanden v. Fort Dodge, 102 Ia. 441, 71 N. W. 411.

<sup>59</sup> Bradford v. Fox, 171 Pa. St. 343, 33 Atl. 85.



will mere acquiescence as to the work prevent the assertion that the assessment was not authorized by law.<sup>60</sup>

— **Laches.**

**736.** It is the duty of parties interested to act promptly if they have objections to make to the regularity of an assessment, and not wait until the contract for the work is let and the money expended. But it is an essential element of laches, or negligence, that the party charged with it should have knowledge of the facts constituting his title to relief, or have failed or omitted to obtain knowledge when it was obtainable, or that there must be circumstances which should have induced an inquiry and an effort to gain knowledge.<sup>61</sup> Mere delay in proceeding against a void tax will not constitute laches, especially where the record fails to show affirmatively that the plaintiff had notice of the levy complained of, or where the statute gives him the right to wait

<sup>60</sup> *New Whatcom v. Bellingham, &c., Co.*, 10 Wash. 378, 38 Pac. 1024. The following are additional cases where the acts mentioned were not sufficient to create an estoppel:

*Failure to appear before Council.*

*City Council v. Birdsong*, 126 Ala. 632, 28 So. 522.

*Protest against extension of time.*

*Dougherty v. Coffin*, 69 Cal. 454, 10 Pac. 672.

*Submission by owner of certified plat.*

*People v. Clifford*, 166 Ill. 165, 46 N. E. 770.

*Alderman taking part in proceedings.*

*Warren v. Grand Haven*, 30 Mich. 24.

*Connecting with sewer.*

*State v. Commissioners*, 38 N. J. L. 190, 20 Am. Rep. 380.

*Accepting award of part of damages.*

*Gaston v. Portland*, 41 Or. 373, 69 Pac. 34, 445.

*Property damaged, work improper, and owner remonstrated.*

*Haisch v. Seattle*, 10 Wash. 435, 38 Pac. 1131.

*Petition not acted on—work changed.*

*Winnebago Fur. Co. v. Fond du Lac Co.*, 113 Wis. 72, 88 N. W. 1018.

*Allowing city to grade and expend money.*

*Cowley v. Spokane*, 99 Fed. 840. *Assessing property 700 feet from sewer, without notice.*

*Pennsylvania Co. v. Cole*, 132 Fed. 668.

<sup>61</sup> *State v. Jersey City*, 52 N. J. L. 490, 19 Atl. 1096; *State v. Rutherford*, 55 N. J. L. 450, 26 Atl. 933; *Brewer v. Elizabeth*, 66 N. J. L. 547, 49 Atl. 480.



until proceedings to foreclose the lien are begun.<sup>62</sup> It is not a bar to relief where there are provisions for a reassessment,<sup>63</sup> although the court has power to deny relief on the ground of laches, without passing on any other question.<sup>64</sup> If found by the court, it will bar all relief by way of certiorari to review an assessment, except as to the constitutionality of the law under which the assessment was levied.<sup>65</sup> Where a city charter provides that certain acts shall be done by the authorities before changing the grade of a street, and proceedings for constructing a viaduct in front of relator's premises were commenced and the work continued for several months without the city performing the requisite jurisdictional acts, *mandamus* to the authorities to perform those acts is properly refused because of relator's *laches*.<sup>66</sup> And generally speaking, laches will be imputed in cases similar to those holding estoppel by knowledge and silence, unless steps be taken to judicially determine the validity of the proceedings before the completion of the work,<sup>67</sup> or where

<sup>62</sup> *Casey v. Burt Co.*, 59 Neb. 624, 81 N. W. 851; *Batty v. Hastings*, 63 Neb. 26, 88 N. W. 139; *Auditor-General v. Calkins*, 136 Mich. 1, 98 N. W. 742.

Where a city, after changing the grade of certain streets, refused to recognize its liability for injuries to abutting owners resulting from such change of grade, and an abutting owner upon each of the streets affected began suit to enforce the liability of the city for damages done to his property by the change of grade, and the remaining owners took no steps to establish their rights until after the determination of these suits, and the consequent action of the city thereof, such owners were justified in assuming that if it should finally be determined by such litigation that the city was liable,

and that the municipal authorities would then proceed to assess all benefits and damages accruing from the change in the manner provided by statute, and they were not liable for laches in not sooner instituting legal proceedings for the enforcement of their rights. *Roggs v. Elizabeth*, 64 N. J. L. 492, 46 Atl. 164.

<sup>63</sup> *State v. Bayonne*, 63 N. J. L. 202, 42 Atl. 773.

<sup>64</sup> *In re Woolsey*, 95 N. Y. 135.

<sup>65</sup> *State v. New Brunswick*, 42 N. J. L. 510; *Culver v. Jersey City*, 45 N. J. L. 256.

<sup>66</sup> *State ex rel. Taylor v. Superior*, 108 Wis. 16, 83 N. W. 1100.

<sup>67</sup> *Preston v. Roberts*, 12 Bush, 570; *Cooper v. Nevin*, 90 Ky. 85, 13 S. W. 841; *Fehler v. Gosnell*, 99 Ky. 380, 35 S. W. 1125; *State v. Passaic*, 47 N. J. L. 273; *Van*



a material portion of time has elapsed before bringing action.<sup>68</sup>

— Waiver and acquiescence.

**737.** The principles involved in the application of the doctrines of waiver and acquiescence to the contesting of special assessments are substantially the same as those involved in the application of the doctrine of estoppel, and many courts use the terms almost interchangeably. The cases in which these theories are discussed are outlined in the marginal note.<sup>69</sup>

**Fraud.**

**738.** A court or body acting judicially may commit an error or exceed its jurisdiction, but it cannot be guilty of

*Wagoner v. Paterson*, 67 N. J. L. 455, 51 Atl. 922.

<sup>68</sup> *Four years too late.*

*Auditor-Gen. v. Hoffman*, 132 Mich. 198, 93 N. W. 259.

*Seven years too late.*

*Ross v. Portland*, 105 Fed. 682. *Three years too late.*

*Stetler v. E. Rutherford*, 65 N. J. L. 528, 47 Atl. 489.

*Contra.*

*Four years not too late.*

*Lyon v. Tonawanda*, 98 Fed. 361.

For cases showing special facts held not to constitute laches, see *State v. Atlantic City*, 34 N. J. L. 99; *State v. Jersey City*, 35 N. J. L. 381; *Batty v. Hastings*, 63 Neb. 26, 88 N. W. 139.

<sup>69</sup> The voluntary appearance in a proceeding to confirm an assessment, by objectors, and filing of objections on the merits, will be deemed a waiver of defects in the notice of application for such confirmation. *Murphy v. Peoria*, 119 Ill. 509, 9 N. E. 895; *Quick v.*

*River Forest*, 130 Ill. 323, 22 N. E. 816.

Voluntary appearance by a landowner, and filing objections to a special assessment, is a waiver of all objections to jurisdiction of the person. *Fisher v. Chicago*, 213 Ill. 268, 72 N. W. 680; *Nicholes v. People*, 165 Ill. 502, 46 N. E. 237; *Dickey v. People*, 213 Ill. 51, 72 N. E. 791.

The voluntary payment of an installment of a paving assessment prevents objections to judgment for remaining installments under the Illinois statute? *Downey v. People*, 205 Ill. 230, 68 N. E. 807; *McDonald v. People*, 206 Ill. 624, 69 N. E. 509.

*Signing petition—No waiver of legal method.*

One joining in a petition to the Common Council for a local improvement does not thereby waive his right to have the proceedings in relation thereto conform to the mode prescribed in the charter.



fraud in the legal sense of the term.<sup>70</sup> That an assessment was fraudulently made may, however, always be shown, and such an assessment will be absolutely void.<sup>71</sup> The one

Strout v. Portland, 26 Or. 294, 38 Pac. 126.

*Acquiescence.*

Where there is a doubt as to whether the board of assessors or the Council shall apportion the assessment, the fact that for forty years the former has done so under the direction of the latter, is controlling. And if there were any doubt on this point, the confirmation of the assessment by the Council amounts to a ratification. Smith v. Buffalo, 90 Hun, 118, 35 N. Y. Supp. 635.

*Miscellaneous decisions on estoppel.*

One who does not appear before the council to urge objections to the assessment, where the council is made the original tribunal to determine the facts, will be deemed to have waived his objections. Duncan v. Ramish, 142 Cal. 686, 76 Pac. 661.

Under a statute providing that a lot owner whose assessment exceeds a certain amount may pay the same in installments by signing a waiver of irregularities, such signature does not operate to release the owners of back-lying real estate from the lien of the assessment. Voris v. Pittsburg, &c., Co., 163 Ind. 599, 70 N. E. 249.

A property owner who does not know there will be an attempt made to charge his abutting property with the expense of grading a street, does not waive his objections thereto by standing by and seeing the work done without pro-

test. Gallaher v. Garland, 126 Iowa, 206, 101 N. W. 867.

Where the assessment is void, one does not waive his objections by standing by and seeing the work done without protest. Gallagher v. Garland, 126 Iowa, 206, 101 N. W. 867.

One who files a protest against a special assessment with the board of equalization before the time fixed in the published notice for the meeting of the board thereby waives any defect in the notice. Shannon v. Omaha (Neb.), 103 N. W. 53.

Where a partial assessment, pursuant to special act, is made in the territory therein prescribed, and on the basis directed; and after completion of the work the village council levied the final assessment, on same basis, and within same territory, it was *held*, that property owners who had failed to object to the justice and validity of first assessment had acquiesced therein, and could not contest the final assessment on grounds available when first assessment was made. State v. District Court, 61 Minn. 542, 64 N. W. 190.

As to action commenced after issue of improvement bonds, made conclusive of regularity of proceedings by statute, see State v. Norton, 63 Minn. 497, 65 N. W. 935.

<sup>70</sup> Brennan v. Buffalo, 162 N. Y. 491, 57 N. E. 81.

<sup>71</sup> Chicago v. Burtice, 24 Ill. 489; Chicago v. Adams, 24 Ill. 492.



who objects to an assessment for either fraud or irregularity, has the *onus* of establishing the same before being entitled to the relief he seeks,<sup>72</sup> and the objection that a petition for vacating an assessment contained no averments of fraud affecting it cannot be taken for the first time on the hearing in the appellate court.<sup>73</sup>

**739.** In a city charter providing that in no event shall there be liability on the part of the city for payment, of certain work, the fact that the official records falsely showed that all steps necessary to a valid assessment and letting of a valid contract, had been taken, will not, in the absence of fraud by the city officers, render the city liable to the contractor for such work, who had relied upon such records, and who could not collect from the amount of the certificates issued to him against the abutting property by reason of their invalidity.<sup>74</sup> But where exorbitant prices are charged, largely in excess of any sum which, in the exercise of common prudence and honesty it ought to have cost, this constitutes fraud, in the absence of any excuse or explanation.<sup>75</sup> But an assessment for a street improvement will not be set aside for alleged fraud of the council in letting the con-

<sup>72</sup> *In re Bassford*, 50 N. Y. 509.

<sup>73</sup> *Leake v. Orphans' Home*, 92 N. Y. 116.

<sup>74</sup> *Zwietusch v. Milwaukee*, 55 Wis. 369, 13 N. W. 227.

<sup>75</sup> *In re Livingstone*, 121 N. Y. 94, 24 N. E. 290.

Where a special contract for "filling" was let at \$1.47 a cubic yard, but not by public competition, evidence of the "bid-book" of the department offered by the petitioner to vacate the assessment on the grounds of a fraudulent combination to the effect that "filling" in the vicinity was contracted for at a price not exceeding eighty cents a yard, is receivable as competent on the issue of fraud, and

the commissioner must be presumed to have known the usual prices paid for such work. *In re Righter*, 92 N. Y. 111.

Where a street improvement was charged for by day's work at \$14 per cubic yard for rock excavation, pine culvert at \$7.05 a lineal foot, and brick sewer at \$25 per lineal foot, while the fair value of each was shown to be \$4, \$1.50 and \$4.55, respectively, not only improvidence and extravagance are established, but fraud and irregularity as well. *Leake, etc., v. Orphans' Home*, 92 N. Y. 116. See *Union Cemetery Assn. v. McConnell*, 124 N. Y. 88, 26 N. E. 330.



tract therefor, although it appears that the accepted bid was nearly 50 per cent. above a fair cash price for the work, where the contractors were paid in depreciated city warrants, since the bid was not so high that its acceptance could not be accounted for on the ground of improvidence in the council.<sup>76</sup>

**740.** Where the requisite number of property owners have petitioned for an asphalt pavement, in place of a well worn macadam, and the improvement enhances the value of abutting property, no sufficient evidence of fraud or gross abuse of power by the council is shown which would justify the courts in setting aside the tax bills therefor.<sup>77</sup> The general rules of pleading relative to fraud are applicable in special assessment cases.<sup>78</sup>

#### Tax deeds and certificates.

**741.** The title to be made under a tax deed is *stricti juris*, and non-compliance with anything the law makes a

<sup>76</sup> Shannon v. Portland, 38 Or. 382, 62 Pac. 50.

<sup>77</sup> Field v. Barber Asphalt Pav. Co., 194 U. S. 618, 48 L. ed. 1142, 24 Sup. Ct. Rep. 784.

*Allegations sufficient to avoid assessment.*

<sup>78</sup> Where the allegations of the complaint are to the effect that the work ordered could not be done within *eighteen* days, the time limited; that the lot could not be graded as required until after the grading of the street, except at several times its necessary cost; that the street commissioners shortly afterward contracted at an exorbitant rate with other parties, also defendants, for the grading to be done in sixty days, such allegations, if proven, show a corrupt and fraudulent conspiracy, and would avoid the whole assessment and the certificate issued thereun-

der. Foote v. Milwaukee, 18 Wis. 271.

*Demurrer — When improperly sustained.*

Where the complaint in a suit in equity to vacate an assessment for fraud not appearing in the record, a demurrer thereto is improperly sustained, where the frauds alleged would vitiate the proceedings, and equity would relieve against a conveyance under them. Dederer v. Voorhies, 81 N. Y. 153. *When fraud not established.*

Fraud is not established merely by proof that a special assessment is inequitable. Owens v. Marion, 127 Ia. 469, 103 N. W. 381; Cooley, Taxation (3d Ed.), p. 1258, and cases cited.

*Remedy for fraudulent assessment.*

As to the remedy of the property owner where an assessment has been fraudulently made,



condition precedent to the right to have a deed, is fatal, and the courts will not look to see whether the omission has misled or injured any one, or not.<sup>79</sup> Thus a deed based upon a sale for unpaid taxes levied during a series of years, some of which are valid and others invalid, is void, and conveys no valid title to the property thus assessed.<sup>80</sup> A tax deed issued on a notice incorrectly stating the day on which the time for redemption will expire, is void.<sup>81</sup> The prefixing of the word "countersigned" to the signature of an officer does not make the same invalid, under a statutory requirement for the signature of such officer.<sup>82</sup> A tax sale certificate properly describing the land of the owner, "less the right of way" of a certain railroad, is valid.<sup>83</sup> Deeds of land for non-payment of special assessments have precedence of existing mortgages thereon.<sup>84</sup>

whether by action to vacate the assessment, or against the city to have the fraudulent excess ascertained and deducted from or allowed upon the assessment, see *Eno v. Mayor, &c.*, 68 N. Y. 214.

*Improperly let contract.*

Where a contract for certain work was improperly relet because of want of notice, at 42 cents a yard, after having been first let to plaintiff at 3 cents a yard, and there being other bids at 7 and 14 cents a yard, a proper case for equitable relief was made out. *Mitchell v. Milwaukee*, 18 Wis. 93.

*Purchase of tax title by administrator.*

Where an administrator purchases an outstanding tax title upon the land of his intestate, with the money of the estate, and has the property conveyed to himself, it inures to the benefit of the heir. *Watkins v. Zwietusch*, 47 Wis. 513, 3 N. W. 35.

<sup>79</sup> *Brophy v. Harding*, 137 Ill. 621, 27 N. E. 523, 34 N. E. 253.

<sup>80</sup> *Nehasane Park Assn. v. Lloyd*, 167 N. Y. 431, 60 N. E. 741.

<sup>81</sup> *Brophy v. Harding*, 137 Ill. 621, 27 N. E. 523, 34 N. E. 253.

<sup>82</sup> *Gurnee v. Chicago*, 40 Ill. 165.

<sup>83</sup> *Hamar v. Leihy*, 124 Wis. 265, 102 N. W. 568.

*Date of certificate.*

The date of the certificate to be issued is to be determined by the contract; and if this be silent on the subject, the superintendent or other proper authority may exercise a sound discretion in the matter. It is no abuse of discretion to give the certificate the same date as the contract, where the work was not commenced until long afterwards. *State v. Frazier*, 113 Ind. 267, 14 N. E. 561.

<sup>84</sup> *Kirby v. Waterman*, 17 S. D. 314, 96 N. W. 129.



**Purchaser at tax sale — In general.**

**742.** Where one purchases a lot at a sale for an unpaid assessment, pays the money, and receives a certificate of purchase, but before a deed is given, the owner obtains a decree setting aside the sale, and ordering the surrender of the certificate, and its cancellation, he may recover from the city the sum so paid.<sup>85</sup> A purchaser of property at a sale for unpaid taxes, takes his title free from special assessment liens, and is entitled to a decree quieting his title as against them, notwithstanding a portion of such assessments have been paid by prior owners.<sup>86</sup>

**— Caveat emptor.**

**743.** The purchaser at a delinquent tax sale is bound to know that the tax has been lawfully assessed against the owner and that he is in fact delinquent. He is remediless, although the tax title is invalid, as the rule *caveat emptor* applies.<sup>87</sup>

**— Subsequent purchaser.**

**744.** The invalidity of a special tax levied by a municipal corporation against the lot of an individual is ordinarily as available to the subsequent purchaser of the property as to one who was its owner when the tax was imposed, and he may sue to establish the invalidity thereof.<sup>88</sup>

**Certiorari — In general.**

**745.** Special assessment proceedings, although of purely statutory origin, are largely judicial in their character, and

<sup>85</sup> Wells v. Chicago, 66 Ill. 280.

<sup>86</sup> Fitzgerald v. Sioux City, 125 Ia. 396, 101 N. W. 268.

<sup>87</sup> Richardson v. Denver, 17 Colo. 398, 30 Pac. 333; Boals v. Bachmann, 201 Ill. 340, 66 N. E. 336; McCague v. Omaha, 58 Neb. 37, 78 N. W. 463.

<sup>88</sup> Lasbury v. McCague, 56 Neb.

220, 76 N. W. 862; Batty v. Hastings, 63 Neb. 26, 88 N. W. 139.

***Purchaser with knowledge.***

Where a purchaser takes title to lands with knowledge of unpaid assessments against them, and assumes their payment, he may object to the legality of such assessments. State v. Jersey City, 35 N. J. L. 381.



consequently peculiarly liable to review by courts of general jurisdiction by writ of certiorari. Where jurisdiction to issue such writ is given by the constitution of a state to the circuit court, such jurisdiction cannot be taken away by legislative enactment so as to make the remedy by appeal the only one for property owners having occasion to object to such proceedings.<sup>89</sup> Certiorari to review special assessments is not a writ of right, but is issued only when it is shown that substantial justice requires it,<sup>90</sup> except when otherwise specifically directed by statute.<sup>91</sup> A common-law writ of certiorari will lie to secure a review of proceedings to establish a drain, where the petition therefor alleges jurisdictional defects.<sup>92</sup>

— When writ will issue.

**746.** Certiorari will issue to review assessment proceedings against property claimed by relator as exempt;<sup>93</sup> to review the action of the court in confirming a special assessment to defray the expense of a local improvement;<sup>94</sup> is a proper remedy for one aggrieved by failure to give notice;<sup>95</sup> lies to review drain proceedings that are void;<sup>96</sup> to review the confirmation of an assessment by the proper authority or court, it being a final adjudication of the validity thereof;<sup>97</sup> it may be prosecuted to vacate an ordinance which is in excess of authority, without waiting until an assessment is made against the relator for taxes which are the results of an illegal exercise of power.<sup>98</sup> When the proceedings of

<sup>89</sup> *State v. Ashland*, 71 Wis. 502, 37 N. W. 809.

<sup>90</sup> *Beaser v. Ashland*, 89 Wis. 28, 61 N. W. 77; *Harwood v. Donovan*, 188 Mass. 487, 74 N. E. 914.

<sup>91</sup> *People v. Tax Commissioners*, 144 N. Y. 483, 39 N. E. 385.

<sup>92</sup> *Brady v. Hayward*, 114 Mich. 326, 72 N. W. 233.

<sup>93</sup> *State v. Elizabeth*, 50 N. J. L. 347, 13 Atl. 5.

<sup>94</sup> *Sherwood v. Duluth*, 40 Minn. 22, 41 N. W. 234.

<sup>95</sup> *Ottawa v. Chicago, R. I. & P. R. Co.*, 25 Ill. 43.

<sup>96</sup> *Whiteford v. Phinney*, 53 Mich. 130, 18 N. W. 593.

<sup>97</sup> *State v. District Court*, 33 Minn. 235, 22 N. W. 625, 632.

<sup>98</sup> *State v. Jersey City*, 34 N. J. L. 390.



the board are irregular and not in conformity with the charter, the landowner may review them by certiorari, notwithstanding the fact that the city charter gives to the land owner who presents to the board of public works written objections to the award made to him, a right to bring a suit and have a trial by jury.<sup>99</sup> It is the proper remedy for a review when the commissioners fail to report any damages in favor of the abutting owner, but their report shows the subject of damages was passed upon.<sup>1</sup>

**747.** Where the board of public works and common council of a city have attempted, without authority of law, to charge upon private property the cost of building a bridge, their proceedings may be reviewed on certiorari, although the city charter has provided that an appeal shall be the only remedy of the owner for the redress of any grievance he may have by reason of the making of an improvement, or of the amount of the cost thereof charged upon his land.<sup>2</sup> Where there is no remedy by appeal by which the validity of a street assessment may be contested, certiorari is the proper remedy for reviewing the proceedings.<sup>3</sup> An action in equity to vacate a special assessment merely because the assessment on plaintiff's land was largely in excess of its proportionate benefit, is not maintainable, but the facts as found by the trial court might have entitled the plaintiff to relief on review by certiorari.<sup>4</sup> It is a proper remedy to try the question whether assessments for a sewer made under

<sup>99</sup> State v. Jersey City, 55 N. J. L. 511, 26 Atl. 828.

<sup>1</sup> State v. Hoboken, 57 N. J. L. 330, 31 Atl. 278.

<sup>2</sup> State v. Ashland, 71 Wis. 502, 37 N. W. 809.

The appeal allowed by a charter from the commissioners of appraisal to the common council, and from the latter to the circuit court, where a lot owner is dissatisfied with the appraisal of benefits and damages against his

lot for street improvements, does not raise in the circuit court the validity of the proceedings, but only the question of *amount*; and *certiorari* will lie from that court to try the validity of such proceedings. State v. Fond du Lac, 42 Wis. 287.

<sup>3</sup> Wilson v. Seattle, 2 Wash. 543, 27 Pac. 474.

<sup>4</sup> Hoffeld v. Buffalo, 130 N. Y. 387, 29 N. E. 747.



a specific statute are invalid for any reason disclosed by the record, or because of the unconstitutionality of the statute.<sup>5</sup> Where assessors for a local improvement adopt the correct legal rule that all property benefited be assessed, an error in determining what property is in fact benefited must be reviewed and corrected by certiorari and not by suit.<sup>6</sup> A statute providing for a review and correction by certiorari of illegal or erroneous assessments, is not applicable to a case where the whole assessment roll is claimed to be illegal and void; it applies only where there is a valid assessment roll in which some person has been illegally assessed, or where the assessment is excessive and unjust.<sup>7</sup>

— **Action of court.**

**748.** Upon common law certiorari, the court will not examine the proceedings returned, further than to ascertain whether the inferior tribunal has kept within its jurisdictional limits.<sup>8</sup> Where upon the return of the writ it is shown that the council imposed the assessment other than in the mode required by law, and to the prejudice of the relator, the assessment will be vacated.<sup>9</sup>

— **When writ will not issue.**

**749.** Where proceedings of the county board are legislative in character, such as passing a resolution for opening

<sup>5</sup> Weed v. Boston, 172 Mass. 28, 42 L. R. A. 642, 51 N. E. 204.

<sup>6</sup> Kennedy v. Troy, 77 N. Y. 493.

<sup>7</sup> Van Dewenter v. Long Island City, 139 N. Y. 133, 34 N. E. 774.

<sup>8</sup> People v. Mayor, &c., 4 N. Y. 419, 55 Am. Dec. 266.

<sup>9</sup> People v. Adams, 88 Hun, 122, 34 N. Y. Supp. 579.

Where, under a charter proceeding by *certiorari* to review an assessment, it appears that through inadvertence or an error of judgment on the part of the board property of the relator not bene-

fited by the proposed improvement and not assessable therefor, had been included in the assessment with other property of his which was benefited and assessable, and no illegality going to the jurisdiction is found, such inclusion will be deemed a defect which will warrant the court in sending the assessment roll back to the council "to amend or correct it according to law," pursuant to the charter, instead of vacating it as illegal. People v. Buffalo, 147 N. Y. 675, 42 N. E. 344.



and extending a street, and in fixing the boundaries of the taxing district, certiorari will not lie to review them, nor for the purpose of attacking an assessment as fraudulent in fact.<sup>10</sup> It ought not to be granted, even if the record, when returned, appears to be defective or informal, provided substantial justice has been done, or if ruinous consequences would follow a reversal of the proceedings, and parties cannot be placed *in statu quo*.<sup>11</sup> In a proceeding by common law certiorari, the questions as to the jurisdiction or regularity of the inferior tribunal can be determined only by the record, and extrinsic evidence is inadmissible, and where the return on certiorari shows that the original record has disappeared, the relief prayed for must be denied, since the court can make no order on a proceeding not before it.<sup>12</sup>

— Assessment for benefits.

**750.** Upon petition for certiorari to review and quash assessment proceedings, it is insufficient ground for the issuance of a writ that the expenses were not assessed proportionately upon all persons benefited, or that items of expense were improperly included. Evidence as to there being benefits in fact must appear in the record, or the court is without jurisdiction to review that question.<sup>13</sup>

<sup>10</sup> Wulzer v. Supervisors, 101 Cal. 15, 40 Am. St. Rep. 17, 35 Pac. 353; State v. District Court, 27 Minn. 442, 8 N. W. 161.

<sup>11</sup> Hagar v. Supervisors, 47 Cal. 222.

<sup>12</sup> Rue v. Chicago, 66 Ill. 256; Walker v. Dist. of Col., 6 Mackey, 352.

A statutory provision forbidding the allowance of a *certiorari* to set aside an ordinance for a public improvement after the contract therefor has been awarded, is a reasonable limitation of the right to the writ that would be sus-

tained. Rosell v. Neptune City, 68 N. J. L. 509, 53 Atl. 199.

Where the statute provides that the cost of the expense of opening a street above the special benefits shall be paid out of the general road tax, which is assessable against all the taxable property in the municipality, taxpayers are not so injuriously affected in their property rights as to entitle them to *certiorari* to set aside the assessment. State v. N. Plainfield, 63 N. J. L. 61, 42 Atl. 805.

<sup>13</sup> Grace v. Newton, 135 Mass. 490.



— Laches.

**751.** A land owner who has stood by without objection until a street improvement in front of his land has been completed at the public expense, will not be heard upon certiorari afterwards brought to review an assessment for benefits, to question the validity of the ordinance and contract under which the improvement was made.<sup>14</sup> A delay of two years in applying for a writ to review an assessment, with full knowledge of fact, is laches, and delay in objecting to assessments may be cause for dismissing certiorari.<sup>15</sup> Laches in suing out a writ of certiorari to review an assessment within the bar of a statutory limitation will not bar a review of an assessment laid under an unconstitutional statute.<sup>16</sup>

— To whom writ directed.

**752.** The common council, being a permanent body, having control of its records, and appointing the city clerk, it is proper that certiorari to review its actions in laying out a

*Evidence must appear in record.*

In certiorari proceedings to review assessment proceedings based on the ground that the property of a surface railway company in the street should have been assessed for benefits, but was omitted, and the record was without evidence to show it was benefited, and the board returned that it was not, the question of fact was one to be determined by the board, and in the absence of evidence in the record its determination is not reviewable in the courts. *People v. Gilon*, 126 N. Y. 147, 27 N. E. 282.

*Payment of percentage as discharge.*

After special assessment duly levied, the council made an order that the payment of a certain percentage of the amount assessed, varying according to locality,

should be a discharge. After that time, a petition for certiorari was filed, but it was held that the order modifying the original assessment was no ground for issuing the writ. *Holt v. Somerville*, 127 Mass. 408.

*Assessment exceeding benefits.*

An assessment on lands for a public improvement clearly proved to exceed the benefits thereby conferred on the property, will be set aside on certiorari. *State v. Bayonne*, 63 N. J. L. 202, 42 Atl. 773.

<sup>14</sup> *Rosell v. Neptune City*, 68 N. J. L. 509, 53 Atl. 199.

<sup>15</sup> *State v. Beverly*, 53 N. J. L. 560, 22 Atl. 340; *State v. Hoboken*, 57 N. J. L. 330, 31 Atl. 278.

<sup>16</sup> *Kirkpatrick v. Commissioners*, 42 N. J. L. 510; *N. Y. & G. L. R. Co. v. Kearney*, 55 N. J. L. 463, 26 Atl. 800.



new street properly runs to it, and not to the city clerk.<sup>17</sup> In proceedings for the review of an assessment of the cost of a local improvement, it has been decided that the city is a proper party in interest, no matter what its ultimate responsibility may be, since it is primarily responsible for the collection of the assessment.<sup>18</sup>

#### — Answer to petition.

**752a.** An answer to a petition for a writ of certiorari should state facts, and not set forth matters which the respondents deem will occur; but this irregularity will not authorize the issue of the writ when there is no other sufficient ground for its issuance. And an answer to a petition for certiorari to review a sewer assessment which shows that although the sewer in question and one in another street were built together, at substantially the same price per lineal foot, and stating the price, is sufficient.<sup>19</sup>

#### — Pleading and practice.

**753.** Upon the hearing of a petition for a writ of certiorari to quash a sewer assessment, heard upon the petition and answer, all material facts well alleged in the answer, and all material facts well alleged in the petition and not denied in or put in issue by, the answer, and all consistent

<sup>17</sup> *State v. Fond du Lac*, 42 Wis. 287.

<sup>18</sup> *Frederick v. Seattle*, 13 Wash. 428, 43 Pac. 364.

<sup>19</sup> *Fairbanks v. Fitchburg*, 132 Mass. 42.

#### *Sufficiency of answer.*

A petition for a writ of certiorari to quash a sewer assessment, alleging that the order to levy such assessment applied only to "abutters," and the petitioner was not such; that the city records did not show the expense of the sewer; that no benefit was derived from same; that the assess-

ment was made by the board, which had never made any legal assessment; that other persons similarly situated or abutting on the sewer had not been assessed, and that the time when the proportions of assessments should be paid had not been fixed. The answer of the board was to the effect that the use of "abutter" was a clerical error which had been corrected, and denied all the other allegations. *Held*, that the writ ought not to issue. *Collins v. Holyoke*, 146 Mass. 298, 15 N. E. 908.



with record, will be deemed to be true.<sup>20</sup> Where a petition for a writ of *certiorari* to quash certain special assessment proceedings sets forth the records, and alleges facts outside of the same, the respondents may controvert such facts or allege others which will in effect avoid them, although the board may have changed its personnel, if the facts must have been passed upon in making the order, and are within the knowledge of those who make such answer.<sup>21</sup>

— When court will not interfere.

**754.** To justify the court in taking cognizance of a petition to review an assessment, it must appear upon the face thereof that the relator has sustained some injury. Even in cases where the requirements of a city charter as to proceedings necessary to lay a sewer and levy a special assessment to pay for the same, are not complied with, the court will not, on *certiorari* to review such proceedings, interfere unless it appears that injustice has been done the relator.<sup>22</sup> An omission to state, in an order altering a street, that the alteration was made pursuant to a specific statute, is no ground for quashing, if the order was made while the stat-

<sup>20</sup> Weed v. Boston, 172 Mass. 28, 42 L. R. A. 642, 51 N. E. 204.

<sup>21</sup> Fairbanks v. Fitchburg, 132 Mass. 42.

If a petition for a writ of *certiorari* to quash a special assessment is reserved by a single justice of the Supreme Court of Massachusetts for the consideration of the full court, upon a verified petition, and an answer filed by a succeeding board, the averments of the answer are to be taken as true. Collins v. Holyoke, 146 Mass. 298, 15 N. E. 908.

*Amending the record.*

On a petition for *certiorari* to quash proceedings in assessing benefits for abating a nuisance, the answer alleged that the assess-

ments were made upon the petitioners as owners of certain parcels of land, described in a schedule, and that they were exhibited upon plan used in making the assessments, and which sufficiently described the premises. It appeared that the plan was made after the petition was brought, and that it was sufficient to identify each lot. Held, that if the assessment was not sufficiently specific for want of a perfect description, the board might amend its record, and the schedule might be considered as a part of such amendment. Grace v. Newton, 135 Mass. 190.

<sup>22</sup> State v. La Crosse, 101 Wis. 208, 77 N. W. 167.



ute was in force. Neither is an over-valuation of the benefit received, nor an omission to state that the board has assessed benefits upon all the abutting estates, nor a clerical error in inserting a wrong date in the preamble.<sup>23</sup>

### Appeal — Regulation by statute.

**755.** In order that there may be cheap and speedy review of the decision of local and inferior tribunals or offi-

<sup>23</sup> Jones v. Boston, 104 Mass. 461.

#### *Evidence — Benefits.*

On *certiorari* to quash a special assessment proceeding for the improvement of a public way, which did not confine the assessment to abutters, evidence as to the value of certain estates near the end of the route being increased much more than remoter estates, is inadmissible as to the fact, unless for the purpose of showing such omission to assess was due to a mistake of law. Lincoln v. Board of Com'rs, 176 Mass. 210, 57 N. E. 356.

#### *Benefits — Work not completed.*

Upon petition for a writ of *certiorari* to quash proceedings for buying land and laying out a public park, only a portion of the work being completed, the court cannot as a matter of law determine that the estates of the petitioners had not been benefited by such work as had already been completed. Foster v. Park Commissioners, 133 Mass. 321.

#### *Benefits — Inaccessibility of sewer.*

In a case where benefits for the construction of a sewer have been assessed against objector's land, when the sewer is inaccessible, and he can receive no benefits from its

construction, and cannot reach it without trespassing on private property, the assessment must have been made by fraud or demonstrable mistake of fact, and will be set aside. State v. District Court, 90 Minn. 540, 97 N. W. 425.

#### *Sewer — Including prior cost.*

It is not permissible to include in a sewer assessment the cost of a sewer in a different street with which it connects, built several years before and for the cost of which when built no assessment was laid on the owners of the benefited estates; and an assessment so made will be quashed on *certiorari*. Brown v. Fitchburg, 128 Mass. 282.

#### *Sewers — Failure to assess on another street.*

It is no objection to a sewer assessment that a person living on another street had not been assessed for a private drain entering into a sewer on that street, it appearing that the two sewers were treated as distinct, and that the cost of the latter sewer had not yet been assessed, but would be when that sewer district was laid out. Fairbanks v. Fitchburg, 132 Mass. 42.

#### *Sewers — Revocable license.*

It is no valid objection to a sewer assessment that one whose



cers in assessment matters, the statutes of the various states very generally provide for an appeal to the courts, under certain conditions. The entire subject of appeal is statutory, and governed by statutory regulations.<sup>24</sup> The right to an appeal being purely statutory, the legislature has the authority to make the decision of the municipal officers final and conclusive.<sup>25</sup> The remedy of a person claiming to have been unfairly assessed for the cost of a local improvement is to apply to the statutory tribunal vested with the power of reviewing the proceedings of the assessing board.<sup>26</sup> Special assessments are a species of taxation which is constitutional and proper, without any provision for an appeal from the action of those intrusted with the duty of making or revising such assessments.<sup>27</sup>

drain leads into another drain, which leads to the sewer, is not assessed, he having merely a revocable license. *Fairbanks v. Fitchburg*, 132 Mass. 42.

*Determination of amount of liability.*

When commissioners of adjustment under the statute have made an assessment for a public improvement, although no assessment had theretofore been imposed, or attempted to be imposed, and the proceedings are removed by *certiorari*, it is the duty of the court on appeal to ascertain and determine for what sum the property was legally liable, if at the time of adjudication an assessment can lawfully be levied. *Zahn v. Rutherford* (N. J.), 60 Atl. 1123.

<sup>24</sup> Cooley on Taxation, p. 1272; *In re Application Commissioners*, 50 N. Y. 493; *Warren v. Riddell*, 106 Cal. 352, 39 Pac. 781; *State v. Norton*, 63 Minn. 497, 65 N. W. 935.

<sup>25</sup> *Hughes v. Parker*, 148 Ind. 692, 48 N. E. 243.

*Determination as to apportionment between public and owners.*

The statute of 1897 providing that the determination of the court as to the distribution of cost of a sewer between the public and private owners, shall not be reviewed on appeal or error, is not unconstitutional, since the right of appeal is a matter of legislative discretion. *Bickerdike v. Chicago*, 185 Ill. 280, 56 N. E. 1096; *Mead v. Chicago*, 186 Ill. 54, 57 N. E. 824.

<sup>26</sup> And where no constitutional objection is raised or fraud charged, the inquiry in the foregoing case will be limited to the question whether the municipal authorities acted within, and in conformity to, the powers conferred upon them. *Kansas City Grading Co. v. Holden*, 107 Mo. 305, 17 S. W. 798.

<sup>27</sup> *Oil City v. Oil City Boiler Works*, 152 Pa. St. 348, 25 Atl.



— When allowable.

**756.** If a special assessment be made pursuant to law, it is final and conclusive, and cannot be reviewed by any other tribunal.<sup>28</sup> But where errors are alleged in an assessment that the council can correct, an appeal is the proper proceeding; but where the assessment is void upon its face, no appeal is necessary.<sup>29</sup> In San Francisco, it lies from an assessment for street work which it is claimed by the owner was not performed according to contract,<sup>30</sup> and in Indiana, from an order directing a reassessment to pay for the expense of constructing a free gravel road.<sup>31</sup> Under a statute authorizing an appeal from the action of the council within ten days after the confirmation and approval of the assessment roll, such an appeal is premature where confirmation and approval have not been accomplished by the passage of an ordinance to that effect, as required by a general city ordinance.<sup>32</sup> But a lessee cannot appeal from a judgment of confirmation against leased premises where the judgment expressly excepts his leasehold interest, including the improvements, from liability for the assessment; and this is true notwithstanding he has covenanted to pay all taxes or assessments levied upon the premises.<sup>33</sup>

549; *Bowers v. Braddock*, 172 Pa. St. 596, 33 Atl. 759.

<sup>28</sup> Where a street is opened and paved, thus assimilated with the rest of the city and made a part of it, all the particular benefits to the locality derived from the improvements have been received and enjoyed. Repairing streets is a part of the ordinary duties of a municipality; and a legislative act authorizing a municipality to cause a certain street to be repaved, and to assess the cost thereof to abutting property, is unconstitutional and void. *Hammitt v. Philadel-*

*phia*, 65 Pa. St. 146, 3 Am. Rep. 615.

<sup>29</sup> *Ryan v. Altschul*, 103 Cal. 174, 37 Pac. 339; *Chase v. Los Angeles*, 122 Cal. 540, 55 Pac. 414.

<sup>30</sup> *Emery v. Bradford*, 29 Cal. 75.

<sup>31</sup> *Campbell v. Commissioners*, 118 Ind. 119, 20 N. E. 772.

<sup>32</sup> *Bellingham Bay, &c., Co. v. New Whatcom*, 17 Wash. 496, 50 Pac. 477.

<sup>33</sup> *Weise v. Chicago*, 200 Ill. 339, 65 N. E. 648. When taken, and what presented by, see *Commissioners v. Fullen*, 118 Ind. 158, 20 N. E. 771.



— What matters considered on.

**757.** Questions of a jurisdictional character are for judicial inquiry, but all other matters concerning assessment proceedings are usually for the board itself, and reviewable only on appeal in the manner provided by statute.<sup>34</sup> All defects appearing on the face of the proceedings, which go to show that the requirements of law have not been complied with, can be urged upon appeal.<sup>35</sup> Under a statute providing for an appeal to the district court upon all questions concerning the validity of a special assessment, mere irregularities cannot be considered where a tribunal has been provided for passing thereon, and the plaintiff has not appeared before it.<sup>36</sup> On appeal from a judgment of sale of lands for unpaid special assessments, no question as to the validity of the judgment will be considered except that of jurisdiction.<sup>37</sup> Where a party appeals from an assessment of benefits, the question of damages in the same street matter is not open to review on such appeal.<sup>38</sup> An appeal from an assessment by one of the several parties assessed does not

<sup>34</sup> *Chambers v. Satterlee*, 40 Cal. 497; and see, generally, *Kirkpatrick v. Taylor*, 118 Ind. 329, 21 N. E. 20.

Appeals must be taken within the time and in the manner provided by law. *Denver v. Dunning*, 33 Colo. 487, 81 Pac. 259; *In re Scranton Sewer*, 62 Atl. 173; *Velhage v. Stanley* (Conn.), 63 Atl. 347; *Harris v. Tacoma* (Wash.), 81 Pac. 690; *Stone v. Chicago*, 218 Ill. 348, 75 N. E. 980.

A writ vacating an assessment is not a writ of right, and will issue only when substantial justice requires it. *Harwood v. Donovan*, 188 Mass. 487.

Restricting right of appeal not a denial of due process of law. *Ross v. Wright Co. Supervisors* (Iowa), 104 N. W. 506; *People v.*

*Cohen*, 219 Ill. 200, 76 N. E. 388.

<sup>35</sup> *Chicago v. Wright*, 32 Ill. 192.

<sup>36</sup> *Owens v. Marion*, 127 Iowa, 469, 103 N. W. 381; *Marshalltown, L. P. & R. Co. v. Marshalltown*, 127 Iowa, 637, 103 N. W. 1005.

<sup>37</sup> *Keeler v. People*, 160 Ill. 179, 43 N. E. 342.

<sup>38</sup> *Mayor, &c., v. Smith, &c., Brick Co.*, 80 Md. 458, 31 Atl. 423.

The assessment of benefits, and the assessment of damages, are separate and distinct matters, although usually made by the same persons, at the same time and in the same proceedings. A notice of appeal from one assessment only is in effect a declaration that the other is sufficient. See *Pabst Br. Co. v. Milwaukee* (Wis.), 105 N. W. 563.



bring up the whole apportionment for revision.<sup>39</sup> Under a charter giving a lot owner the right of appeal to the common council, and thence to the circuit court, from the decision of the board of public works on the question of benefits, such appeal is designed to correct errors of judgment in the board, but is probably not available to correct an assessment which the board had no jurisdiction to make.<sup>40</sup> When an appeal from a street improvement assessment is taken regularly and in proper time, the Board or Court having jurisdiction of the appeal, has no power to dismiss it, and even if an order is made dismissing it, the assessment does not become a finality, and an action cannot be maintained on such assessment.<sup>41</sup> But the question whether commissioners have exceeded their powers in organizing a drainage district or unduly extended the boundaries thereof, cannot be raised on appeal in chancery to enjoin the collection of the assessment, but must be presented by a direct proceeding as by *quo warranto*.<sup>42</sup>

— When appeal exclusive remedy.

**758.** Where a remedy for an erroneous assessment is provided by statute in the shape of an appeal, such remedy is exclusive, and parties who have neglected to pursue it must be conclusively presumed to be content with the assessment.<sup>43</sup> Over-valuation is no defense in an action on a tax. The statutory remedy by appeal is exclusive.<sup>44</sup> The only remedy for a party aggrieved by a change of grade of a street, or by the assessment of damages therefor, is by appeal in the manner provided by law. His only remedy is created by statute, there being none at common law.<sup>45</sup>

<sup>39</sup> *Clapp v. Hartford*, 35 Conn. 66.

<sup>40</sup> *Pier v. Fond du Lac*, 38 Wis. 470.

<sup>41</sup> *People v. O'Neil*, 51 Cal. 91.

<sup>42</sup> *People v. Jones*, 137 Ill. 35, 27 N. E. 294.

<sup>43</sup> *Wabash E. R. Co. v. Commissioners*, 134 Ill. 384, 10 L. R. A. 285, 25 N. E. 781.

<sup>44</sup> *Auburn v. Paul*, 84 Me. 212, 24 Atl. 817.

<sup>45</sup> *Genois v. St. Paul*, 35 Minn. 330, 29 N. W. 129.



Where the method of assessment adopted in distributing the burden is wrong, the remedy is by appeal; and such assessment, in the absence of an appeal, is conclusive, unless the board is wholly without jurisdiction, or there be some other departure from the established procedure.<sup>46</sup>

**759.** Under a charter giving a lot owner compensation for injuries sustained by alteration of the established grade of a street, giving an appeal to the circuit court from such assessment, and declaring that "no action at law shall be maintained for such damages or injuries," damages are still recoverable in an ordinary civil action where such change of grade was unauthorized, but the complaint must show such want of authority.<sup>47</sup> Upon the question as to whether or not a city has a right to levy an assessment for street paving upon the property of a street railway company, the latter are not confined to their remedy by appeal, but might show the want of jurisdiction of the city if it exist as a defence to such action.<sup>48</sup> Under a city charter providing that upon the opening of a street by the common council special

*But not where proceedings invalid.*

But where the city is without jurisdiction to proceed with the work, as by failure to give the notices of assessment and of confirmation, the owner may recover damages in a common law action of trespass. He is not obliged to seek his remedy by appeal. *Overmann v. St. Paul*, 39 Minn. 120, 39 N. W. 66.

*When action of council final.*

Under a charter authorizing the council to construct breakwaters, and to pay for same by levying city and ward taxes, and special assessments on the property specially benefited, and to determine the amounts to be charged against the lots specially benefited, and also providing for a hearing on the assessment, and the right of ap-

peal by any one aggrieved thereby to the Circuit Court, the action of the common council in determining what property is benefited is conclusive. Its decision as to the proper proportion of the whole assessment is to be borne by each lot, is reviewable on appeal, and appellant is entitled to have such question submitted to a jury. *Tee-garden v. Racine*, 56 Wis. 545, 14 N. W. 614.

<sup>46</sup> *Harney v. Benson*, 113 Cal. 314, 45 Pac. 687.

<sup>47</sup> *Dore v. Milwaukee*, 42 Wis. 108.

<sup>48</sup> *New Haven v. Fair Haven & N. R. Co.*, 38 Conn. 422, 9 Am. Rep. 399; but see *State ex rel. Milwaukee Street Railway Co. v. Anderson*, 90 Wis. 550



commissioners shall be appointed to assess all benefits and damages accruing therefrom upon the particular lots benefited thereby, and giving all parties the right to be heard at any stage of the proceedings and the right of appeal from the assessment after its confirmation, the determination of the commissioners as to what property will be benefited, after confirmation by the council, is final, and upon appeal the only question is whether the assessment is properly apportioned.<sup>49</sup>

— When appeal not exclusive remedy.

**760.** Where an assessment for street improvements is arbitrary and fraudulent, and therefore void, the appeal provided by the charter is not the only remedy. The person aggrieved may have his remedy in equity, or a common law action for damages.<sup>50</sup> Equity will enjoin the collection of

<sup>49</sup> *Dickson v. Racine*, 61 Wis. 545, 21 N. W. 620; *Teegarden v. Racine*, 56 Wis. 545, 14 N. W. 614.

<sup>50</sup> *Pier v. Fond du Lac*, 38 Wis. 470; *Watkins v. Milwaukee*, 52 Wis. 98, 8 N. W. 823; *Lieberman v. Milwaukee*, 89 Wis. 336, 61 N. W. 1112; *Kerstens v. Milwaukee*, 106 Wis. 200, 48 L. R. A. 851, 81 N. W. 948, 1103; *Jorgenson v. Superior*, 111 Wis. 561, 87 N. W. 565; *Friedrich v. Milwaukee*, 114 Wis. 304, 90 N. W. 174.

*Jurisdiction.*

Where a limited tribunal takes upon itself to exercise a jurisdiction which does not belong to it, its decision amounts to nothing, and does not create a necessity for an appeal. *Williamson v. Berry*, 8 How. 543, 12 L. ed. 1191; *Mayor, &c., v. Baltimore*, 18 Md. 284, 79 Am. Dec. 686.

*Fraudulent representations by city officers.*

Under a city charter giving per-

sons dissatisfied with an assessment the right to appeal to the Circuit Court within a certain time, such remedy will not be held exclusive in an action to recover an excessive assessment paid in ignorance of facts and induced by fraudulent misrepresentations of city officers. *Harrison v. Milwaukee*, 49 Wis. 247, 5 N. W. 326.

*Non-compliance with contract.*

Where a contract for street improvement entered into by the proper authority does not comply with the resolution for doing the work, the remedy of the party aggrieved is by appeal under the charter. He cannot avail himself of such irregularity in an action to recover from him the amount of the assessment. *Chambers v. Satterlee*, 40 Cal. 497.

*Equity will interfere where assessment is void.*

An appeal given by a city charter from an assessment of benefits,



a void local assessment, and tax payers are not relegated to an appeal from an assessment.<sup>51</sup> Where extrinsic evidence is not necessary to show the invalidity of a portion of the assessment, the defendant may interpose that as a defense, without a previous appeal to the board.<sup>52</sup>

### — Waiver.

**761.** Where a statute provides that "all objections to errors, irregularities, or inequalities, not made before the common council, shall be waived," except in cases of fraud, and permits an appeal to the courts where all questions touching the validity of the assessment or its amount, not waived, shall be heard and determined, a property owner who objects that his lots were not benefited, but who neither appeared before the council nor appealed from its decision, cannot maintain an action in equity to restrain the collection of the tax.<sup>53</sup> Error in the determination of the location of a street, incorrect delineation of land, objections to the form of the report of proceedings of commissioners in

upon which the only remedy given the appellant, if successful, is that the difference between the amount assessed and the amount adjudged to be paid as benefits shall be paid by the city, does not preclude an action to set aside an unequal and void assessment, even though the charter provides that such appeal shall be the only remedy of the landowner "for the redress of any grievance he may have by reason of the making of such improvement." *Hayes v. Douglas Co.*, 92 Wis. 429, 31 L. R. A. 213, 53 Am. St. Rep. 926, 65 N. W. 482.

#### *Cost of unauthorized work.*

A street assessment which includes the cost of more work than is authorized is not void as to the cost properly included therein, and may be corrected on appeal to the

statutory forum. *Dyer v. Scalmanini*, 69 Cal. 637, 11 Pac. 327.

#### *Assessment for work already done.*

Where it is objected that an assessment includes the expense of work already done and paid for, the remedy is by appeal. *Williams v. Bergin*, 116 Cal. 56, 47 Pac. 877.

<sup>51</sup> *Chicago, M. & St. P. R. Co. v. Phillips*, 111 Ia. 377, 82 N. W. 787.

<sup>52</sup> *Perine v. Lewis*, 128 Cal. 236, 60 Pac. 422, 772.

<sup>53</sup> *Minn. & St. L. R. Co. v. Lindquist*, 119 Iowa, 144, 93 N. W. 103.

If the authorities having power to make a special assessment commit errors which are not jurisdictional, and a remedy at law by appeal is provided, failure of the



making an assessment, the fact that the work was accepted before completion, and similar matters of fact, or the amount of the assessment, are all waived by failure to appeal.<sup>54</sup> Where a landowner appears before the proper board on review from a special assessment, and objects to the proceedings upon the merits, it is a waiver of any irregularity in the notice to appear.<sup>55</sup> Any irregularity in the demand for the amount of an assessment for a street improvement, or any defect in the assessment roll, is waived by failure to appeal.<sup>56</sup> By appealing from the award of damages, the landowner waives all question as to the regularity of the assessment; and if on such appeal he obtain an increase of damages, he is estopped from alleging that the damages were not legally awarded to him.<sup>57</sup>

#### — Burden of proof.

**762.** In an appeal by a property owner from an assessment of benefits accruing from a street opening, the burden

property owner to avail himself of such remedy will not entitle him to relief in equity. *Keigwin v. Drainage Com'rs*, 115 Ill. 347, 5 N. E. 575.

#### *Waiver.*

In the absence of fraud, or prejudice to the rights of property owners, mere irregularities not jurisdictional, are deemed waived when not urged in the manner and at the time provided by law. *Bates v. Adamson* (Cal. App.), 84 Pac. 51; *Owens v. Marion*, 127 Iowa, 469, 103 N. W. 381; *Wagg v. People*, 218 Ill. 337, 75 N. E. 977; *Phillips v. People*, 218 Ill. 450, 75 N. E. 1016; *Ottis v. Sullivan*, 219 Ill. 365, 76 N. E. 487; *Covington v. Noland* (Ky.), 89 S. W. 216; *Tusting v. Asbury Park* (N. J. L.), 62 Atl. 183.

<sup>54</sup> *Diggins v. Hartshorn*, 108 Cal.

154, 41 Pac. 283; *McCusick v. Stillwater*, 44 Minn. 372, 46 N. W. 769; *Treanor v. Houghton*, 103 Cal. 53, 36 Pac. 1081; *Wells v. Wood*, 114 Cal. 255, 46 Pac. 96.

<sup>55</sup> *Gregory v. Ann Arbor*, 127 Mich. 454, 86 N. W. 1013.

<sup>56</sup> *Beaudry v. Valdez*, 32 Cal. 269; *Emery v. Bradford*, 29 Cal. 75; *Taylor v. Palmer*, 31 Cal. 240.

<sup>57</sup> *State v. Harland*, 74 Wis. 11.

#### **Some General Elements of Waiver.**

##### *As basis of estoppel.*

The defense of waiver created as to an action to recover back a street improvement tax, where the amount of an invalid special assessment certificate was paid without protest, forms the basis of estoppel which becomes complete by addition of the element of change of position on the part of



of establishing the amount of such benefits is upon the city; <sup>58</sup> and upon such appeal the burden of proof is on the appellant to show that the assessment is more than his due

the municipality receiving the payment before any change of attitude on the part of the payor, so that the former would be prejudiced by such change of attitude if the right thus claimed were enforced. *Pabst Br. Co. (Wis.)*, 105 N. W. 563.

*Waiver bars remedy.*

By judicial policy firmly established in special classes of cases, including that of recovering back money paid as taxes without protest, one cannot after waiving a right turn and insist upon it and enforce such insistence by judicial remedies even though there be no element of estoppel involved. Such is the defense of waiver strictly so called. *Pabst Br. Co. v. Milwaukee (Wis.)*, 105 N. W. 563.

*Notice.*

As to facts constituting a waiver, see *Philadelphia v. Schofield*, 166 Pa. St. 389, 31 Atl. 119.

*Must be with knowledge.*

An act to be efficient in support of the defense of waiver must be done by the waiver with knowledge, or reasonable means of knowledge, of the facts and with the intent on his part to forego insisting upon the right waived. But such knowledge may be constructive as well as actual, and the intent essential to a defense may be implied as well as express. *Pabst Br. Co. v. Milwaukee (Wis.)*, 103 N. W. 563.

*Valid without consideration.*

The defense of waiver does not require to perfect it any consideration beneficial to the waivee,

nor any element of estoppel. *Pabst Br. Co. v. Milwaukee (Wis.)*, 105 N. W. 563.

*Two causes of action.*

When a landowner has two distinct grounds for opposing an assessment, one common to himself and others, and one pertaining to himself alone, and elects to bring an action for the benefit of himself and others, he will be deemed to have waived his right to bring the other action. A judgment for defendant on first action, on the merits, is an absolute bar to the second. *Cincinnati v. Emerson*, 57 O. St. 132, 48 N. E. 667.

*Objections waived on appeal.*

Where the trial court requires the objector to point out specifically upon what objections he relies, out of a large number, and the action of the trial court is preserved, the appellate court will deem other objections waived, and refuse to consider the same. *Clark v. Chicago*, 214 Ill. 318, 73 N. E. 358.

*Illegality not apparent on face.*

When the illegality of a tax does not appear on the face of the record, courts of equity have jurisdiction. *Ogden City v. Armstrong*, 168 U. S. 224, 42 L. ed. 444, 18 Sup. Ct. Rep. 98.

*Tax wholly void.*

And where a tax is wholly void for lack of jurisdiction to levy it, the statutory remedy is not exclusive, and the parties aggrieved may have their proper judicial remedy. *Ibid.*

<sup>58</sup> *Mayor, &c., v. Smith, &c.,*



proportion of the whole.<sup>59</sup> It is essential to the right of appeal that the party have an interest in the subject matter of the suit.<sup>60</sup>

### **Mandamus — In general.**

**763.** Mandamus is the proper remedy to compel the municipal authorities to take the proper steps to collect as-

Brick Co., 80 Md. 458, 31 Atl. 423.

<sup>59</sup> Teegarden v. Racine, 56 Wis. 545, 14 N. W. 614; Dickson v. Racine, 61 Wis. 545, 21 N. W. 620; Dickson v. Racine, 65 Wis. 306, 27 N. W. 58.

<sup>60</sup> Weise v. Chicago, 200 Ill. 339, 65 N. E. 648.

### **Miscellaneous cases on appeals.**

#### *United States.*

#### *Assessment exceeding benefits.*

Where all the proceedings are regular, one who has not appealed therefrom in accordance with the statute cannot apply to a court of equity for relief on the ground that the assessment was in excess of the benefits received. *Brown v. Drain*, 112 Fed. 582.

#### *California.*

#### *When appeal unnecessary.*

Where an assessment is invalid by failure to enter the owner's name against the property, or the word "unknown," as the case may be, the owner and his property are absolutely unaffected by such assessment, and he is under no obligation to take any steps, by appeal or otherwise, to avoid incurring personal liability or the incumbrance of his property by way of lien for such assessment. *Smith v. Cofran*, 34 Cal. 310.

#### *How directed.*

Where a notice of appeal is re-

quired to be published, it need not be directed, *eo nomine*, to the persons who might be affected by such right of appeal. *Williams v. Vise-lich*, 121 Cal. 314, 53 Pac. 807.

#### *What matters may be corrected by.*

Error in determination of location of street, incorrect delineation of land, or the fact that the work was accepted before completion, are objections that will be deemed waived by failure to appeal. *Diggins v. Hartshorne*, 108 Cal. 154, 41 Pac. 283.

#### *Double assessment void.*

Where lots are assessed for double the amount legally chargeable, such double assessment is void, and no lien therefor can be enforced, although the lot owners have failed to appeal. *Kenny v. Kelly*, 113 Cal. 364, 45 Pac. 699.

#### *When written protest operates as an appeal.*

See *Creed v. McCombs*, 146 Cal. 449, 80 Pac. 679.

#### *Connecticut.*

#### *Effect of reducing assessment.*

Where on an appeal one assessment is reduced, it is not necessary that the amount of such reduction should be added to the assessment of the others. *Clapp v. Hartford*, 35 Conn. 66.

#### *Dismissal of appeal as to benefits.*

Under a charter permitting the authorities to assess the entire cost



of sewers on the property benefited by them, the cost of a main sewer much larger than necessary for the accommodation of the abutting property was assessed upon the owners of that part of the street through which it was made. On appeal it was objected that the cost should not be assessed on such owners alone, but it being shown that the lands assessed were in fact benefited beyond the amount assessed upon them, the appeal was dismissed. *Hungerford v. Hartford*, 39 Conn. 279. *Illinois*.

*Writ of error may be restricted.*

Writ of error is not a writ of right in statutory proceedings, and may be restricted and regulated by the legislature when the proceeding is according to the course of the common law. *Hart v. W. Chi. Pk. Com'rs*, 186 Ill. 464, 57 N. E. 1036.

*Michigan*.

*Injunction — Vacation — Contempt.*

Where a bill for a preliminary injunction was dismissed in the trial court, an appeal therefrom does not revive the injunction, and the city authorities are not guilty of contempt for enforcing the collection of the assessment pending the appeal. *Brevoort v. Detroit*, 24 Mich. 322.

*Adoption of committee report is action of council.*

Where on appeal to the council from an assessment of benefits and damages, the matter is referred to a special committee who fix a day for hearing, and after the hearing report thereon to the common council, who adopt their report, such action becomes the action of

the council. *Brown v. Saginaw*, 107 Mich. 643, 65 N. W. 601.

*Minnesota*.

*Insufficient description — When immaterial.*

Judgment of the court upon appeal from an order in special assessment proceedings, is not defective because the lands are not described therein, if they are sufficiently described in other parts of the record. *Dowlan v. Sibley Co.*, 36 Minn. 430, 31 N. W. 517.

*Missouri*.

*Exceptions on, must be filed in time.*

Where the statute provides that the report of commissioners of assessment may be reviewed by the court on written exceptions filed within ten days after the filing of the report, exceptions filed after that time are properly stricken out on motion. *St. Louis v. Lang*, 131 Mo. 412, 33 S. W. 54.

*New Jersey*.

*Finding not reviewable.*

The finding by the court reviewing the assessment that the same has been paid according to the peculiar benefits received, is the finding of a fact which will not be reviewed on appeal if the court shows any proof to sustain it. *Dean v. Patterson*, 68 N. J. L. 664, 54 Atl. 836.

*Pennsylvania*.

*Appeal from assessment of part of property.*

An owner of six city lots, assessed for the same improvement, cannot by an appeal from the assessments as to four of them suspend proceedings by the city for the collection of the assessment on the other two. *Pittsburg v. Maxwell*, 179 Pa. St. 553, 36 Atl. 158.



sessments,<sup>61</sup> but it will not issue to control the exercise of the discretion properly vested in the corporate authorities.<sup>62</sup> It will not be granted unless the petition show the corporate authorities have been asked to do the desired act, and have refused. Nor will it be granted to compel the levying of a special assessment where five years have elapsed since the dismissal of the proceedings.<sup>63</sup> It will, in the discretion of the court, lie to compel the county officers to receive and file estimates of the amount of a special park tax, notwithstanding the pendency of a suit in equity by another party to enjoin such action.<sup>64</sup> And where it is the duty of a common council to require an estimate of the cost of improving a street at the benefit of the property owners, to be made, and they refuse to order such estimate, mandamus is an appropriate remedy.<sup>65</sup> Where parties at one time had an adequate remedy by injunction to restrain the collection of an invalid assessment, of which they did not avail themselves, and were otherwise guilty of great *laches*, their prayer for mandamus will not be granted.<sup>66</sup> Where portions of a street improvement have been completed and accepted, but do not conform to the ordinance, and the assessment against

#### *Wisconsin.*

##### *When action for damages maintainable.*

The appeal provided for in Milwaukee city charter relates to an assessment for grading a street for the first time, and not to a claim of damages for a change of grade subsequently made by the city. In the latter case, the party damaged has his remedy in an action at law. *Church v. Milwaukee*, 31 Wis. 512.

##### *When appeal the only remedy.*

Under a charter providing for the recovery of damages sustained by a lot owner from a change of a previously established grade, and providing that an appeal from the

assessment shall be the only remedy by the dissatisfied lot owner, the latter cannot bring an original action in the Circuit Court for injuries received. *Owens v. Milwaukee*, 47 Wis. 461, 3 N. W. 3.

<sup>61</sup> *McCulloch v. Mayor, &c.*, 23 Wend. 458.

<sup>62</sup> *Rhodes v. Denver*, 10 Colo. App. 99, 49 Pac. 430; *People v. Hyde Park*, 117 Ill. 462, 6 N. E. 33.

<sup>63</sup> *People v. Hyde Park*, *supra*.

<sup>64</sup> *People v. Salomon*, 51 Ill. 39.

<sup>65</sup> *Greenfield v. State*, 113 Ind. 598, 15 N. E. 241.

<sup>66</sup> *Simpson v. Kansas City*, 52 Kan. 88, 34 Pac. 406.



a railroad company abandoned, the remedy is by mandamus to compel the proper performance of the work and the collection of the abandoned assessments.<sup>67</sup>

**764.** Where work done by a contractor is not according to the ordinance, but has been accepted by the city and paid for, the remedy of the property owner is not by injunction to restrain the collection of the assessment, but by mandamus to compel the city to complete the work in accordance with the terms of the ordinance.<sup>68</sup> A special assessment will not be enjoined because the improvement is not made in conformity with the provisions of the ordinance, the remedy being by mandamus.<sup>69</sup> Although the property of a city cannot be sold for a special assessment or tax so as to pass title to private parties, yet mandamus will lie to compel the payment of the amount assessed out of the city or county treasury.<sup>70</sup> Where a lot outside of an assessment district has been erroneously included in the assessment by mistake, it is a clerical error which should be corrected by the assessing board under a statute making it their duty to rectify errors of that nature, and mandamus is a proper remedy to compel the performance of this duty.<sup>71</sup> Payment of a judg-

<sup>67</sup> Shannon v. Hinsdale, 180 Ill. 202, 54 N. E. 181.

Holder of warrants may proceed by mandamus. Espy Estate Co. v. Pacific Co. Com'rs (Wash.), 82 Pac. 129; Waldron v. Snohomish (Wash.), 83 Pac. 1106.

Contractor not entitled to, when he has received final order for full contract. Sherwood v. Ryneerson (Mich.), 104 N. W. 392.

<sup>68</sup> Callister v. Kochersperger, 168 Ill. 334, 48 N. E. 156.

<sup>69</sup> Lyman v. Chicago, 211 Ill. 209, 71 N. E. 832; Heinroth v. Kochersperger, 173 Ill. 205, 50 N. E. 171; Field v. Western Springs, 181 Ill. 186, 54 N. E. 929.

<sup>70</sup> In re Mt. Vernon, 147 Ill. 359, 23 L. R. A. 807, 35 N. E. 533.

*Improving property without title.*

Where a city without authority improves private property, a property owner assessed therefor may have *mandamus* to compel the condemnation of such property. People v. Sass, 171 Ill. 357, 49 N. . 501. Or, may enjoin the expenditure of funds therefor until condemnation proceedings are begun.

<sup>71</sup> People v. Wilson, 119 N. Y. 515, 23 N. E. 1064.



ment against a city for damages for taking land for a street having been provided for, in accordance with statute, by the levy of a special assessment upon the property specially benefited, the landowner is not entitled to compel by mandamus the levy of a tax for that purpose upon all the taxable property of the city until the special assessment has proved inadequate.<sup>72</sup>

### Quo warranto.

**765.** The legality of the formation and organization of a drainage district, or of the acts of commissioners in selecting a street for improvement, may properly be inquired into by *quo warranto* proceedings.<sup>73</sup>

### Trespass.

**766.** The old action of trespass affords some advantages to the property owner seeking to recover damages for a depreciation caused by a street improvement, usually an accompaniment of a decided cut or fill in grading the street. If there be no damages authorized by statute for injury caused abutting property by such grading, done lawfully

<sup>72</sup> State v. Superior, 81 Wis. 649, 51 N. W. 1014.

Where a charter provides for the return to each person assessed pro rata, of any excess collected over the cost of the improvement, and eight distinct improvements were made, in some of which a deficiency arose, the surplus was transferred to the contingent fund. On failure of the council to apportion the fund, interested parties brought suit against the city, which contested all liability, and also claimed mandamus to apportion and pay over was the only remedy. Held, technical, and that the city could not interpose such

defense after virtual denial of the rights of plaintiffs.

And in such case, each improvement must stand by itself, as the deficiency cannot be set off against the surplus, but the former must be provided for by reassessment. Thayer v. Grand Rapids, 82 Mich. 298, 46 N. W. 228.

<sup>73</sup> People v. Walsh, 96 Ill. 232, 36 Am. Rep. 135; Evans v. Lewis, 121 Ill. 478, 13 N. E. 246; Aldis v. South Park Comrs., 171 Ill. 424, 49 N. E. 565.

*Assumpsit.*

Where the statute provides no method of enforcing a special tax, assumpsit will lie. Mayor etc. v. Howard, 6 Harr. & J. 383.



and with due care, yet there are frequently cases where the proceedings have been so irregular as to render the assessment void, or the work has been so carelessly done as to cause damage. In either case, the property owner could probably recover his actual damages, irrespective of the statute, because the officials not having proceeded legally, may be deemed trespassers *ab initio*, notwithstanding their original entry may have been lawful. In such cases, the benefits cannot be offset.<sup>74</sup> The right of access from a street by the owner of land abutting on such street is a property right of which the owner cannot be deprived without compensation; and when a municipal corporation, in the exercise of its power to grade and improve streets, destroys or impairs such right, the corporation is liable to the owner in an action for damages.<sup>75</sup> And it has been held that a city is liable for injuries to abutting property resulting from cutting down a street on which no grade has been previously established, as required by statute, though there has been no trespass or direct encroachment on the property.<sup>76</sup> The provision, Sec. 10, Art. 1, of the Oregon constitution guaranteeing to every person a remedy by due course of law for injury in person, property, or reputation, was intended to preserve the common-law right of action for injury, so that, while the remedy or form of procedure may be changed, or conditions may be attached to its exercise, some remedy must remain; thus, a charter giving to the council the control of the streets, and authority to raise money for their repair, and providing that neither the city nor any member

<sup>74</sup> Although in the absence of a statute providing for compensation, an abutting owner whose land is injured by the change of grade of a street lawfully made, is without remedy, where the title of such owner extends to the center of the street, if the municipality illegally and wrongfully excavates or otherwise interferes

with the street, it is liable to him for the damages. *Folmsbee v. Amsterdam*, 142 N. Y. 118, 36 N. E. 821.

<sup>75</sup> *Macon v. Wing*, 113 Ga. 90, 38 S. E. 392; *Elliott on R. & S.*, section 695.

<sup>76</sup> *Millard v. Webster City*, 113 Ia. 220, 84 N. W. 1044.



of the council shall be liable for any damages resulting from any defective street, is repugnant to the right to a remedy guaranteed by the constitution, and is void so far as it conflicts.<sup>77</sup>

**767.** The unauthorized removal of a sidewalk laid in front of a person's lot is an actionable trespass, the measure of damages, in the absence of a wrong motive for such removal, being the value of the walk as down.<sup>78</sup> The liability of a city for negligently raising a fund to pay certain warrants is one arising *ex delicto*, and not *ex contractu*, and therefore the city is liable for the damages arising therefrom, though its limit of indebtedness has been reached.<sup>79</sup> Where a municipal officer levied on and collected from plaintiff the amount of a void special assessment, but which assessment the city had power to make in a regular way, the city is liable to plaintiff in an action of tort.<sup>80</sup>

**768.** When in grading a street by municipal authorities acting with due care and skill, without malice, and under rightful authority, a land owner is injured by the falling away of the natural support for his land, an action of trespass will not lie, no provision for the payment of consequential damages having been made.<sup>81</sup> But the science of the law is as progressive as some of the more exact sciences, and this stern old common law rule has been greatly modified of late, and has finally been definitely repudiated.<sup>82</sup> There is no sound reason for exempting municipalities from the same rules of property as those which govern the individuals. Indeed, from their great power as compared with the individual, and their usual lack of personal lia-

<sup>77</sup> *Mattson v. Astoria*, 39 Ore. 577, 87 Am. St. Rep. 687, 65 Pac. 1066. See *Haubner v. Milwaukee*, on rehearing, 124 Wis. 159.

<sup>78</sup> *Rogers v. Randall*, 29 Mich. 41.

<sup>79</sup> *Little v. Portland*, 26 Ore. 235, 37 Pac. 911.

<sup>80</sup> *Howell v. Buffalo*, 15 N. Y. 512.

<sup>81</sup> *Radcliffe's Exrs. v. Mayor*, etc., 4 N. Y. 195, 53 Am. Dec. 357.

<sup>82</sup> *Damkoehler v. Milwaukee*, 124 Wis. 144, 101 N. W. 706.



bility, it would seem as if the policy of the law should look rather to compelling the corporation to a stricter enforcement of the law than the property owner. Where a complaint alleges that plaintiff's lots were sold "for the amount of said" (special) "assessments," it will be presumed that all other taxes thereon had been paid, and it was not necessary to allege such payment.<sup>83</sup> Under a city charter making necessary the presentation of a claim against the city to the common council for allowance or rejection, and for an appeal in case of rejection, a claim was filed "For damage caused by change of grade." The complaint filed, after rejecting said claim, was for damages by reason of an *unlawful* change of said grade, and a demurrer thereto was overruled. A subsequent judgment against the plaintiff could not be sustained on the ground that the claim was based on a *lawful* change of grade, and hence was insufficient to sustain the action.<sup>84</sup>

<sup>83</sup> *Gilman v. Milwaukee*, 61 Wis. 588, 21 N. W. 640.

<sup>84</sup> *Drummond v. Eau Claire*, 85 Wis. 556, 55 N. W. 1028.

*Duty of owner—Ejectment.*

One claiming title to real estate in virtue of a sale made to him by a municipal corporation for an unpaid assessment of the expense of opening a street, must, in ejectment by the former owner, assume the onus of proving that the corporation has complied with all its charter requisites both in respect to laying out the street and making the assessment. *Sharp v. Johnson*, 4 Hill, 92, 40 Am. Dec. 259.

*Trespass.*

See *Moore v. Albany*, 98 N. Y. 396.

Where a city, acting within its general powers, though irregularly, commits a trespass, as by re-

moving a fence, cutting trees, and building a sidewalk, under the mistaken belief that the enclosure was an encroachment on a street, the corporation and all individuals connected with the act are liable for the trespass. *Brink v. Dunmore*, 174 Pa. St. 395, 34 Atl. 598.

Trespass lies against a municipal corporation. *Allen v. Decatur*, 23 Ill. 332, 76 Am. Dec. 192; *Meinzer v. Racine*, 70 Wis. 561, 36 N. W. 260; *Crossett v. Janesville*, 28 Wis. 420; *Friedrich v. Milwaukee*, 118 Wis. 254, 95 N. W. 126.

*Liability of city for wrongful acts of officers.*

A city is liable for the wrongful acts of its officers if they trespass upon and seize private property for street purposes without complying with the statute for con-



**Recovery back — In general.**

769. Perhaps no question in connection with the entire subject has received so directly contrary opinions as the right to recover the amount paid on an invalid assessment. The extreme tenderness which the courts feel for anything in the shape of a tax tinctures nearly all the adjudications upon this subject. In the majority of jurisdictions, where the improvement is done by contract, the city acting only as collecting and disbursing agent between the parties, this somewhat exaggerated reverence seems misplaced. If the city officials proceed wrongfully, or the contractor proceeds crookedly, the law affords ample remedy. But to hold that when the taxpayer liquidates his special tax bill because his property will be sold if he does not, that this is a voluntary payment, is a doctrine with which the writer is unable to coincide. But the general rule of law applicable to these cases is, that money voluntarily paid, with full knowledge of the facts, and without protest, cannot be recovered back; and perhaps the converse of the proposition may be considered the rule in the larger number of states. The payment under protest of an unlawful demand, when such payment is necessary to avoid serious injury or risk in respect to property, is not to be deemed as voluntarily made, and the money may be recovered back.<sup>85</sup> But a void special assessment is not validated by the mere fact that payments there-

demning such property. *Omaha v. Croft*, 60 Neb. 57, 82 N. W. 120.

Property owners in New York City have a right to be heard before the proper city authorities with reference to an assessment for a local improvement, but after the hearing and confirmation of the assessment they have no right to attack it in the courts, except as specifically prescribed in the

statute. *In re Mum*, 165 N. Y. 149, 58 N. E. 881.

A municipal corporation is liable for the unauthorized acts of its officers, constituting trespass, where adopted and ratified by other officers having authority. *Omaha v. Croft*, 60 Neb. 57, 82 N. W. 120.

<sup>85</sup> *Gill v. Oakland*, 124 Cal. 335, 57 Pac. 150; *State v. Nelson*, 41 Minn. 25, 4 L. R. A. 300, 42 N. W. 548.



on have been voluntarily made.<sup>86</sup> An assessment made under an unconstitutional statute, paid under protest, and being induced by compulsory process, may be recovered back in an action on contract.<sup>87</sup> Assumpsit will not lie in such case unless the tax is entirely void; if the objection is merely to some irregularity, the remedy is by appeal.<sup>88</sup>

**770.** Where a statute permits the taxes or assessments to be paid under protest before delinquency, and, after giving certain notice, to sue to recover same back because of illegality, one who seeks to recover such taxes must pay the entire amount due before it becomes delinquent, so as to bring himself within the provisions of the statute.<sup>89</sup> If money has been paid for a tax illegally assessed, the proper remedy to recover the same back is by an action for money had and received. That action is applicable where a person receives money, which, in equity and good conscience, he ought to refund.<sup>90</sup> Where money has been voluntarily paid to a city to discharge an assessment, the plaintiff in an action to recover back the money has the burden of showing that the assessment was void.<sup>91</sup>

— Facts outside the record.

**771.** Where an assessment for a local improvement, valid

<sup>86</sup> *Wakeley v. Omaha*, 58 Neb. 245, 78 N. W. 511.

The fact that a property owner has paid installments of a special assessment as they became due, does not by way of adoption or approval of the assessment conclude him from claiming that it was not then a charge or incumbrance on his premises. *McLaughlin v. Miller*, 124 N. Y. 510, 26 N. E. 1104.

<sup>87</sup> *Dexter v. Boston*, 176 Mass. 247, 79 Am. St. Rep. 306, 57 N. E. 379.

<sup>88</sup> *Wright v. Boston*, 9 Cush. 233.

Assumpsit lies to recover a tax which is illegal, paid under protest, and exacted under color of process. *Grand Rapids v. Blakeley*, 40 Mich. 367, 29 Am. Rep. 539.

In Illinois, one who is entitled to a rebate on a special assessment paid by him may recover it in an action of assumpsit against the municipality. *Chicago v. Singer*, 116 Ill. App. 559.

<sup>89</sup> *South Omaha v. McGavock* (Neb.), 100 N. W. 805.

<sup>90</sup> *Board of Supervisors v. Manny*, 56 Ill. 160.

<sup>91</sup> *Remsen v. Wheeler*, 121 N. Y. 685, 24 N. E. 704.



upon its face, and an apparent lien upon the lands assessed, but which is in fact by reason of facts *dehors* the record illegal and void in part, is paid by the owner of the lands in ignorance of the illegality, he may, on discovery thereof, maintain an action in equity against the municipality to set aside the assessment as to the illegal excess, and to recover back the same, and without first vacating the assessment.<sup>92</sup>

#### — Failure of jurisdiction.

**772.** The rule that where the assessment has been made with jurisdiction, and the property owner has paid the tax thereby imposed, he cannot recover back the money paid until the assessment has been vacated or set aside in some appropriate proceeding, does not apply to defects which render the assessment void for want of jurisdiction.<sup>93</sup>

#### — Ignorance or coercion.

**773.** In order to maintain an action to recover back money paid on an illegal assessment, it must appear that the

<sup>92</sup> *Strusburgh v. Mayor*, 87 N. Y. 452; *Diefenthaler v. Mayor*, 111 N. Y. 331, 19 N. E. 48; *Trimmer v. Rochester*, 134 N. Y. 76, 31 N. E. 255.

<sup>93</sup> *Mutual Life Ins. Co. v. Mayor*, 144 N. Y. 494, 39 N. E. 386; *Browns v. May*, 120 N. Y. 357, 24 N. E. 947.

Where an assessment for a local improvement is valid upon its face, but is in effect void because the assessors had no jurisdiction to impose it, an action may be maintained to recover back money involuntarily paid in satisfaction thereof, without first having the assessment set aside or vacated. *Bruecher v. Port Chester*, 101 N. Y. 240, 4 N. E. 272.

*Failure to give notice.*

Where the inspector of roads and levees has failed to give to

the absent proprietor the notice required by law of the work to be done on his levees, the contractor who has done the work may recover from the proprietor on *quantum meruit*, to pay such an amount as the latter had been benefited by the work done; or, the contractor may recover of the parish. *Newcomb v. Police Jury*, 4 Rob. (La.) 233; *Michel v. Police Jury*, 3 La. An. 123; *Michel v. Police Jury*, 9 La. An. 67.

Where the assessment proceedings, and sale based thereon, are absolutely void for want of jurisdiction, the money paid can be recovered on the ground of an entire failure of consideration, for which the money was paid to the city. *Chapman v. Brooklyn*, 40 N. Y. 372.



payment was made in ignorance of the invalidity of the assessment or through some legal coercion or coercion of fact.<sup>94</sup>

— **Abandoning work — Failure of consideration.**

**774.** Money paid under a misapprehension of facts may be recovered; so, also, if there has been a total failure of the consideration for which the money was paid. Thus an assessment paid for street opening purposes may be recovered from the city if the street be not opened within a reasonable time; and any period of time which would bar the recovery, if the action should be delayed, will be deemed reasonable.<sup>95</sup>

— **Unconstitutional assessment.**

**775.** Where an assessment is unconstitutional and void,

*Same.*

Where the statutory notice has not been given to a taxpayer of the time when, and place where, he must appear and pay his highway tax in labor, there is no authority in the town officers to return the tax as unpaid, and enter it on the assessment roll; and if the amount of such tax has been illegally collected, the taxpayer may recover it by action. *Biss v. New Haven*, 42 Wis. 605.

A statute prohibiting the reduction or disturbance, beyond the fair value of the improvement, of any assessment for a local improvement, does not apply to a common law action brought by a property owner to recover from the city money paid by him upon an illegal assessment, by coercion of law to prevent a sale of his property, and does not prevent a recovery in such action of the entire amount of the assessment so paid by him. *Poth v. Mayor*, 151 N. Y. 16, 45 N. E. 372.

<sup>94</sup> *Redmond v. Mayor*, 125 N. Y. 411.

632, 26 N. E. 727; *Jex v. Mayor*, 103 N. Y. 536, 9 N. E. 39.

In 1891 proceedings were instituted to open, widen and extend a street, plaintiff's property assessed for benefits, the improvement partly made, and the plaintiff paid his assessment, and the money was retained by the city. His lots were not benefited by the grading done, and further work was abandoned by the city in 1893. Held, that plaintiff was entitled to recover as upon a failure of consideration. *McConville v. St. Paul*, 75 Minn. 383, 43 L. R. A. 584, 74 Am. St. Rep. 508, 77 N. W. 993.

But the complaint must allege that all of the money accruing from the assessment had not been expended upon the improvement. *Rogers v. St. Paul*, 79 Minn. 5, 47 L. R. A. 537, 81 N. W. 539; *Germania Bank v. St. Paul*, 79 Minn. 29, 81 N. W. 542; *Rogers v. St. Paul*, 86 Minn. 98, 90 N. W. 155.

<sup>95</sup> *Bradford v. Chicago*, 25 Ill.



and has been so judicially declared, and the invalidity is such that it must appear upon the proof necessary to be made to sustain proceedings under it, it is not essential to the maintenance of an action to recover back moneys collected under the assessment that it should first be judicially vacated.<sup>96</sup>

— Voluntary and compulsory payments.

**776.** A payment of a special assessment to redeem from the lien of a tax sale is not a voluntary payment.<sup>97</sup> Where a sewer assessment is void in part by reason of the rock excavation having been done by days work instead of by contract, as required by the charter, the amount of such excess paid in ignorance of its invalidity, is not a voluntary payment, and may be recovered back.<sup>98</sup> The payment of an assessment is not voluntary, if the collector have a warrant by virtue of which he may levy and sell; and one who has paid the money may recover, although the assessment was illegal, the city having the money for its general uses.<sup>99</sup> The payment of an alleged illegal assessment for a local improvement, after active legal proceedings have been instituted for its collection on the part of the municipality by a sale of the payer's property, is not to be regarded as voluntary, but the result of legal compulsion.<sup>1</sup>

<sup>96</sup> Horn v. New Lots, 83 N. Y. 100, 38 Am. Rep. 402.

*Regular proceedings have effect of judgment.*

When the proceedings in the case of an assessment are regular upon their face, and on presentation make out a right to have and demand the amount levied, and to collect it in due course of law, they have the force of a judgment, and a person who pays the same may, upon a subsequent setting aside of the assessment, maintain an action against the municipality to recover back the amount, the

payment in such case not being voluntary, but under coercion of law. Peyser v. Mayor, etc., 70 N. Y. 497, 26 Am. Rep. 624.

<sup>97</sup> Valentine v. St. Paul, 34 Minn. 446, 26 N. W. 457.

<sup>98</sup> Mutual Life Ins. Co. v. Mayor, 144 N. Y. 494, 39 N. E. 386.

<sup>99</sup> Bradford v. Chicago, 25 Ill. 411.

<sup>1</sup> Poth v. Mayor, 151 N. Y. 16, 45 N. E. 372.

*Payment under protest.*

If the owner of a city lot pays an assessment levied thereon for



— Who may recover.

**777.** The right of restitution only extends to those who institute proceedings; one owner cannot avail himself of proceedings instituted by another whose property is affected by the same assessment. Setting aside an assessment at the suit of one party as being illegal and void, does not set aside all the assessments, but only that against the plaintiff in such action, and the other assessments are not affected or invalidated thereby.<sup>2</sup>

— Mistakes in payment.

**778.** The payment and acceptance of an assessment for street improvement cannot be regarded as an accord and satisfaction of an additional amount afterwards found by a corrected assessment to be due, as the mistake in the assessment was not then known to, or in contemplation of either party.<sup>3</sup> Where an assessment has been paid, and subsequently has been vacated and set aside, and a re-assessment made for a less sum than the original assessment, an action

improvement of it, which is illegal and void, it will be regarded as a voluntary payment, and he cannot recover it back in an action at law against the officer, even where paid under protest after a threatened sale. *De Baker v. Carrillo*, 52 Cal. 473.

*Fraudulent statement by officials.*

Where one-half only of the cost of laying water pipe is chargeable against the abutting lots, but plaintiff paid the whole amount thereof (included in her taxes charged on the city tax roll), not knowing the actual cost, and being induced thereto by the false and fraudulent statements of city officers that she was charged only half the cost, this is not a voluntary payment. *Harrison v. Milwaukee*, 49 Wis. 247, 5 N. W. 326.

*Payment to collector with warrant.*

The rule that payment of a tax made to a collector having in his hands a warrant to collect, is compulsory, does not apply to a special assessment paid to an officer having a precept which can only be levied on the lands of the owner. In such case, the payment will be considered voluntary, because a sale under the precept would not disturb him in the free enjoyment of his property, and his remedies would still remain to him in case the assessment be illegal. *Falls v. Cairo*, 58 Ill. 403.

<sup>2</sup> *Purssell v. Mayor*, 85 N. Y. 330; *Trimmer v. Rochester*, 130 N. Y. 401, 29 N. E. 746.

<sup>3</sup> *Stengel v. Preston*, 89 Ky. 616, 13 S. W. 839.



will lie to recover back the difference between the first and second assessments.<sup>4</sup> In an action to recover back money paid on an illegal assessment, the burden is upon the plaintiff to prove that he made the assessment in ignorance of the facts making the assessment invalid, and where the evidence on his part tends to show such ignorance, the question is one of fact for the jury.<sup>5</sup>

— Limitations.

**779.** The statute of limitations on the right to recover back money paid on an assessment which has been vacated and set aside does not begin to run from the time of the payment of the assessment, but from the time of the vacation of the assessment.<sup>6</sup>

— When no recovery.

**780.** A broad statement of the principle underlying this branch of the subject is, that in no case can the state be

<sup>4</sup> Mayor v. Green, 42 N. J. L. 627.

*Interest payable.*

Interest will be allowed against a city upon the sum illegally exacted as a tax and paid under protest. Grand Rapids v. Blakely, 40 Mich. 367, 29 Am. Rep. 539.

*Plea of city.*

Where a party is entitled to the restoration of a tax which has been illegally collected, it is no answer for the city to say that it holds the fund for somebody else. Joyner v. Third School Dist., 3 Cush. 567; Grand Rapids v. Blakely, 40 Mich. 367, 29 Am. Rep. 539.

<sup>5</sup> An owner of land incumbered by an assessment for a local improvement apparently valid and enforceable by a sale of the premises, may in good faith pay it and thereafter on discovering that it was illegal

recover back the money paid. Tripler v. Mayor 139 N. Y. 1, 34 N. E. 729.

A land owner who has paid an assessment for benefits may recover by action the money so paid if such assessment be afterwards set aside. Mayor v. O'Callaghan, 41 N. J. L. 349.

In an action to recover back money paid on an assessment for a sewer under a charter provision authorizing the council to assess the expenses thereof on any person or persons who might, in the opinion of the council, be in any manner benefited thereby, the court will presume in the absence of showing that the council found such benefit to exist. Cone v. Hartford, 28 Conn. 364.

<sup>6</sup> Mayor v. Green, 42 N. J. L. 627.



compelled to refund a tax voluntarily paid, upon a claim of technical illegality in the assessment, provided the property on which it was paid was legally taxable; <sup>7</sup> or, as aptly put in another case, if a party with full knowledge of the facts of the case voluntarily pays money in satisfaction of a demand unjustly made on him, he cannot afterwards recover back the money.<sup>8</sup>

### — Vested rights

**781.** There is no contract between a city and a property owner therein that the city will return him the amount that he has paid it on a void street assessment, and consequently such owner cannot have any vested right to recover such payment. There are no vested rights in either defenses or rights of action based on mere informalities.<sup>9</sup> Money paid for an

The term "void on its face" as applied to a record, implies that no evidence other than an inspection of the record is necessary to prove its invalidity. *Tripler v. Mayor*, 125 N. Y. 617, 26 N. E. 721.

*When replevin not maintainable.*

Although a warrant for a collection of a special assessment may have been issued erroneously or irregularly, if on its face it gives authority to collect such assessment, replevin cannot be sustained for property taken by virtue of the warrant. *Troy & L. R. Co. v. Kane*, 72 N. Y. 614.

Taxes paid under mistake of law may be recovered back. *Newport v. Ringo's Ex'trx.*, 87 Ky. 636, 10 S. W. 2.

Recovery back under statute—when barred. See *Dennison v. New York*, 182 N. Y. 24, 74 N. E. 486.

As to what amounts to coercion in law, see *Vaughn v. Port Chester*, 135 N. Y. 460, 32 N. E. 137.

A voluntary payment cannot be recovered back. *Chicago v. Stuart*, 53 Ill. 83.

As to what is not a voluntary payment, see *Stephen v. Daniels*, 27 O. St. 527.

A tax levied in a void proceeding is unenforceable. *Casey v. Burt County*, 59 Neb. 624, 81 N. W. 851.

Recovery back, when may be had. See *Stephan v. Daniels*, 27 O. St. 527.

<sup>7</sup> *People v. Miner*, 46 Ill. 374.

<sup>8</sup> *Falls v. Cairo*, 58 Ill. 403; *Els-ton v. Chicago*, 40 Ill. 514, 89 Am. Dec. 361; *Conkling v. Springfield*, 132 Ill. 420, 24 N. E. 67.

<sup>9</sup> *Nottage v. Portland*, 35 Ore. 539, 76 Am. St. Rep. 513, 58 Pac. 883.



assessment cannot be recovered back for illegality, unless the assessment be set aside by some competent authority.<sup>10</sup>

— Assessment valid on its face.

**782.** Where one, upon whose land an assessment is laid apparently valid, but by reason of facts outside of the record, actually void, pays it with full knowledge of these facts, before any attempt has been made to enforce it, the payment may not be regarded as an involuntary one made under coercion in law.<sup>11</sup>

— Assessment invalid on its face.

**783.** Where an assessment is invalid on its face, or where the property owner has knowledge, actual or constructive, of its invalidity, if he pays it without duress, the payment is voluntary and it cannot be recovered back.<sup>12</sup>

— Rule alike as to taxes and assessments.

**784.** As the rule forbidding the recovery of municipal taxes voluntarily paid applies also to street assessments, property owners who have, under mistake of law, paid as-

<sup>10</sup> *Campion v. Elizabeth*, 41 N. J. L. 355.

<sup>11</sup> *Tripler v. Mayor*, 125 N. Y. 617, 26 N. E. 721; *Trimmer v. Rochester*, 130 N. Y. 401, 29 N. E. 746.

When the alleged illegality upon which relief against an assessment is founded, is patent upon the record on which the person claiming under it must rely to support his claim, the owner of the land is not entitled to affirmative relief to remove it, as, in the legal sense it is not a cloud upon the title or prejudicial to him. *Pooley v. Buffalo*, 124 N. Y. 206, 26 N. E. 624.

<sup>12</sup> *Redmond v. Mayor*, 125 N. Y. 632, 26 N. E. 727.

Where an ordinance directing a local improvement in a city is on its face illegal, the payment without coercion of an assessment for the expense incurred under its authority is a mistake of law, and the sum paid cannot be recovered back. *Phelps v. Mayor*, 112 N. Y. 216, 2 L. R. A. 626, 19 N. E. 408.

The payment of a special assessment which is invalid by reason of defects in the proceedings of the common council on which it is based appearing by the records required by law to be kept by that body, is a mistake of law, and an action cannot be maintained to recover back the amount. *Pooley v. Buffalo*, 122 N. Y. 592, 26 N. E. 16.



assessments for street repairs for which the city alone was liable, cannot recover the amount from the city on the ground that it was a debt of the city paid by its order to the contractors.<sup>13</sup>

— Authority of city to refund.

**785.** Where a special assessment made under an unconstitutional law, has been paid, the party making payment cannot recover the amount paid so long as the assessment remains uncanceled; and the municipality is not only under no compulsion to make restitution, but is without authority so to do, unless thereunto expressly empowered by the legislature. And this is equally true whether the payment be made under protest, or without it.<sup>14</sup>

— Recovery because of failure of consideration.

**786.** Where the plaintiff has received a full equivalent for the assessment in the shape of enhanced value of his property cause by the improvement, an attempt to recover back the amount of the special assessment voluntarily paid on the ground that the consideration for such assessment had wholly failed, he cannot recover.<sup>15</sup> Of course a voluntary

<sup>13</sup> Brands v. Louisville, 111 Ky. 56, 63 S. W. 2.

<sup>14</sup> State v. Elizabeth, 51 N. J. L. 485, 18 Atl. 302.

In absence of statutory authority a city cannot be required to refund money received from a purchaser of real estate at a sale made thereof by the county treasurer for illegal special assessments or taxes imposed by the city. McCague v. Omaha, 58 Neb. 37, 78 N. W. 463.

Owners of property who have paid an unlawful assessment, cannot recover it back, after the assessment has been set aside, such payment being deemed in law vol-

untary. Union Etc. Assn. v. Chicago, 61 Ill. 439.

But such payments will operate to discharge the land *pro tanto*, from the lien of a re-assessment made for the same improvement. Id.

A voluntary payment of an assessment, made under a mistake of law, but with full knowledge of the facts and not induced by any fraud or improper conduct on the part of the payee, cannot be recovered. Vanderbeck v. Rochester, 122 N. Y. 285, 25 N. E. 408.

<sup>15</sup> Falls v. Cairo, 58 Ill. 403.

*Wrong remedy for collection.*

One who pays a sewer tax which



payment, though made under protest, cannot be recovered back,<sup>16</sup> even though it be shown part of the assessment was illegal.<sup>17</sup>

### Equity — In general.

787. The highest court of our country has stated that courts of equity are always open to afford a remedy where

he legally owes the city, under protest, cannot recover same from the city on the ground that the remedy used to collect it was not the legal one. *Dittoe v. Davenport*, 74 Ia. 66, 36 N. W. 895.

*Payment to prevent lien not under duress.*

Where an illegal special assessment is paid merely to prevent a levy upon realty, it cannot be said that the payment was made under duress and therefore involuntary, the more especially when a complete and easily available legal remedy to prevent the levy was open to the landowner. *Hoke v. Atlanta*, 107 Ga. 416, 33 S. E. 412.

<sup>16</sup> *Hoke v. Atlanta*, 107 Ga. 416, 33 S. E. 412.

<sup>17</sup> *Fuller v. Elizabeth*, 42 N. J. L. 427.

*Payment by lessee.*

If a lessee voluntarily pay a valid street assessment against the property of the lessor, it cannot recover it back from the city, although there was no obligation to pay same under the terms of the lease. *Second Universalist Society v. Providence*, 6 R. I. 235.

And when a lessee pays the amount of a special assessment which he is bound to pay by a covenant in his lease, the pro-

ceedings being regular on their face, but afterwards set aside upon the application of the landlord pending at the time of payment, the lessee may recover back the money so paid by him in an action therefor, he being entitled to avail himself of the decision so obtained. *Purssell v. Mayor*, 85 N. Y. 330.

*Grading adjoining property.*

Under charter authority, grading was done on street upon which plaintiff's property was situated, pursuant to a general plan of improvement, and benefits were assessed against her property of \$159.61, and paid. No grading was done in front of her property, and the plan was subsequently abandoned. On suing to recover taxes paid, it was held that her property might have been benefited in part by the grading done and that whatever sum she might recover, if any, was the difference between amount paid, and amount of benefit actually derived. *Strickland v. Stillwater*, 63 Minn. 43, 65 N. W. 131.

*Note.*—The court say this rule is not strictly logical, but seems to be the only practical way of settling the matter.

*Determination of illegal excess.*

If the excess in amount of a



there is an attempt, under the guise of legal proceedings, to deprive a person of his life, liberty or property, without due process of law.<sup>18</sup> In special assessment proceedings, which are altogether out of the methods of the common law, and where so much arbitrary power is lodged in the hands of irresponsible boards or officers, it is to the courts of equity that the property owner must most frequently apply to prevent being unjustly deprived of his property. But it is by no means every suit that equity will recognize, even where the assessment is invalid, but only those brought under some well recognized head of equity jurisdiction.<sup>19</sup> Where the municipality attempts some method other than that provided by the statute, or goes beyond the authority given, to that extent it is without jurisdiction, and its acts are void. In such cases, it is undertaking the exercise of an arbitrary power, which equity will enjoin,<sup>20</sup> although it will not interfere with the discretion of municipal authorities in the exercise of the powers granted them except where there is a want

special assessment over amount actually chargeable cannot be ascertained by computation and without proof, the court should determine the same as near as practicable, to a reasonable certainty, and require the payment of the balance as terms of granting relief against such excess. *Wells v. Western P. & S. Co.*, 96 Wis. 116, 70 N. W. 1071.

<sup>18</sup> *French v. Barber Asphalt P. Co.*, 181 U. S. 324, 45 L. ed. 879, 21 Sup. Ct. Rep. 625; *White v. Tacoma*, 109 Fed. 32.

<sup>19</sup> *Douglas v. Harrisville*, 9 W. Va. 162, 27 Am. Rep. 548; *Bellevue Imp. Co. v. Bellevue*, 39 Neb. 876, 58 N. W. 446; *Ogden City v. Armstrong*, 168 U. S. 224, 42 L. ed. 444, 18 Sup. Ct. Rep. 98.

*Illinois.*

<sup>20</sup> *Lebanon v. O. & M. R. Co.*,

77 Ill. 539; *Kimball v. Trust Co.*, 89 Ill. 611; *Allwood v. Cowen*, 111 Ill. 481.

*Indiana.*

*Ft. Wayne v. Shoaff*, 106 Ind. 66, 5 N. E. 403; *Bluffton v. Miller*, 33 Ind. App. 521, 70 N. E. 989.

*Maryland.*

*Mayor etc. v. Baltimore*, 18 Md. 284, 79 Am. Dec. 686.

*South Dakota.*

*Dakota L. & T. Co. v. Codington Co.*, 9 S. Dak. 159, 68 N. W. 314; *Lee v. Mellette*, 15 S. Dak. 586, 90 N. W. 855.

Collection of void assessment will be enjoined. *Hensley v. Butte (Mont.)*, 83 Pac. 481; *Arnold v. Knoxville (Tenn.)*, 90 S. W. 469.

Property owners may enjoin assessment where there has been a substantial departure from the



of jurisdiction in the proceedings.<sup>21</sup> Equity jurisprudence does not include the exercise of eminent domain, and the necessity of taking property and ascertaining the damages are not reviewable by bill in equity.<sup>22</sup> When plaintiff's case comes fairly within the cases of which courts of equity will take cognizance and afford relief, it is not important that the plaintiff may have had a remedy by certiorari.<sup>23</sup>

**788.** A court of equity will never entertain a bill to restrain the collection of a tax excepting in cases where the tax is unauthorized by law, or is assessed upon exempt property, and even in such excepted cases it must appear that the collection of the tax will be likely to produce irreparable injury or cause a multiplicity of suits.<sup>24</sup> Illegality in an assessment resulting from a want of law authorizing it, will alone justify a court of equity in enjoining its collection. And an illegality occurs when the taxing tribunal exceeds its powers, or the authorities fail to obtain jurisdiction to proceed.<sup>25</sup> If the property assessed for a special benefit will be diminished materially in value, or if private property will be otherwise materially injured by the threatened act, the owners will have the right to call upon a court of equity for protection. But in such case the allegation must be distinct and clear, and it must be supported by satisfactory evidence

terms of a contract. *McCain v. Des Moines (Iowa)*, 103 N. W. 979.

Property owners may enjoin in such suit. *Coleman v. Rathbun (Wash.)*, 82 Pac. 540.

Unless the defect appears on the face of the proceedings, and then the owner has an adequate remedy at law. *Blanchard v. Barre*, 77 Vt. 420, 60 Atl. 970.

For multiplicity of suits, see *Gainesville v. Dean (Ga.)*, 53 S. E. 183.

<sup>21</sup> *Dixon v. Detroit*, 86 Mich. 516, 49 N. W. 628.

<sup>22</sup> *Clark v. Teller*, 50 Mich. 618, 16 N. W. 167.

<sup>23</sup> *Morse v. Buffalo*, 35 Hun, 613.

<sup>24</sup> *Cook County v. C. B. & Q. R. Co.*, 35 Ill. 460.

This is certainly rather narrow doctrine, but it must be borne in mind that the Illinois court does not favor equitable interference in assessment matters. But see two following citations.

<sup>25</sup> *Keigwin v. Drainage Comrs.*, 115 Ill. 347, 5 N. E. 575.



removing all substantial doubt that the threatened injury is substantial, and not merely of a trifling or nominal character.<sup>26</sup> If the commissioners or other municipal authorities exceed their powers, they may become trespassers, and if the act they are about to commit may produce great and irreparable injury, they may, like other trespassers, be restrained.<sup>27</sup> The jurisdiction of equity having attached for the purpose of annulling an invalid certificate of sale of lots, it may proceed to restrain a sale of personal property seized for the tax.<sup>28</sup>

**789.** Equity will enjoin the exercise of an unauthorized power; and where part of a resolution for doing street work is *ultra vires* and void, an injunction will lie against so much of the proposed improvement as is illegal.<sup>29</sup> Whether or not plaintiff must resort to extraneous evidence to defeat a tax deed, is the test of his right to invoke the aid of equity to restrain the sale of his property.<sup>30</sup> Where public officers are proceeding illegally under claim of right, they may be enjoined,<sup>31</sup> but a bill to restrain the collection of a tax cannot be aided by any presumption against the correctness of the official action.<sup>32</sup> Where any portion of a street paving improvement, such as the paving of the street intersections, is

<sup>26</sup> Springer v. Walters, 139 Ill. 419, 28 N. E. 761.

<sup>27</sup> Woodruff v. Fisher, 17 Barb. 224.

*Stranger's ignorance of defects.*

In an action to set aside a sale of a lot for non-payment of a special assessment, where there was no jurisdiction in the council to order the work, it is no defense for the owner of the tax certificate to show that he was a stranger to the proceedings, and ignorant of the defects therein when he made his purchase. Canfield v. Smith, 34 Wis. 381.

<sup>28</sup> Hamilton v. Fond du Lac, 25 Wis. 490.

<sup>29</sup> Adams v. Shelbyville, 154 Ind. 467, 49 L. R. A. 797, 77 Am. St. Rep. 484, 57 N. E. 114.

<sup>30</sup> Chase v. Los Angeles, 122 Cal. 540, 55 Pac. 414.

<sup>31</sup> Touzalin v. Omaha, 25 Neb. 817, 41 N. W. 796; Johnson v. Hahn, 4 Neb. 139; Hughes v. Trustees, 1 Vesey, Sr. 188; M. & H. R. Co. v. Artcher, 6 Paige, 88; Hamilton v. Cummings, 1 Johns. Ch. 516; Belknap v. Belknap, 2 Johns. Ch. 472, 7 Am. Dec. 548; Livingston v. Livingston, 6 Johns. Ch. 497, 10 Am. Dec. 353.

<sup>32</sup> Cuming v. Grand Rapids, 46 Mich. 150, 9 N. W. 141.



to be paid for from the general fund, any taxpayer who is aggrieved by an illegal contract may maintain suit for relief, whether an abutting owner or not.<sup>33</sup> If courts of equity are called upon to interfere with the action of a common council, on behalf of tax payers, the circumstances should be such as to show that the proposed action will be inequitable, and injurious to the public interests.<sup>34</sup> While work on a local improvement is in progress a court of equity has power to control the manner of its performance, upon the application of a property owner assessed to pay the improvement, to prevent any substantial departure from the terms of the ordinance.<sup>35</sup> He who seeks equity should do equity, and an injunction obtained by a property holder to restrain the sale of his land for an unpaid local assessment should be dissolved, and he left to his technical rights, where he has purposely delayed his suit. But if the injunction had been obtained before commencing the work, the court would have felt bound to inquire into the regularity of the assessment.<sup>36</sup>

#### — Injunction — When premature.

**790.** Where a city has let a contract for a sewer, but has not appropriated the cost or caused any tax to be assessed, an

<sup>33</sup> *Patterson v. Barber Asphalt Pav. Co.* (Minn.), 104 N. W. 566. See *Damkoehler v. Milwaukee*, 124 Wis. 144, 101 N. W. 706.

<sup>34</sup> *Chaffee v. Granger*, 6 Mich. 51.

<sup>35</sup> *People v. Whidden*, 191 Ill. 374, 56 L. R. A. 905, 61 N. E. 133.

<sup>36</sup> *Weber v. San Francisco*, 1 Cal. 455.

#### *Election of remedies.*

A plaintiff cannot obtain a perpetual injunction against a city from changing a street grade to the injury of his premises, and in the same proceeding recover damages for the injury he would receive from such change of grade.

*Mac Murray etc. Co. v. St. Louis*, 138 Mo. 608, 39 S. W. 467.

#### *Apportionment between life-tenant and remainderman.*

Where a city proceeds to sell premises assessed to a life tenant for her default in failing to pay an installment of such assessment, equity may be invoked by her and will apportion the assessment by imposing the principal upon the remaindermen and compelling the life tenant to pay only such interest thereon as becomes due and payable during her life time. *Chamberlin v. Gleason*, 163 N. Y. 214, 57 N. E. 487.



action by a property owner to enjoin the levying of a tax is premature.<sup>37</sup> The non-compliance of the city authorities with the charter, in ordering work done on a street, and in advertising for bids, will not entitle an adjoining lot owner to an injunction before any taxes have been levied or assessments made to pay for such work.<sup>38</sup> But a proceeding by injunction to restrain the collection of a special assessment is not prematurely brought when it appears that the amount of such assessments has been ascertained, and notice thereof has been given to the property owners.<sup>39</sup>

### — Cloud on title.

**791.** Equity will interfere to prevent or remove a cloud upon plaintiff's title, where the defect is not merely formal, but affects his substantial rights.<sup>40</sup> To authorize a suit to

*When statute forbidding court to act, unconstitutional.*

Under the title of "An act to incorporate cities of the first class, and regulating their duties, powers and government," a proviso declaring that "no court or judge shall grant any injunction to restrain the levy, enforcement, or collection of any special tax or assessment, or any part thereof, made or contemplated being made to pay the cost of any improvement," etc., is void, not being within the title of the act. *Touzalín v. Omaha*, 25 Neb. 817, 41 N. W. 796.

<sup>37</sup> *Kansas City v. Smiley*, 61 Kan. 718.

<sup>38</sup> *Ballard v. Appleton*, 26 Wis. 67.

<sup>39</sup> *Andrews v. Love*, 50 Kan. 701, 31 Pac. 1094, reversing S. C. 46 Kan. 264, 26 Pac. 746.

*California.*

<sup>40</sup> *Dean v. Davis*, 51 Cal. 407; *Bolton v. Gilleran*, 105 Cal. 244,

45 Am. St. Rep. 33, 38 Pac. 881. *Illinois.*

*Lee v. Ruggles*, 62 Ill. 427; *Craft v. Kochersperger*, 173 Ill. 617, 50 N. E. 1061.

*Michigan.*

*Thomas v. Gain*, 35 Mich. 155, 24 Am. Rep. 535.

*Minnesota.*

*Minnesota Linseed Oil Co. v. Palmer*, 20 Minn. 468, Gil. 424; *Sewall v. St. Paul*, 20 Minn. 511, Gil. 459.

*Missouri.*

*Fowler v. St. Joseph*, 37 Mo. 228; *Verdin v. St. Louis*, 131 Mo. 26, 33 S. W. 480, 36 S. W. 52.

*Nebraska.*

*Touzalín v. Omaha*, 25 Neb. 817, 41 N. W. 796; *Horbach v. Omaha*, 54 Neb. 83, 74 N. W. 434.

*New Mexico.*

*Albuquerque v. Zeiger*, 5 N. M. 674, 27 Pac. 315.

*New York.*

*Guest v. Brooklyn*, 69 N. Y. 506; *Stuart v. Palmer*, 74 N. Y.



set aside a lien as a cloud upon the title, the lien must be apparently valid, and must exist under such circumstances that it may in the future embarrass or injure the owner or endanger his title.<sup>41</sup> To authorize the intervention of a court of equity to remove a cloud upon the title to realty, it must appear that the instrument or record of title is not void upon its face, and that the claimant under it would not develop the defects rendering the assessment or conveyance invalid by the proof which he would be obliged to produce.<sup>42</sup> Where an assessment is made under an act which is void or unconstitutional, an action cannot be maintained to set aside the assessment as a cloud on title. If the act be unconstitutional, the assessment is void upon its face, and so is not a cloud on the plaintiff's title.<sup>43</sup> An averment that a confirmation judgment is void because not properly entitled, is no ground for enjoining the sale of property for the assessment, as such

183, 30 Am. Rep. 289; *Townsend v. Mayor*, 77 N. Y. 542; *Wells v. Buffalo*, 80 N. Y. 253; *Dederer v. Voorhies*, 81 N. Y. 153; *Ramsey v. Buffalo*, 97 N. Y. 114; *Monroe Co. v. Rochester*, 154 N. Y. 571, 49 N. E. 139; *Alvord v. Syracuse*, 163 N. Y. 158, 57 N. E. 310; *Conde v. Schenectady*, 164 N. Y. 258, 58 N. E. 130.

*Utah.*

*Pettit v. Duke*, 10 Utah 311, 37 Pac. 568.

*Washington.*

*McNamee v. Tacoma*, 24 Wash. 591, 64 Pac. 791.

*Wisconsin.*

*Mitchell v. Milwaukee*, 18 Wis. 93; *Pier v. Fond du Lac*, 38 Wis. 470; *Beaser v. Ashland*, 89 Wis. 28, 61 N. W. 77; *Dietz v. Neenah*, 91 Wis. 422, 64 N. W. 299.

<sup>41</sup> *Townsend v. Mayor*, 77 N. Y. 542.

<sup>42</sup> *Guest v. Brooklyn*, 69 N. Y. 506.

<sup>43</sup> *Stuart v. Palmer*, 74 N. Y. 183, 30 Am. Rep. 289; *Wells v. Buffalo*, 80 N. Y. 253.

A suit to set aside and cancel a tax as illegal and a cloud upon plaintiff's title cannot be maintained where the sole ground of illegality alleged is that the law, under which the tax was imposed, is unconstitutional; as, if the tax be invalid upon the ground claimed, its invalidity will always appear. *Townsend v. Mayor*, 77 N. Y. 542.

*Contra.*

Where a special assessment is void because the law under which the proceedings were had is unconstitutional and void, it need not be shown to be inequitable in order to have its collection restrained. *Dietz v. Neenah*, 91 Wis. 422, 64 N. W. 299.



sale would constitute no cloud, the invalidity of the judgment being apparent from the inspection of the record.<sup>44</sup> It is the general rule that a suit in equity must be based upon a right to invoke the power of the court to prevent an apprehended injury, and the jurisdiction of the court will be exercised only, to prevent a multiplicity of actions, to prevent irreparable injury to the freehold, and to remove a cloud from the title.<sup>45</sup> A court of equity will enjoin the collection of an illegal sprinkling tax;<sup>46</sup> the sale of land on a void tax or assessment, and the issue of a deed after such sale;<sup>47</sup> or the issuance of a certificate of sale on a void assessment where the deed issued thereon would be *prima facie* valid;<sup>48</sup> or void special proceedings which, if not prevented, will also result in creating a *prima facie* lien, and a cloud on the title;<sup>49</sup> and having obtained jurisdiction to perform any such act, it will grant all the relief in the premises to which the plaintiff shows himself entitled.<sup>50</sup>

#### — Apparent defect.

**792.** If a provision of a municipal charter requiring an assessment for street paving to be apportioned upon the lots of land abutting on the street "according to the number of feet frontage upon the same" be unconstitutional as taking property without due process of law, the invalidity of an assessment made under it is apparent on the face of the pro-

<sup>44</sup> *Craft v. Kochersperger*, 173 Ill. 617, 50 N. E. 1061.

<sup>45</sup> *Guest v. Brooklyn*, 69 N. Y. 506.

<sup>46</sup> *Pettit v. Duke*, 10 Utah, 311, 37 Pac. 568.

<sup>47</sup> *Mitchell v. Milwaukee*, 18 Wis. 93.

<sup>48</sup> *Dietz v. Neenah*, 91 Wis. 422, 64 N. W. 299.

<sup>49</sup> *Beaser v. Ashland*, 89 Wis. 28, 61 N. W. 77.

*When certificate of sale for invalid tax is a cloud on title.*

And a certificate of sale for such invalid tax would constitute a cloud on plaintiff's title, the fact that he did not occupy lots which he did not own not being a matter of record. *Hamilton v. Fond du Lac*, 25 Wis. 490.

<sup>50</sup> *Sewall v. St. Paul*, 20 Minn. 511, Gil. 458.



ceedings, and an action in equity to set the assessment aside as a cloud on title cannot be maintained.<sup>51</sup>

— **Extrinsic evidence.**

**793.** The rule allowing equitable relief by way of removal of cloud on title, when the claim or lien purports to affect real estate and appears on its face to be valid, and the defect in it can be made to appear only by extrinsic evidence, which will not necessarily appear in proceedings to enforce the lien, applies to an action which attacks collaterally a local assessment, by seeking to set it aside; but the extrinsic evidence, resorted to in such action, must show the defect relied on to be the one affecting the jurisdiction of the municipal officers.<sup>52</sup>

— **Failure to make timely objection.**

**794.** Where a city council has regularly assessed abutting property, given due notice to file objections within a certain time, an owner who fails to object cannot after-

<sup>51</sup> *Conde v. Schenectady*, 164 N. Y. 258, 58 N. E. 130.

*Conveyance made prima facie evidence of regularity.*

Where land is sold for an unpaid assessment under a statute providing that the conveyance thereof shall be presumptive evidence of regularity, and containing no provision that the completed assessment shall be *prima facie* evidence of regularity, and as one claiming under such sale would be required to show the proceedings, and thus develop any defects invalidating them, an action cannot be maintained to set aside the assessment as a cloud on the title because of such defects. *Dederer v. Vorhees*, 81 N. Y. 153. *Charter presumption of validity.*

Where under a city charter an

assessment is presumptively valid although in fact illegal, whenever such an assessment is laid, the party whose lands are affected by it may immediately bring an action to have it declared void as a cloud on title. *Rumsey v. Buffalo*, 97 N. Y. 114.

<sup>52</sup> *Monroe Co. v. Rochester*, 154 N. Y. 571, 49 N. E. 139.

Where special assessment proceedings are valid upon the face of the record, and their validity can only be shown by extrinsic facts, the lien of the tax constitutes a cloud on plaintiff's title, to remove which, and to set aside and enjoin all proceedings to enforce such lien, is the peculiar province of a court of equity. *Minnesota Linseed Oil Co. v. Palmer*, 20 Minn. 468, Gil. 424.



wards dispute the validity of the assessment in an action to remove the cloud on his title created by a sale of the property upon foreclosure of the assessment lien.<sup>53</sup>

— Assessment in excess of benefits.

**795.** Where the assessing board lay a special assessment upon property regardless of the principle of benefits, or ma-

<sup>53</sup> *McNamee v. Tacoma*, 24 Wash. 591, 64 Pac. 791. When equity will not interfere on a petition that the assessment lien is a cloud upon title, see *Blanchard v. Barre*, 77 Vt. 420, 60 Atl. 970. *Insufficient statement in certificate of sale.*

The invalidity of a local assessment does not so appear on the face of the proceedings to enforce the same as to deprive the owner of the property assessed of his equitable right to maintain a suit in equity to set aside the assessment as a cloud on title and enjoin its enforcement and the sale of his property for its non-payment, although it was wholly unauthorized and void, when the statute providing for the execution of a certificate of sale and a conveyance to be made upon default of redemption does not require any statement therein as to the character of the tax or assessment, for the non-payment of which the sale was made, but only that the sale was made for unpaid city taxes. *Alvord v. Syracuse*, 163 N. Y. 158, 57 N. E. 310.

*Certificate including work chargeable to city.*

Where a certificate of the board of public works which, under the charter, is a lien on a lot, and which is given for work done in

grading and paving a street, and includes in fact work properly chargeable to the ward, but that fact does not appear on the certificate, the certificate constitutes a lien on plaintiff's lot, and a cloud on the title thereto, and, after payment of amount actually chargeable to the lot, is entitled to some remedy to remove the cloud. *Pier v. Fond du Lac*, 38 Wis. 470. *Claim of defendant for refunding of special tax.*

In a bill to remove a cloud upon plaintiff's title in the shape of a tax deed for an illegal special assessment, the defendant has no equitable claim to having refunded to him the amount of such special tax, the same being illegal, and there being no showing that the lands were actually benefited by the work done. *Lee v. Ruggles*, 62 Ill. 427.

*Bill issued under ordinance contrary to charter.*

A bill in equity may be maintained by an abutting property owner to cancel a void paving tax against his property, if issued, and to divest the apparent lien thereof, if issued, or, if not issued, to prevent a cloud upon the title, although the bill be absolutely void because issued under an ordinance contrary to the city charter in that it authorizes the let-



terially in excess of the present benefits actually received, it is a case of taking private property for public use without just compensation, and a proper case for the exercise of the equity jurisdiction.<sup>54</sup> If it were made to appear there was a probability that a municipality would not acquire the title to a street which it proposed to improve, and that the benefit of any improvement to be made by the aid of a special assessment would be lost to the public, it may be that a court of equity would enjoin the proceeding until the title be first acquired.<sup>55</sup> And where the statute limits the amount of the special assessment to a certain percentage of its value as returned for taxation, any excess over that amount may be en-

ting in one contract the work of paving the street and its maintenance for a term of years. *Verdin v. St. Louis*, 131 Mo. 26, 33 S. W. 480, 36 S. W. 52.

*Failure to give notice to abate nuisance.*

Where a city is required to give a property owner notice of the existence of a nuisance on his land, and an opportunity to abate it himself, but fails to give such notice and opportunity, an assessment against the property for the expense of grading and filling is wholly void and will be canceled as a cloud on his title. *Horbach v. Omaha*, 54 Neb. 83, 74 N. W. 434.

*United States.*

<sup>54</sup> *Norwood v. Baker*, 172 U. S. 269, 291, 43 L. ed. 443, 452, 19 Sup. Ct. Rep. 187; *Bidwell v. Huff*, 103 Fed. 362.

*Alabama.*

*City Council v. Foster*, 133 Ala. 587, 32 So. 610.

*Georgia.*

*Atlanta v. Hanlein*, 101 Ga. 697, 29 S. E. 14.

*Illinois.*

*Holmes v. Hyde Park*, 121 Ill. 128, 13 N. E. 540; *Goodwillie v. Lake View*, 137 Ill. 51, 27 N. E. 15.

*Indiana.*

*McKee v. Pendleton*, 154 Ind. 652, 57 N. E. 532.

*Maryland.*

*Mayor, etc. v. Johns Hopkins Hospital*, 56 Md. 1.

*Mississippi.*

*Macon v. Patty*, 57 Miss. 378, 34 Am. Rep. 451.

*Ohio.*

*Chamberlain v. Cleveland*, 34 O. St. 551; *Birdseye v. Clyde*, 61 O. St. 27, 55 N. E. 169.

*Oregon.*

*Paulson v. Portland*, 16 Ore. 450, 1 L. R. A. 673, 19 Pac. 450.

*Vermont.*

*Allen v. Drew*, 44 Vt. 174.

<sup>55</sup> *Holmes v. Hyde Park*, 121 Ill. 128, 13 N. E. 540; *Goodwillie v. Lake View*, 137 Ill. 51, 27 N. E. 15.



joined at the suit of the owner of the land upon which it is laid.<sup>56</sup>

**796.** Not only will the courts interfere to prevent an excessive rate, one beyond the cost of the improvement, but they will judge whether the object for which it is made is public, and whether so exclusively public as to prevent its imposition on a particular locality.<sup>57</sup> A suit to enjoin an assessment for the construction of a township ditch, upon the ground that plaintiff's land will derive no benefit therefrom, is prematurely brought when the trustees have taken no steps to make such an assessment.<sup>58</sup> Where the assessment is levied upon property for a share of the cost of a local improvement, which is so situated that it cannot possibly be benefited thereby, the owner may maintain a suit to prevent the enforcement of the assessment, but different owners of distinct parcels of property so assessed have no right to join as plaintiffs in such suit.<sup>59</sup> But an action will not lie to

<sup>56</sup> *Birdseye v. Clyde*, 61 O. St. 27, 55 N. E. 169; *Bidwell v. Huff*, 103 Fed. 362.

<sup>57</sup> *Macon v. Patty*, 57 Miss. 378, 34 Am. Rep. 451.

<sup>58</sup> *Lutman v. L. S. & M. S. R. Co.*, 56 O. St. 433, 47 N. E. 248.

<sup>59</sup> *Paulson v. Portland*, 16 Ore. 450, 1 L. R. A. 673, 19 Pac. 450.

*"He who seeks equity must do equity."*

"Plaintiffs have strenuously resisted all efforts to collect the cost of this improvement or any part of it, and have neither contributed nor offered to constitute their equitable proportion towards it. They have waited until their lands have been practically urban, and are in demand for building purposes in consequence of the work done by the city, and now they come into a court of equity, and ask the court to enjoin the city against

making any further effort to enforce its lien for the work which has brought their lands into market at greatly increased prices, and then the lien be canceled so that they may make a title to purchasers free from all future liability therefor. It is incumbent on one who seeks equity to do equity." *Pittsburg's Appeal*, 118 Pa. St. 458, 12 Atl. 366.

This was a bill filed to cancel a lien against the property for an assessment for a street improvement which was invalid, the property affected being suburban property, and the unconstitutional front foot rule having been applied, the property in the meantime having greatly increased in value.

*Assessment may become confiscation.*

*"Non dubitatur that a local as-*



enjoin a city from proceeding with a street improvement because of a statement in the declaratory resolution that the city will assess the total cost against the abutting property without reference to the question of benefits, where the resolution provided that the improvement should be made under the provisions of a statute giving to the abutting owner the right of a hearing before a tribunal empowered, and in duty bound to adjust all questioned assessments to the basis of actual special benefits received by the improvement.<sup>60</sup> This phase of the owner's remedy will be discussed under another head.<sup>61</sup>

### — Fraud.

**797.** Equity will relieve against the corrupt or fraudulent practices of officials whereby a party may be deprived of important rights, or likely sustain irreparable injury.<sup>62</sup> An action to vacate part of a paid municipal assessment alleged to have been added by reason of illegal action or fraud, and to

assessment may so transcend the limits of equality and reason that its exaction would cease to be a tax or contribution to a common burden, and become extortion and confiscation. In that case, it would be the duty of the court to protect the citizen from *robbery* under color of a better name." *Allen v. Drew*, 44 Vt. 174.

"If a local assessment imposed for an improvement directed to be made so far transcends the limits of equality and reason, that its execution would cease to be a tax, or contribution to a common burden, and become extortion and confiscation, the Courts should interfere in such case to protect the citizen." *Mayor, etc. v. Johns Hopkins Hospital*, 56 Md. 1.

This statement is undoubtedly true, but it does not go far enough. If the tax takes from the citizen

anything in substantial excess of the actual benefits conferred, in the shape of a practical enhancement in value, it is to the extent of such excess a forced contribution, and as wrong in principle as any ship money or other enforced exaction. And to wait until it reaches the line of confiscation before giving relief is as wrong in principle as it would be to punish grand larceny, and let those guilty of petit larceny go free and unscathed.

<sup>60</sup> *Taylor v. Crawfordsville*, 155 Ind. 403, 58 N. E. 490.

<sup>61</sup> See, *infra*, *Appeals*.

<sup>62</sup> *Schofield v. Watkins*, 22 Ill. 66; *McBride v. Chicago*, 22 Ill. 574; *Vieley v. Thompson*, 44 Ill. 9; *Dempster v. Chicago*, 175 Ill. 278, 51 N. E. 710; *Cooley on Taxation*, 547.



recover back the excess so paid, is maintainable if there be no statutory prohibition.<sup>63</sup> Where a contract for public improvements is let for a grossly extravagant price, or fictitious items are included in the amount to be assessed, it operates as a fraud upon the property owners, and a court of equity will interfere to reduce the assessment, or vacate it.<sup>64</sup> The city is a necessary party and the only party to be beneficially interested to a bill seeking to enjoin the execution of a special assessment judgment on the ground of alleged delinquencies, fraud and unlawful acts of city officials.<sup>65</sup> But the fact that it fraudulently relieved certain contractors from performing parts of their contracts for public work, and is about to pay other contractors for completing the work from which the first contractors were relieved, is not ground for enjoining the collection of the assessment.<sup>66</sup> And in an action to restrain the erection by a city of an elevated bridge in the street in front of plaintiff's premises, the complaint is insufficient if it contain only general allegations of fraud, and want of consideration on the part of the council.<sup>67</sup>

#### — Nuisance.

**798.** Although a special assessment may be levied in certain cases to pay the expense of abating a nuisance, a special tax assessed by a city on the lot of a citizen to pay the cost of abating a nuisance created by the city on that lot will not be sustained in equity.<sup>68</sup> And where a lot owner has not

<sup>63</sup> *Knapp v. Brooklyn*, 97 N. Y. 520.

<sup>64</sup> *Dixon v. Detroit*, 86 Mich. 516, 49 N. W. 628; *In re Livingston*, 121 N. Y. 94, 24 N. E. 290.

<sup>65</sup> *Heinroth v. Kochersperger*, 173 Ill. 205, 50 N. E. 171.

<sup>66</sup> *Ibid.*

<sup>67</sup> *Seattle Tr. Co. v. Seattle*, 27 Wash. 520, 68 Pac. 90.

#### *Fraud*

Is not shown by failure of the council to take testimony as to the value of the property assessed, or

of the amount of the benefits, nor by proof that the assessment is inequitable. *Owens v. Marion*, 127 Iowa, 469, 103 N. W. 381.

#### *Pleading.*

An allegation in an answer that a certain person lobbied for the contracts, and spent his time and money to influence action thereon, does not sufficiently allege fraud. *Barber Asphalt Pav. Co. v. Field (Mo.)*, 86 S. W. 860.

<sup>68</sup> *Lasberry v. McCague*, 56 Neb. 220, 76 N. W. 862.



sought the interference of a court of equity to restrain the sale of a lot for a special assessment made against it to abate a nuisance created by the city in grading a street, the contractor or his assignee cannot recover the amount of such assessment from the city on the ground that the lot owner may, if he desire, prevent its being enforced.<sup>69</sup>

— Adequate remedy at law.

**799.** Where the party aggrieved has an adequate remedy at law, a court of equity will not assume jurisdiction because of irregularities in the assessment, or even a want of compliance with material requirements of law;<sup>70</sup> except, that when the subject of the suit is embraced under any appro-

<sup>69</sup> *Smith v. Milwaukee*, 18 Wis. 69.

In grading certain streets, by failure to build proper sewers, water was turned on plaintiff's land and remained, constituting a nuisance, which the city ordered the owner to abate, and he refused. The city then filled the lots, and abated the nuisance, and issued certificates therefor to the contractor. The plaintiff asked for an injunction to restrain issue of sale certificates, and have them set aside, as constituting a cloud upon his title. Upon demurrer, the court held that there being a nuisance in fact, the city had a right to abate it; that the proceedings being regular, the assessment could not be held void at law; that in the absence of any allegation to the contrary, compensation for the injury to the lots caused by raising the street must be deemed made by the filling; and that it not appearing the plaintiff had not actually been benefited to the amount of the assessment by the grading and fill-

ing, the complaint fails to state a cause of action entitling plaintiff to equitable relief. *Watkins v. Milwaukee*, 55 Wis. 335, 13 N. W. 222.

*Colorado.*

<sup>70</sup> *Denver v. Dumas*, 33 Colo. 94, 80 Pac. 114; *Spalding v. Denver*, 33 Colo. 172, 80 Pac. 126.

*Illinois.*

*Ottawa v. C. R. I. & P. R. Co.*, 25 Ill. 43; *Heinroth v. Kochersperger*, 173 Ill. 205, 50 N. E. 171; *Field v. Western Springs*, 181 Ill. 186, 54 N. E. 929; *Lyman v. Chicago*, 211 Ill. 209, 71 N. E. 832.

*Iowa.*

*Rockwell v. Bowers*, 88 Ia. 88, 55 N. W. 1.

*Indiana.*

*Robinson v. Valparaiso*, 136 Ind. 616, 36 N. E. 644.

*Michigan.*

*Byram v. Detroit*, 50 Mich. 56, 12 N. W. 912, 14 N. W. 698.

*Minnesota.*

*Fadger v. Aitkin*, 87 Minn. 445, 92 N. W. 332, 934; *Kerr v. Waseca*, 88 Minn. 191, 92 N. W. 932.



pritate head of equitable jurisdiction, the court will take cognizance of it, notwithstanding there be an adequate remedy at law, unless the objection is raised by demurrer or answer.<sup>71</sup> A special assessment will not be enjoined because the improvement is not made in conformity with the provisions of the ordinance or contract, the lot owner having an adequate remedy by mandamus.<sup>72</sup> A party cannot by suit to set aside an assessment and enjoin the collection thereof, or other collateral attack, dispute the correctness of the assessment, where mere irregularities, or errors of a formal nature, have been committed, or where the ground of complaint is the excess of the amount of his assessment over his due proportion. The remedy in such a case is by certiorari.<sup>73</sup> When the

#### *Nebraska.*

##### *Adequate remedy at law.*

A court of equity will not enjoin the collection of a tax for mere irregularities in the proceedings of the taxing officers—the remedy at law being ample in such cases; but where a tax is void, such tax-payer may invoke the aid of such court to protect him from wrong or oppression. *Bellevue Imp. Co. v. Bellevue*, 39 Neb. 876, 58 N. W. 446; *Touzalin v. Omaha*, 25 Neb. 817, 41 N. W. 796. See, also, *Ives v. Irey*, 51 Neb. 136, 70 N. W. 961; *Omaha v. Megeath*, 46 Neb. 502, 64 N. W. 1091.

#### *New York.*

*Monroe Co. v. Rochester*, 154 N. Y. 570, 48 N. E. 139.

#### *Washington.*

*Wright v. Tacoma*, 3 Wash. Terr. 410, 19 Pac. 42.

#### *Wisconsin.*

*Knapp v. Heller*, 32 Wis. 467; *Cook v. Racine*, 49 Wis. 243, 5 N. W. 352; *Hixon v. Oneida Co.*, 82 Wis. 515, 52 N. W. 445; *State v.*

*La Crosse*, 101 Wis. 208, 77 N. W. 167; *State v. Gosnell*, 116 Wis. 606, 61 L. R. A. 33, 93 N. W. 542; *Beaser v. Barber Asphalt Pav. Co.*, 120 Wis. 599, 98 N. W. 525.

<sup>71</sup> *Williams v. Detroit*, 2 Mich. 560.

<sup>72</sup> *Lyman v. Chicago*, 211 Ill. 209, 71 N. E. 832; *Heinroth v. Kochersperger*, 173 Ill. 205, 50 N. E. 171; *Field v. Western Springs*, 181 Ill. 186, 54 N. E. 929; *Robinson v. Valparaiso*, 136 Ind. 616, 36 N. E. 644.

<sup>73</sup> *Monroe Co. v. Rochester*, 154 N. Y. 570, 48 N. E. 139.

Where land had been condemned for a street, and the town council had ordered the street to be opened, plaintiff sought to enjoin such action, but the court refused him the desired relief on the ground that his remedy was by *certiorari* to test the right of the council to so act, or he might have set up the invalidity of its action in the condemnation proceedings. *Rockwell v. Bowers*, 88 Ia. 88, 55 N. W. 1.



municipality has general power to cause street paving to be done at the expense of the private owner, and the amount assessed is not more than his proper share of the reasonable cost of such improvement, and if, from irregular exercise of that power, or other cause which does not adversely affect the burden imposed upon him, the imposition be illegal or invalid, such owner must find his remedy under the strict rules of courts of law, and courts of equity, although invested with full power, will, in the exercise of their discretion, refuse him their peculiar forms of relief.<sup>74</sup>

### — Payment or tender.

**800.** The levying of a tax is not a judicial act and the court cannot impose, as a condition of relief against a void

<sup>74</sup> Accordingly where an abutting owner, during the progress of a street paving contract, with full knowledge of the work, and opportunity to object, yet omitted to do so, on the advice of attorneys, until after completion of the work, and it was ascertained the assessment against his property was no more than his proper share, but the contract proved invalid because the city had already exceeded its debt limit, the court properly dismissed his complaint. *Beaser v. Barber Asphalt Paving Co.*, 120 Wis. 599, 98 N. W. 525; *Knapp v. Heller*, 32 Wis. 467; *Cook v. Racine*, 49 Wis. 243, 5 N. W. 352; *Hixon v. Oneida Co.*, 82 Wis. 515, 52 N. W. 445; *State v. La Crosse*, 101 Wis. 208, 77 N. W. 167; *State v. Gosnell*, 116 Wis. 606, 61 L. R. A. 33, 93 N. W. 542; but see *Dietz v. Neenah*, 91 Wis. 422, 64 N. W. 299, which holds that where the proceedings are without jurisdiction, the special assessment need not be shown

to be inequitable in order to have its collection restrained.

*Unreasonable delay in bringing suit.*

Injunction to restrain collection will not issue where the parties have unreasonably delayed seeking relief, and are presumably benefited by the work done, and have an adequate remedy at law. *Byram v. Detroit*, 50 Mich. 56, 12 N. W. 912, 44 N. W. 698.

*Omission to make timely protest.*

When a city charter provides that the council may pass a resolution to improve a street, and may file a survey and estimate of cost, all of which shall be published, and that all opposed to the improvement may protest within ten days after such publication; and that if no such protest is made, the assessment shall be deemed assented to; *Held*, that equity will not set aside such assessment at the instance of an abutting property owner, who made no protest within the re-



tax, the payment of such tax as would be lawful, where new proceedings and a different basis of assessment are necessary to ascertain what tax is lawful.<sup>75</sup> Where the special assessment is entirely void, either from being levied on a *rule* of assessment which is illegal, or other cause, it is not necessary to either pay or tender any sum as a condition of being granted equitable relief.<sup>76</sup> One who seeks the assistance of a court of equity to restrain the collection of an assessment is excused from paying or tendering payment of such proportion of the tax assessed against him as he should, in equity, pay, when the assessment is made upon a basis so false and unwarranted that it furnishes no data from

quired time, and not until the work was properly done and the city had become liable for the improvement, but will leave him to his legal remedy. *Wright v. Tacoma*, 3 Wash. Ter. 410, 19 Pac. 42.

<sup>75</sup> *Hutchinson v. Omaha*, 52 Neb. 345, 72 N. W. 218.

*Payment from special fund.*

A city is not liable for warrants payable out of a special fund merely because of failure to collect taxes, the assessment not being invalid or the city negligent in making it. *Denver v. National Ex. Bank (Colo.)*, 82 Pac. 448.

*Demand of payment.*

For demand of payment complying with statute, see *San Francisco Pav. Co. v. Egan*, 146 Cal. 635, 80 Pac. 1076.

Where no other sufficient demand has been made, beginning suit on the special tax bill is sufficient under the charter of St. Louis. *Barber Asphalt Pav. Co. v. Peck*, 186 Mo. 506, 85 S. W. 387.

*Payment — Bonds.*

The effect of a statute that the issuance of bonds shall be *prima*

*facie* proof of the regularity of proceedings is only to change the burden of proof, and has no curative effect or irregularities. *Creed v. McCoombs*, 146 Cal. 449, 80 Pac. 679.

<sup>76</sup> *Chase v. Los Angeles*, 122 Cal. 540, 55 Pac. 414; *Iowa Pipe & Tile Co. v. Callanan*, 125 Iowa, 358, 67 L. R. A. 408, 106 Am. St. Rep. 311, 101 N. W. 141; *Hassan v. Rochester*, 67 N. Y. 528; *Gallaher v. Garland*, 126 Iowa, 206, 101 N. W. 867; *Norwood v. Baker*, 172 U. S. 269, 293, 43 L. ed. 443, 453, 19 Sup. Ct. Rep. 187; *Zehnder v. Barber Asphalt Pav. Co.*, 106 Fed. 103.

It is not competent for the legislature to compel an owner of land to redeem it from a void tax sale as a condition on which he shall be allowed to assert his title against it. *Cooley on Const. Limit.* 453, citing *Conway v. Cable*, 37 Ill. 82, 87 Am. Dec. 240; *Hart v. Henderson*, 17 Mich. 218; *Wilson v. McKenna*, 52 Ill. 43; *Reed v. Tyler*, 56 Ill. 288; *Dean v. Borschennis*, 30 Wis. 236.



which a just proportion of the cost of improvement can be determined.<sup>77</sup> It is only in case of some irregularity in doing the work under a valid contract, or partial invalidity of the contract, that an abutting lot owner will be required, as a condition precedent to enjoining the collection of a tax bill, to pay or tender what is justly due.<sup>78</sup> While the legislature by general law may require a tax-payer, where a tax is levied in pursuance of law, and there are mere errors and irregularities in the proceedings, to pay such tax under protest, and recover the same back in an action at law, yet this will not apply to a tax which is absolutely void.<sup>79</sup>

**801.** But where there is any portion of the tax which the plaintiff ought, in justice, to pay, and the amount is ascertainable, he will be compelled to pay it as a condition of relief, or tender payment if the amount be not then definitely ascertainable.<sup>80</sup> This statement is applicable equally to ac-

<sup>77</sup> *Howell v. Tacoma*, 3 Wash. 711, 28 Am. St. Rep. 83, 29 Pac. 447.

<sup>78</sup> *Verdin v. St. Louis*, 131 Mo. 26, 33 S. W. 480, 36 S. W. 52.

<sup>79</sup> *Touzalin v. Omaha*, 25 Neb. 817, 41 N. W. 796.

*California.*

<sup>80</sup> *Quint v. Hoffman*, 103 Cal. 506, 37 Pac. 514, 777; *Hellman v. Shoulters*, 114 Cal. 136, 44 Pac. 915, 45 Pac. 1057.

*Colorado.*

*Denver v. Londoner*, 33 Colo. 104, 80 Pac. 117; *Denver v. Kennedy*, 33 Colo. 80, 80 Pac. 122, 467; *Spalding v. Denver*, 33 Colo. 172, 80 Pac. 120.

*Illinois.*

*Meadowcroft v. Kochersperger*, 170 Ill. 356, 48 N. E. 987.

*Indiana.*

*Ricketts v. Spraker*, 77 Ind. 371; *Jackson v. Smith*, 120 Ind. 520, 22

N. E. 431; *Reeves v. Grottendick*, 131 Ind. 107, 30 N. E. 889.

*Iowa.*

*Morrison v. Hershire*, 32 Ia. 271; *Allen v. Davenport*, 107 Ia. 90, 77 N. W. 532.

*Kansas.*

*Ottawa v. Barney*, 10 Kan. 270.

*Missouri.*

*Johnson v. Duer*, 115 Mo. 366, 21 S. W. 800; *Verdin v. St. Louis*, 131 Mo. 26, 33 S. W. 480, 36 S. W. 52.

*Washington.*

*Heath v. McCrea*, 20 Wash. 342, 55 Pac. 432; *Annie Wright Seminary v. Tacoma*, 23 Wash. 109, 62 Pac. 444.

*Wisconsin.*

*Mills v. Gleason*, 11 Wis. 470, 78 Am. Dec. 721; *Myrick v. La Crosse*, 17 Wis. 443; *Dean v. Charlton*, 23 Wis. 590, 99 Am. Dec. 205; *Mills v. Charlton*, 29 Wis.



tions to annul excessive assessments;<sup>81</sup> to enjoin a sale for irregularities sufficient to avoid same;<sup>82</sup> to prevent a legal or equitable lien from ripening into a title;<sup>83</sup> to enjoin execution of a deed or the collection of a tax, where part of the same is valid;<sup>84</sup> to avoid double taxation;<sup>85</sup> to set aside part of assessment against a corner lot taxed on two fronts;<sup>86</sup> or to annul interest or other improper charges.<sup>87</sup>

### — When equity will not interfere.

**802.** No rule is more firmly settled, or subject to fewer exceptions, than the rule that equity will not interfere to

400, 9 Am. Rep. 578; Hart v. Smith, 44 Wis. 213; Meggett v. Eau Claire, 81 Wis. 326, 51 N. W. 566; Yates v. Milwaukee, 92 Wis. 352, 66 N. W. 248; Pratt v. Milwaukee, 93 Wis. 658, 68 N. W. 392.

#### *Trend of modern decision.*

The tendency of legislation and decision is more and more to require property owners who are contesting taxation, either general or special, to pay, as a primary condition of any relief, such part of the tax as is equitable and just, notwithstanding there may be serious irregularities in the original levy. Wells v. Western P. & S. Co., 96 Wis. 119, 70 N. W. 1071; State v. La Crosse, 101 Wis. 208, 77 N. W. 167.

#### *When payment deemed waived.*

Where a charter requires the payment of all general taxes chargeable to any property as a condition precedent to an action to avoid a special assessment, a failure to do so will be deemed waived unless taken advantage of by demurrer or plea in abatement. Wells v. Western P. & S. Co., 96 Wis. 116, 70 N. W. 1071.

<sup>81</sup> Denver v. Londoner, 33 Colo. 104, 80 Pac. 117; Denver v. Kennedy, 33 Colo. 80, 80 Pac. 122, 467; Spalding v. Denver, 33 Colo. 172, 80 Pac. 126; Meadowcroft v. Kochersperger, 170 Ill. 356, 48 N. E. 987; Ottawa v. Barney, 10 Kan. 270.

<sup>82</sup> Hellman v. Shoulters, 114 Cal. 136, 44 Pac. 915, 45 Pac. 1057.

<sup>83</sup> Reeves v. Grottendick, 131 Ind. 107, 30 N. E. 889.

<sup>84</sup> Ricketts v. Spraker, 77 Ind. 371; Dean v. Charlton, 23 Wis. 590, 99 Am. Dec. 205; Hart v. Smith, 44 Wis. 213; Yates v. Milwaukee, 92 Wis. 352, 66 N. W. 248.

<sup>85</sup> Heath v. McCrea, 20 Wash. 342, 55 Pac. 432.

<sup>86</sup> Morrison v. Hershire, 32 Ia. 271.

<sup>87</sup> Annie Wright Seminary v. Tacoma, 23 Wash. 109, 62 Pac. 444; Allen v. Davenport, 107 Ia. 90, 77 N. W. 532.

"Every man is entitled to a certain remedy in the law for all wrongs against his person or his property, and cannot be compelled to buy justice, or to submit to conditions not imposed upon his fel-



restrain the collection of a tax or to vacate an assessment, for mere irregularities not affecting the jurisdiction, except for fraud or intentional wrong.<sup>88</sup> An injunction will not be granted to restrain the collection of a tax when it does not

lows as a means of obtaining it." Cooley, Const. Lim. 444. See Lombard v. Antioch Coll., 60 Wis. 459, 19 N. W. 367.

*Neglect of duty by treasurer.*

The failure of the city treasurer to demand payment of a special assessment, or to give notice where it might be paid and an opportunity to pay it before the sale of the land for nonpayment, and the issuance of the certificate of sale for a sum slightly less than the correct amount, did not affect the justice or equality of the tax itself so as to form a basis of equitable relief, in the absence of an offer to pay the tax and after it had become fixed as a lien on the property by force of the statute of limitations. Pratt v. Milwaukee, 93 Wis. 658, 68 N. W. 392.

*Failure to act promptly.*

Where an assessment of benefits has been legally made so as to determine the proportion chargeable to abutting property, and the subsequent proceedings result in over-charging such property, the owner cannot wait until the improvement is completed and his property has received the full benefit thereof, and then screen himself from the entire tax because of the illegal excess. Wells v. Western P. & S. Co., 96 Wis. 116, 70 N. W. 1071.

*Effect of failure to pay amount due.*

If, in such case, the excess can

be determined by mere computation, or without proof, failure to tender or offer to pay the balance before suit will be fatal to any claim for costs, and failure to plead an offer is fatal to the cause of action. Id.

<sup>88</sup> Kilgour v. Drainage Com'rs, 111 Ill. 347; Lawrence v. Killam, 11 Kan. 499; Wingate v. Astoria, 39 Or. 603, 65 Pac. 982; Touzalin v. Omaha, 25 Neb. 817, 41 N. W. 796; Belleville Imp. Co. v. Bellevue, 39 Neb. 876, 58 N. W. 446; Omaha v. Megeath, 46 Neb. 502, 64 N. W. 1091; Kelly v. Minneapolis, 57 Minn. 294, 26 L. R. A. 92, 47 Am. St. Rep. 605, 58 N. W. 304; Ives v. Ireys, 50 Neb. 136, 70 N. W. 961.

*Acts of officer de facto.*

A court of equity will not enjoin the levy of a tax by a *de facto* officer, acting under the authority pertaining to his office, nor for mere irregularities; but may interfere where the tax is attempted to be levied by one without pretense of authority. Munson v. Minor, 22 Ill. 595; Merritt v. Farriss, 22 Ill. 303; McBride v. Chicago, 22 Ill. 574; C. B. & Q. R. Co. v. Frary, 22 Ill. 34; Ottawa v. C. R. I. & P. R. Co., 25 Ill. 43; Peoria v. Kidder, 26 Ill. 351; Felsenthal v. Johnson, 104 Ill. 21; Humphreys v. Nelson, 115 Ill. 45, 4 N. E. 637; Camp v. Simpson, 118 Ill. 224, 8 N. E. 308. But see the following recent Illinois cases holding that



appear that the complainant would sustain irreparable injury, or the sale would cast a cloud on the title; and this rule is applicable to a special assessment.<sup>89</sup> The construction of an elevated approach to a viaduct occupying the entire width of the street, is merely a change of grade, and not a taking, nor the imposition of a new servitude on the street; and its erection will not be restrained at the suit of the property owner.<sup>90</sup> A town cannot bring an action to set aside an assessment against it if such action is not brought until after it has levied the assessment as a tax upon the tax-payers and taxable property therein.<sup>91</sup> Where a special assessment is erroneous because only parts of some lots, used as one plot of ground are assessed, the assessment can only be set aside as to such lots and not to others, if the error did not result in imposing an improper assessment on the latter.<sup>92</sup>

**803.** Injunctions will not issue in cases like following: In favor of a land owner to restrain the collection of a street improvement assessment, where a statute in all material respects the same as the one under which the improvement was made and the assessment levied, and the bonds of the municipality to pay the cost issued, had theretofore been adjudged valid by the highest court of the state, simply because similar legislation was held by the same court long afterwards to be a violation of the constitution;<sup>93</sup> enjoining the collection of an assessment made to pay for a sewer, the allegations be-

in that state a bill in chancery will not lie to restrain the collection of a special assessment. *Sumner v. Milford*, 214 Ill. 388, 73 N. E. 742; *Oak Park v. Schoenski*, 215 Ill. 229, 74 N. E. 135; *Steese v. Oviatt*, 24 O. St. 249; *Burgett v. Norris*, 25 O. St. 308; *Gillette v. Denver*, 21 Fed. 822. This latter case holds that neither the illegality nor injustice of the tax affords ground for equitable interference.

<sup>89</sup> *Dean v. Davis*, 51 Cal. 407.

<sup>90</sup> *Colclough v. Milwaukee*, 92 Wis. 182, 65 N. W. 1039; *Bigelow v. Los Angeles*, 85 Cal. 614, 24 Pac. 778; *Willis v. Winona*, 59 Minn. 27, 26 L. R. A. 142, 60 N. W. 814.

<sup>91</sup> *Muskego v. Drainage Com'rs*, 78 Wis. 40, 47 N. W. 11.

<sup>92</sup> *State v. N. Plainfield*, 63 N. J. L. 61, 42 Atl. 805.

<sup>93</sup> *Shoemaker v. Cincinnati*, 68 Ohio St. 603, 68 N. E. 1; *Cincinnati v. Taft*, 63 O. St. 141, 58 N. E. 63.



ing that since the construction of a sewer by special assessment, the city without changing the boundaries of the district had constructed other sewers outside thereof, which opened into the original sewer; <sup>94</sup> nor at the suit of a property owner who had notice of the application for judgment of confirmation, and who did not appear and object; <sup>95</sup> especially where he encourages the contractors to proceed with the work, and tells them that they shall be paid therefor; <sup>96</sup> nor because some of the signers to a petition for a road improvement were induced to sign by the promise of others to pay all the assessments that might be made on their lands to pay the costs; <sup>97</sup> nor to enjoin the collection of a special assessment, or to set aside the sale of the property for former unpaid installments, because the improvement does not conform to the requirements of the ordinance, and because a portion has not been completed; <sup>98</sup> nor to restrain sale of plaintiff's lot under a complaint alleging that a contract for a block pavement was not let within the time required by law, and that no "plan" or "profile" was filed before the contract was let, as required by the charter, there being no facts alleged to show that the plaintiff was injured by such omissions.<sup>99</sup>

#### — Burden of proof.

**804.** In an action to restrain the sale of land for the non-payment of a special assessment and to set aside such assessments because of alleged invalidity in the proceedings, the burden is upon plaintiff to establish the invalidity complained of. There is no presumption in such action that the municipal authorities have acted illegally or that conditions precedent have not been performed.<sup>1</sup> Where the

<sup>94</sup> *Heinroth v. Kochersperger*, 173 Ill. 205, 50 N. E. 171.

<sup>95</sup> *Brown v. Chicago*, 117 Ill. 21, 7 N. E. 108.

<sup>96</sup> *Sleeper v. Bullen*, 6 Kan. 300.

<sup>97</sup> *Makemson v. Kauffman*, 35 O. St. 444.

<sup>98</sup> *Craft v. Kochersperger*, 173 Ill. 617, 50 N. E. 1061.

<sup>99</sup> *Warner v. Knox*, 50 Wis. 429, 7 N. W. 372.

<sup>1</sup> *Tingue v. Port Chester*, 101 N. Y. 294, 4 N. E. 625.



owner of a city lot institutes an action to have declared void certain special taxes assessed against the lot, the burden is upon him to establish the invalidity of such tax.<sup>2</sup> The burden of establishing a right to a perpetual injunction, claimed by a party to an action, is upon such party.<sup>3</sup>

— Parties.

**805.** Any tax payer in a municipality may properly commence a proceeding to enjoin an act which may result in an addition to the burdens of taxation.<sup>4</sup> The rule that one plaintiff may bring a suit in equity for the benefit of all others similarly situated or interested is well settled. Equity will assume jurisdiction in such cases to avoid a multiplicity of suits.<sup>5</sup> Where an ordinance is void, and its provisions are about to be enforced, any person who may be injuriously affected thereby may apply to a court of equity to stay its enforcement as to him.<sup>6</sup> A lessee who, by the terms of his lease is bound to pay an assessment levied against the leased property, has the right to seek the vacation of the assessment on the grounds of illegality, he being the person legally aggrieved.<sup>7</sup> A city is a necessary party in a bill to enjoin the county collector from selling property for a delinquent special assessment levied by such city, where only the right of the city to collect the assessment is challenged.<sup>8</sup> In an action by a taxpayer to enjoin the col-

<sup>2</sup> Lasbury v. McCagne, 56 Neb. 220, 76 N. W. 862.

<sup>3</sup> Spangler v. Cleveland, 43 O. St. 526, 3 N. E. 365.  
*Burden of proof.*

In an action to enjoin a sale to enforce a lien under an act authorizing the issue of street improvement bonds, the burden of proof is on the plaintiff to show defects in the procedure for the issuance of bonds, and to sustain even negative allegations as to absence of required notice, and to

show that none was given, or that it was insufficient. Hellman v. Shoulters, 114 Cal. 136, 44 Pac. 915, 45 Pac. 1057.

<sup>4</sup> Schumacker v. Tobermann, 58 Cal. 508.

<sup>5</sup> Keese v. Denver, 10 Colo. 112, 15 Pac. 825.

<sup>6</sup> Mayor, etc. v. Scharf, 54 Md. 499.

<sup>7</sup> *In re* Burke, 62 N. Y. 224.

<sup>8</sup> Smith v. Kochersperger, 173 Ill. 201, 50 N. E. 187.



lection of a special assessment on the ground that as to him it is unlawful, the contractors who are to perform the work are not necessary parties.<sup>9</sup>

### — Pleadings.

**806.** In no department of the law of taxation are the pleadings more important than in special assessment proceedings. Not only should the general rules of pleading be carefully observed, omitting all evidence and legal conclusions, but the statutes of the state must be carefully, and the facts relied upon set forth with particularity and exactness, and proved as pleaded. A taxpayer seeking to enjoin the collection of a special tax must show that the taxing power was not lawfully exercised or that there are fatal infirmities in the proceedings leading up to the levy, and it is not sufficient to give a court of equity jurisdiction to enjoin a proceeding at law, to allege generally in the bill that there will be irreparable injury, but the facts showing such injury must be set out.<sup>10</sup> If one seeks an injunction against the threatened action of some municipal body, he must show that the proposed action is wrong; and when the question of jurisdiction is at issue, the plaintiff must show upon the face of the record the absence of some jurisdictional fact, the want of which deprives the city authorities of the right to go further in the matter of assessing plaintiff's property.<sup>11</sup> In an action to enjoin the collection of an assessment, which is a proper charge against abutting property except as to a certain amount, the pleadings may be so framed as to enable the court, on finding the assessment to be merely irregular and defective, to ascertain the amount properly chargeable.<sup>12</sup> In order to justify the granting of a temporary restraining

<sup>9</sup> *Chicago, M. & St. P. R. Co. v. Co. v. Chicago*, 138 Ill. 453, 28 N. Phillips, 111 Ia. 377, 82 N. W. 787; E. 740.

*Wilkins v. Detroit*, 46 Mich. 120, <sup>11</sup> *Bemis v. McCloud*, 4 Neb. 8 N. W. 701, 9 N. W. 427. (Unof.) 731, 97 N. W. 828.

<sup>10</sup> *Parrotte v. Omaha*, 61 Neb. <sup>12</sup> *Griswold v. Benton*, 34 O. St. 96, 84 N. W. 602; Ill. Cent. R. 482.



order, it is sufficient if the plaintiff shows the existence of a *prima facie* right, with a threatened injury to that right by the defendants, and that the granting of a temporary restraining order would be less injurious to the defendants than the refusal to grant it would be to the plaintiff.<sup>13</sup>

807. One who complains of an illegal assessment, and seeks to enjoin its collection on some particular ground, such as the omission of the board of public works to recommend the improvement, must allege and prove such fact.<sup>14</sup> A joint bill of complaint cannot be maintained if any one of the complaints alleges a grievance not of the common nature of the rest.<sup>15</sup> A plaintiff who seeks to restrain a city from collecting a special tax on his property for a street improvement is not entitled to a judgment on the pleadings when an answer by the city is on file verified by the city attorney that is in effect a general denial.<sup>16</sup> In an equitable suit to set aside a special assessment for street improvements, a complaint showing mere irregularities and failures to comply with minor statutory requirements is insufficient, unless it alleges an offer to pay the amount of such assessment justly chargeable to the property of the plaintiff. It must also allege facts showing the inequality and injustice that go to the groundwork of the assessment.<sup>17</sup> If under a valid tax for street paving and an invalid tax for curbing, a lot is sold to make the aggregate amount, upon payment of the amount legally assessed, with interest, the plaintiff may have an injunction to restrain the issue of a deed based on such sale. A cause of action being stated as to said lot, a general demurrer to the whole complaint will not

<sup>13</sup> Charles v. Marion, 98 Fed. 166.

<sup>14</sup> O'Kane v. Treat, 25 Ill. 557; Bolton v. Cleveland, 35 O. St. 319.

<sup>15</sup> Brunner v. Bay City, 46 Mich. 236, 9 N. W. 263.

<sup>16</sup> McCrea v. Leavenworth, 46 Kan. 767, 27 Pac. 129.

<sup>17</sup> Meggett v. Eau Claire, 81 Wis. 326, 51 N. W. 566; Pratt v. Lincoln Co., 61 Wis. 62, 20 N. W. 726; Fifield v. Marinette Co., 62 Wis. 532, 22 N. W. 705; Wis. Cent. R. Co. v. Ashland Co., 81 Wis. 1, 11, 50 N. W. 937.



lie.<sup>18</sup> But where the complaint in an equitable suit to restrain the construction of a boulevard on part of a street, shows no injury to the plaintiff except the expense of widening his sidewalk to preserve the harmony and good appearance of the street, and his curb rendered valueless, there is nothing to show he is entitled to summary relief, and a demurrer to the complaint will lie.<sup>19</sup>

— De minimis.

**808.** In a suit to restrain the collection of an assessment on the ground of illegality, it will not be assumed, in the absence of proof, that plaintiff's taxes will only be increased to an amount so trifling that the court will not interfere; the presumption is the other way.<sup>20</sup> Courts of equity will not deny relief to which the plaintiff shows himself entitled because the amount involved is not large.<sup>21</sup>

— Application of equity principles to facts.

**809.** While an attempt has been made to state earlier in

<sup>18</sup> Dean v. Borschenius, 30 Wis. 236.

<sup>19</sup> Mitchell v. Peru, 163 Ind. 17, 71 N. E. 132.

*Failure to show injury.*

No grounds for equitable interference are stated in a complaint alleging that after the grade of a street upon which plaintiff's lots abutted had been fixed, the defendant city constructed a sewer along such street above the level thereof in such a way as to necessitate the raising of said grade, and the expenditure of large sums by the plaintiff in raising his lots, the relief asked being an injunction to restrain the collection of the special tax assessed upon such lots for the construction of the sewer. Robinson v. Milwaukee, 61 Wis. 585, 21 N. W. 610.

As to what is necessary to be averred in a bill for equitable relief, see Verdin v. St. Louis, 131 Mo. 26, 33 S. W. 480, 36 S. W. 52. See, also, Monroe Co. v. Rochester, 154 N. Y. 570, 49 N. E. 139.

<sup>20</sup> Hassan v. Rochester, 67 N. Y. 528.

<sup>21</sup> Matter of Willes, 30 Hun, 13; Matter of Deering, 93 N. Y. 361; Morse v. Buffalo, 35 Hun, 613.

*De minimus non curat lex.*

An excess of six cents upon an assessment of \$24,948.81 will not avoid the assessment, the error being purely unintentional. State v. Newark, 35 N. J. L. 168, where several cases on the maxim *de minimis* are reviewed.

There are several reported cases in which the taxes levied



this chapter some general rules as to the application of equity principles to cases arising out of special assessment proceedings, there are numerous opinions scattered throughout the books which are valuable as showing their application to more isolated facts — miscellaneous cases in one sense, but all being bound together by the underlying principles of this great branch of the remedial law.

**810.** Nearly fifty years ago, the supreme court of Wisconsin said, "The practice of restraining the sale of land for taxes or assessments illegally levied, has been so long established in this state that it is now too late for the courts to inquire whether it was wisely established."<sup>22</sup> Not only will courts of equity jurisdiction restrain the issue of a tax

were slightly in excess of legislative power, and in which it was urged in support of the proceedings, that the law ought to take notice of such unimportant matters; but the courts have held that an excess of jurisdiction is never unimportant. In one case in Maine (*Huse v. Merriam*, 2 Me. 375), the excess was eighty-seven cents only in a tax of \$225.75, but it was deemed sufficient to render the proceedings void. Said Mellen, Ch. J., in delivering the opinion of the court: "It is contended that the sum of eighty-seven cents is such a trifle as to fall within the maxim *de minimis*, etc.; but if not, that still this small excess does not vitiate the assessment. The maxim is so vague in itself as to form a very unsafe ground of proceeding or judging; and it may be almost as difficult to apply it as a rule in pecuniary concerns as to the interest which a witness has in the event of a cause; and in such case it can-

not apply. Any interest excludes him. The assessment was therefore unauthorized and void. If the line which the legislature has established be once passed, we know of no boundary to the discretion of assessors." The same view has been taken by the Supreme Court of Michigan, by which the opinion is expressed that the maxim *de minimus lex non curat* should be applied with great caution to proceedings of this character, and that the excess could not be held unimportant where, as in that case, each dollar of legal tax was perceptibly increased thereby. Perhaps, however, a slight excess, not the result of intention, but of erroneous calculations, may be overlooked; in view of the great difficulty in making all such calculations mathematically correct, and the consequent impolicy of requiring entire freedom from all errors. *Cooley, Const. Lim.*, 638, 639.

<sup>22</sup> *Myrick v. La Crosse*, 17 Wis. 443.



certificate, or the sale of the property, because of an invalid assessment,<sup>23</sup> but it will even go to the extent of affirming a temporary injunction to prevent severe injury, and will retain control of the cause and require the chancellor to modify the injunction from time to time, as might be proper.<sup>24</sup> Injunction will lie to prevent sale of lands under an assessment levied under an ordinance which is void because of non-compliance with the statute;<sup>25</sup> where the tax is void as levied without authority of law, or because the property assessed is exempt from taxation;<sup>26</sup> to restrain entry of paving liens where the paving is not an original one;<sup>27</sup> but it will not enjoin a city having authority to improve a street from making such an improvement by an abutting owner upon the ground that the work is being defectively performed.<sup>28</sup>

**811.** The owners of lots lying so near a public square as to be specially benefited thereby, and whose benefits have been assessed and paid to aid the city in procuring title to the same for public use, can enjoin the diversion of such fund to other uses.<sup>29</sup> And if the city is about to appropriate private land for public use without the right to do so, injunction may issue to prevent the threatened trespass.<sup>30</sup> An owner in an assessment district defined in an unconstitutional

<sup>23</sup> *Mayor, etc. v. Porter*, 18 Md. 284, 79 Am. Dec. 686; *Johnson v. Milwaukee*, 40 Wis. 315; *Gallaher v. Garland*, 126 Iowa, 206, 101 N. W. 867.

<sup>24</sup> Where the grade of a street was ordered raised several feet, excluding ingress and egress to and from the rolling mill property of plaintiff, and excluding light and air therefrom, so that the damage would be irreparable. *Louisville v. Louisville R. M. Co.*, 3 Bush, 416, 96 Am. Dec. 243.

<sup>25</sup> *Dehail v. Morford*, 95 Cal. 457, 30 Pac. 593.

<sup>26</sup> *Heinroth v. Kochersperger*, 173 Ill. 205, 50 N. E. 171.

<sup>27</sup> *Leake v. Philadelphia*, 171 Pa. St. 125, 32 Atl. 1110.

<sup>28</sup> *Dever v. Junction City*, 45 Kan. 417, 25 Pac. 861.

<sup>29</sup> The officers of a city cannot lawfully divert to other uses land condemned for a public park, nor can they without legislative authority, confer a right to do so upon others, by lease or other contract. *Gilman v. Milwaukee*, 55 Wis. 328, 13 N. W. 266.

<sup>30</sup> *Lumsden v. Milwaukee*, 8 Wis. 485.



act for a highway improvement, may restrain the collection of the assessment to pay the cost of the improvement, when an attempt is made to enforce the assessment, and is not required to begin such suit earlier.<sup>31</sup>

**812.** Where the final decree depends upon the granting of a preliminary injunction, and without which the former would be mere *brutum fulmen*, it is the duty of the court to preserve the status by restraining process.<sup>32</sup> A perpetual injunction will be granted only when a party shows a clear right thereto.<sup>33</sup> Where a petition for an injunction states facts which, if true, entitle the petitioner to the relief prayed for, it is error for the court, before answer, to vacate the injunction on motion, and dismiss the petition.<sup>34</sup> The whole theory of a legal assessment depends upon a uniform rule of charges within some defined district, and resting on some principle which is intelligible. But an assessment which throws the whole expense of a costly work in a long street, upon a piece of ground only 140 feet long, is an exercise of the power of creating taxing districts which equity will relieve against.<sup>35</sup> A court of equity is not barred by the

<sup>31</sup> *Lewis v. Symmes*, 61 O. St. 471, 76 Am. St. Rep. 428, 56 N. E. 194; *Columbus v. Agler*, 44 O. St. 485, 8 N. E. 302.

<sup>32</sup> *Lyon v. Tonawanda*, 98 Fed. 361.

<sup>33</sup> *Spangler v. Cleveland*, 43 O. St. 526, 3 N. E. 365.

<sup>34</sup> *Makemson v. Kauffman*, 35 O. St. 444.

*Assessment on part of property improved.*

<sup>35</sup> By resolution of the council, a sewerage district was located, which was to drain a large area, the expense to be assessed for the grading, leveling, repairing, etc. of a certain street, and the expense of doing the work on a long street assessed on 140 feet belong-

ing to plaintiff, which tax he refused to pay, and his land was sold to pay the same. The sale was set aside. *Clay v. Grand Rapids*, 60 Mich. 451, 27 N. W. 596. *Apportionment of reduction in amount.*

Where the expenses of opening a street were assessed partly upon the property benefited and partly upon the city at large, and after the confirmation of the assessment in which was included the item for the fees and expenses of the commissioners, the city resisted that claim and succeeded in effecting a settlement by which the item was largely reduced, the owner of property assessed is entitled to maintain an action in



record in an action involving the validity of an assessment for a street improvement from inquiring into the facts upon which the assessment is based, by the admission of testimony outside the record.<sup>36</sup>

**813.** Conditions precedent to the making of a valid assessment must on no account be omitted, or the result will be a nullity. Where the statute provides that the power to improve streets is dependent on a petition and notice, and has given to property holders, liable to be taxed for the improvement, the right to present their objections and to be heard thereon, the execution of an ordinance without such hearing when demanded, will be restrained by injunction till such hearing be had. And such suit may be instituted by any taxpayer for himself and all other similarly situated.<sup>37</sup> An action in equity will not lie to review the proceedings of municipal boards and officers, or to correct irregularities and

equity to compel the application upon his assessment of a pro rata share of the amount saved, but is liable to interest from the date of the assessment. *Mayer v. Mayor*, 101 N. Y. 284, 4 N. E. 336.

<sup>36</sup> *New Whatcom v. Bellingham Bay, etc. Co.*, 9 Wash. 639, 38 Pac. 163.

*Extrinsic evidence of cost of work.*

Where a city charter does not provide the method of ascertaining the expenses of local improvements for purposes of taxation or assessment, the plaintiff may show by proof outside the record the actual cost thereof. *Minnesota Linseed Oil Co. v. Palmer*, 20 Minn. 468, Gil. 424; *Sewall v. St. Paul*, 20 Minn. 511, Gil. 459; *Mayall v. St. Paul*, 30 Minn. 294, 15 N. W. 170.

<sup>37</sup> *Dennison v. Kansas City*, 95 Mo. 416, 8 S. W. 429.

*Omission of condition precedent.*

Where there is a gross violation of the charter provisions that "a detailed statement" of the cost shall be made by the city engineer, under oath, and that the tax shall not exceed such estimate, the tax is voidable, and the property-owner entitled to an injunction perpetually enjoining the collection of such taxes. *Gilmore v. Hentig*, 33 Kan. 156, 5 Pac. 781.

*Omission to file specifications.*

A street commissioner's notice to a lot owner to grade certain lots belonging to him, contained no specifications of the work to be done, except that he was to grade the street "to the grade line as established." As it did not appear any estimate of the work had been filed with the city clerk before the giving of such notice, as required by the charter, this was a material defect in the proceedings,



errors which may have been committed by them in laying out, opening or improving streets and avenues, or in levying assessments therefor, nor to correct errors therein, or to modify or vacate assessments imposed.<sup>38</sup>

and contracts for the work having been let, a threatened sale of the lots for the assessments levied should be restrained. *Myrick v. La Crosse*, 17 Wis. 443.

*Omission of condition precedent.*

When proposals are invited for doing street work by an advertisement in one newspaper, where a general ordinance requires it to be advertised in *three*, it is such a departure from a substantial and important provision, introduced for the benefit and protection of property owners, as entitles them to an injunction to restrain the collection of the tax imposed upon them to pay the expense of the work done. *Mayor, etc. v. Johnson*, 62 Md. 225.

*Omission of condition precedent.*

Where the charter requires an attempt to be made to agree with the owner of land needed for a street opening before condemning it, and no such attempt is shown, the adjoining owner may enjoin the city from selling his land to satisfy an assessment therefor. *Leslie v. St. Louis*, 47 Mo. 474.

<sup>38</sup> *Guest v. Brooklyn*, 69 N. Y. 506.

*Injunction to restrain street opening.*

A temporary injunction granted in an action to restrain a city from opening a street which for more than thirty years it has allowed the public and its grantors to occupy to the exclusion of the public, will not be disturbed on appeal

when it is not shown that, if allowed to stand, it will result in any special harm to the public or any citizen. *Paine Lumber Co. v. Oshkosh*, 86 Wis. 397, 56 N. W. 1088.

*Injunction to restrain street improvement.*

When a petition for an injunction against a city from improving a certain street is attached to the ordinance under which the work is being done, and the ordinance does not provide for a special tax to pay for such improvement, and the petition does not allege that any such tax has been levied or act done indicating that it is to be levied, the petition does not state a cause of action. *Dever v. Junction City*, 45 Kan. 417, 25 Pac. 861.

*Injunction to restrain street improvement.*

A preliminary injunction restraining a city from proceedings under a void statute and ordinance to curb and change the grade of a sidewalk to the injury of adjoining property, should not be disturbed until the right of the city so to do (claimed to exist by reason of an estoppel, or other facts), is established by testimony regularly on a trial of the cause on the merits. The court should not be required to determine the facts upon mere disputed averments in pleadings, or conflicting *ex parte* statement. *Koeffler v.*



**814.** Courts willingly protect taxpayers against any illegal increase of their burdens. So after the full cost of an assessment has been ascertained, the further collection of the assessment may be stayed, and judgment for more than the amount necessary to pay the final installment refused.<sup>39</sup>

Milwaukee, 85 Wis. 397, 55 N. W. 400.

*Projected improvement not completed.*

A contemplated street opening having been in part divided by the successful prosecution of the *certiorari* by a party whose land was to be taken in such opening, the assessment for benefits made against another land owner upon the basis that the opening would be fully carried out, should be set aside. *Butler v. Keyport*, 64 N. J. L. 181, 44 Atl. 849.

*Ordering alley restored to original condition.*

Where the city authorities took the proper steps to cause an alley to be graded, but after the work was completed the subsequent proceedings were ascertained to be void because of an invalid assessment of benefits, the court should not order a restoration of the alley to its original condition without a showing that such relief would be equitable as to the other abutting owners. *Kersten v. Milwaukee*, 106 Wis. 200, 48 L. R. A. 851, 81 N. W. 948, 1103.

*Interfering with discretion of officers.*

A bill to restrain a municipal corporation, in the exercise of its powers, from regulating a street, and putting the curb stones on a proposed line, and which does not show any irreparable injury, but rests upon the ground that the

city is not putting the curb stones on the true line, by which the complainant will be put to expense, and his property be of less value, contains no recognized ground of equitable relief. *Holmes v. Jersey City*, 12 N. J. Eq. 299.

*Elevated bridge.*

Where it is proposed to establish an elevated bridge, 20 feet high above the established grade, and across the tracks of defendant railway company, such bridge would operate to alter the actual traveled grade of the street, which cannot lawfully be done without altering the grade already established, in the manner provided by the charter of the city; and an owner of a lot injured by the change of the actual traveled grade may enjoin the erection of such bridge. *Wilkin v. St. Paul*, 33 Minn. 181, 22 N. W. 249.

<sup>39</sup> *People v. McWethy*, 177 Ill. 334, 52 N. E. 479.

*Collection larger than allowed.*

Where an assessment for a street improvement is larger than allowed by law, and sufficient has been voluntarily paid to equal or exceed the amounts which have been legally assessed, the collection of the remainder may be enjoined. *Cincinnati v. James*, 55 O. St. 180, 44 N. E. 925.

*Omission to assess property in district.*

One whose assessment is increased by the unauthorized omis-



**815.** Matters of contract are more frequently considered in courts of law. But the equity branch takes cognizance of certain matters in which contract questions are involved, not so much for the settlement of contractual disputes, but for the purpose of preventing wrong if an illegal contract be carried out. The entry of a city into a contract for a public improvement beyond the extent of the powers vested in it entitles an interested property owner to an injunction restraining the city from entering into such a contract.<sup>40</sup> That the common council has confirmed an assessment does not

sion from the assessment of lands of another, may maintain an action against the city to restrain the enforcement of the assessment. *Hassen v. Rochester*, 65 N. Y. 510.

*Sale of several lots together.*

Where the treasurer sold all the lots of plaintiff in a given block as a single tax for constructing sidewalks, the sale is void, and equity will enter a decree for the plaintiff. *Royce v. Aplington*, 90 Ia. 352, 57 N. W. 868.

*Notice less than judgment — Delay.*

A property owner having prompt notice of a judgment of confirmation which is fair upon its face, will not be permitted to wait until the improvement is completed, and then have the judgment vacated in equity and the collection enjoined, because the notice of assessment was less than the judgment entered, which fact did not appear upon the face of the record. *Meadowcroft v. Kochersperger*, 170 Ill. 356, 48 N. E. 987.

*Shortage of fund for street intersections.*

It is the duty of the city council to provide available funds with

which to pay for street intersections before ordering the improvement. But after the improvement is made, and the intersections actually paid for by the city, special assessments against abutting property cannot be enjoined on the ground that this fund with which to pay for the street intersections was not available at the time the improvement was ordered. *Eddy v. Omaha* (Neb.), 103 N. W. 692. *Recovery of costs of suit.*

Where a sale of property for an assessment for the opening of a street has been at the suit of the owner declared void, she cannot, in a subsequent suit to enjoin the opening of the street on the ground of illegality of the proceedings, recover her expenditures in having the sale declared void. *Gaston v. Portland*, 41 Or. 373, 69 Pac. 34, 445.

<sup>40</sup> *Bluffton v. Miller*, 33 Ind. App. 521, 70 N. E. 989.

*Recovery by city on quantum meruit.*

Where a city pays a contractor for doing street work owing to the special assessment therefor being illegal, the city may recover from the abutting owners on *quan-*



preclude plaintiff from seeking equitable relief. There is no authority vested in the council to confirm an assessment made in violation of law.<sup>41</sup> Where a statute provides for the improvement of any street already condemned, and the street is improved before its condemnation as a public highway, the assessments to pay for such work are illegal and void, and their collection may be perpetually enjoined.<sup>42</sup> A

*tum meruit* by suit in equity under the Iowa Statutes. Davenport v. Iowa, 120 Fed. 172.

*Duty of city in letting contracts.*

Where a city charter does not require the contracts for building sidewalks to be let to the lowest bidder, after advertising for proposals therefor, such contracts may be made by private agreement. But they must be fairly entered into, at reasonable prices, and with due regard to the interests of the owners of lots chargeable with the cost thereof, or equity will give relief to such owners on general principles. Cook v. Racine, 49 Wis. 243, 5 N. W. 352.

*Combination of bidders—Delay.*

If a property owner is advised that grounds exist which justify the rejection of a bid and the contract thereunder, because of a combination among bidders, it is his duty, if he wishes the contract abrogated as unfair to him, to take action without unreasonable delay. He cannot be permitted to withhold his objection until he shall have had the benefit of the work, labor and materials of the contractor, and then ask to be relieved of all liability therefor. Givins v. People, 194 Ill. 150, 88 Am. St. Rep. 143, 62 N. E. 534.

*Imperfect work—Restraining payment.*

Where a city is about to pay a

contractor for a public improvement, which is not performed in accordance with the ordinance therefor, the remedy is injunction to restrain the city from improperly paying out the funds, and not injunction against the collection of the assessment. Heinroth v. Kochersperger, 173 Ill. 205, 50 N.E.171. *Performance of contract not considered.*

An injunction suit to prevent the improvement of a street at the expense of abutting owners, is a collateral attack upon the corporate proceedings, and only defects going to the jurisdiction are available. The manner in which the contract was performed, and kindred questions, cannot be considered. McEnery v. Sullivan, 125 Ind. 407, 25 N. E. 540.

*Void sale—Unlawful contract.*

An action will lie to quiet title to the city lot, the sale of which is void as having been made under a void assessment for street work, the contract for which unlawfully delegated power to the superintendent of streets, greatly to increase or lessen the expense of the work, and was thereby rendered invalid. Chase v. Scheerer, 136 Cal. 248, 68 Pac. 768.

<sup>41</sup> Hassan v. Rochester, 67 N. Y. 528.

<sup>42</sup> Mayor, etc., v. Hook, 62 Md. 371.



sewer cannot be constructed under proceedings for grading and graveling a street, unless the charter expressly authorize it. A sewer is not a necessary part of a street.<sup>43</sup>

<sup>43</sup> *Peck v. Grand Rapids*, 125 Mich. 416, 84 N. W. 614. But see *Johnson v. Milwaukee*, 88 Wis. 383, 60 N. W. 270.

*When assignee of certificate not bound by judgment.*

A city having sold a lot for non-payment of a special assessment, the owner brought an action against the city, its treasurer and one K., who was alleged to own the certificate, and obtained a judgment setting aside the certificate of sale, and restraining the city and its treasurer from issuing a tax deed thereon. K., having assigned the original certificate prior to the commencement of the action, his assignee, not being a party or privy thereto, was not bound by such judgment, and had the same right of action against the city as if said judgment had not been rendered. *Smith v. Milwaukee*, 18 Wis. 370.

*Averment contradicting affidavit of posting.*

In the absence of any showing of fraud or ground of equitable relief, equity will not enjoin the sale of property for a delinquent special assessment, or set aside previous sales on the same averment that the affidavit of posting notices was untrue, in that but one of the notices was posted in the neighborhood of the proposed improvement. *Craft v. Kochersperger*, 173 Ill. 617, 50 N. E. 1061.

*Equity, restraining assessment.*

In an action to restrain the

enforcement of an assessment levied upon a lot to pay damages occasioned by condemning land for widening and extending a street, the city is not a necessary party defendant, where under its charter it is not liable in any event for the damages caused by the condemnation, and the assessment, if collected, would go into a special fund to be paid to the parties entitled thereto. *Cohn v. Parcels*, 72 Cal. 367, 14 Pac. 26.

*Charge that commissioner was not a freeholder.*

In a suit to vacate an assessment, it was claimed one of the commissioners was not a freeholder, and that for this defect the suit was maintainable, as such defect would not appear on the face of the proceedings. The court held that by its appointment the court adjudged that the commissioner was a freeholder, and that this was final unless corrected by a direct proceeding for that purpose. *Dederer v. Voorhies*, 81 N. Y. 153.

*Error in description.*

Where there is an error in description of amount of plaintiff's frontage, but the amount of his assessment is not thereby increased, and the proceedings are otherwise regular, a court of equity will not restrain enforcement. *Morse v. Buffalo*, 35 Hun, 613.

*Improper description of lands.*

The fact that lands had been described in the assessment for a



public improvement as belonging to "the heirs of M," whereas the greater portion had been sold to different parties, although violating the provisions of the ordinance requiring lands subjected to an assessment to be particularly described, and it not appearing the conveyances were of record, or that the city had notice, such error as there might have been was not substantial enough to invoke the aid of equity to restrain the collection. *Murphey v. Wilmington*, 5 Del. Ch. 281.

*Relief from penalty.*

When a contract for paving was let at \$2.50 a yard in cash, or \$3.00 chargeable to plaintiff's lot, upon payment or tender of the lower price in cash, as soon as the work was done, plaintiff would be entitled to legal or equitable relief. *Dean v. Borschenius*, 30 Wis. 236.

*What must appear.*

To justify relief through an action to set aside an unequal local assessment, it must appear that in making the assessment the board proceeded on some erroneous principle. The facts should show that the corporate authorities had transgressed their jurisdiction and that, in making the assessment, they had in fact disregarded the ordinance or resolution from which they derive their authority to act.

*Monroe County v. Rochester*, 154 N. Y. 570, 49 N. E. 139.

*Failure to give notice.*

Where there is an entire failure to give to a landowner the statutory notice of a pending improvement, and he has no actual notice or knowledge of the improvement until after its completion, a perpetual injunction will lie to restrain the collection of the assessment against his property. *Joyce v. Barron*, 67 O. St. 264, 65 N. E. 1001.

*Void assessment — Injunction.*

The act of the city engineer in apportioning a part of the cost of a street improvement upon a non-bordering lot, and of the city council in assessing such amount against such lot, when the statute provides for assessment only against bordering lots, are void, and the collection of such assessment will be enjoined, as such acts are municipal, from which no appeal has been provided by statute. *Terre Haute v. Mack*, 139 Ind. 99, 38 N. E. 468.

*When excess only, void.*

When there has been assessed against the property of a district a sum in excess of that properly taxable, and which is susceptible of exact mathematical calculation, the entire assessment is not avoided, but only the excess. *Denver v. Kennedy*, 33 Colo. 80, 80 Pac. 122, 467.



## CHAPTER XIV.

### REASSESSMENTS, AND PROCEEDINGS TO VALIDATE VOID ASSESSMENTS.

Curative acts — In general, 816-818.	Must be based on benefits, 827.
Limitations upon legislative power, 819-820.	Statute of limitations, 828.
Retroactive laws, 821.	Continuation of original proceedings, 829.
Jurisdiction, 822.	Payment of interest, 830.
Reassessment statutes, 823.	Duty of property owner, 831.
Constitutionality of, 824.	When reassessments may be ordered, 832-837.
Validity of, 825.	When not permitted, 838-841.
Construction of, 826.	

#### Curative Acts — In general.

**816.** Unless there be some constitutional provision to the contrary, it is competent for the legislature, by subsequent statute, to cure errors and omissions in special assessment proceedings to the extent that such errors might have been made immaterial, or such omissions have been dispensed with by prior statute.<sup>1</sup> Thus where the original purpose for

#### *United States.*

<sup>1</sup> *Mattingly v. District of Columbia*, 97 U. S. 687.

#### *California.*

*San Francisco v. Certain Real Estate*, 42 Cal. 513; *Himmelman v. Hoadley*, 44 Cal. 213; *People v. Lynch*, 51 Cal. 15, 21 Am. Rep. 677; *Reis v. Graf*, 51 Cal. 86; *People v. O'Neil*, 51 Cal. 91; *People v. Kinsman*, 51 Cal. 92; *Schumacker v. Toberman*, 56 Cal. 508; *De Haven v. Berendes*, 135 Cal. 178, 67 Pac. 786.

#### *Connecticut.*

*Lewis v. Eastford*, 44 Conn. 477; *Harris v. Ansonia*, 73 Conn. 359, 47 Atl. 672.

#### *Illinois.*

*Schofield v. Watkins*, 22 Ill. 66.

#### *Iowa.*

*Allen v. Armstrong*, 16 Ia. 508; *Boardman v. Beckwith*, 18 Ia. 292; *Iowa, etc. Land Co. v. Soper*, 39 Ia. 112; *Huff v. Cook*, 44 Ia. 639; *Richman v. Muscatine Co.*, 77 Ia. 513, 4 L. R. A. 445, 14 Am. St. Rep. 308, 42 N. W. 422; *Tuttle*



which the power of taxation is invoked is one of the ordinary purposes of municipal government, and within the powers granted, and there is no fraud, oppression or excessive expenditure, no inequality or injustice in the apportionment, the defect may be cured by the legislature by subsequent enactment to the extent that it could in the first instance

*v. Polk*, 84 Ia. 12, 50 N. W. 38;  
*Clinton v. Walliker*, 98 Ia. 655,  
 68 N. W. 431; *Windsor v. Des*  
*Moines*, 101 Ia. 343, 70 N. W.  
 214.

*Indiana.*

*Musselman v. Logansport*, 29  
 Ind. 533; *Johnson v. Board of*  
*Commissioners*, 107 Ind. 15, 8 N.  
 E. 1.

*Kansas.*

*Emporia v. Norton*, 13 Kan.  
 569; *Manley v. Emlan*, 46 Kan.  
 655, 27 Pac. 844.

*Maryland.*

*O'Brien v. Baltimore Co.*, 51  
 Md. 15.

*Michigan.*

*People v. Supervisors*, 20 Mich.  
 95; *Sinclair v. Learned*, 51 Mich.  
 335, 16 N. W. 672; *Daniells v.*  
*Watertown*, 61 Mich. 514, 28 N.  
 W. 673.

*New York.*

*People v. McDonald*, 69 N. Y.  
 362; *In re Sackett, etc., Streets*,  
 74 N. Y. 95; *Dederer v. Voorhies*,  
 81 N. Y. 153; *Tift v. Buffalo*,  
 82 N. Y. 204; *Clementi v. Jack-*  
*son*, 92 N. Y. 591; *Vandeventer*  
*v. Long Island City*, 139 N. Y.  
 133, 34 N. E. 774; *Smith v.*  
*Buffalo*, 159 N. Y. 427, 54 N. E.  
 62; *Hatzung v. Syracuse*, 92 Hun.  
 203, 36 N. Y. Supp. 521.

*New Jersey.*

*State v. Newark*, 34 N. J. L.  
 236; *State v. Stockton*, 61 N. J.  
 L. 520, 39 Atl. 921.

*Ohio.*

*Upington v. Oviatt*, 24 O. St.  
 232; *Burgett v. Norris*, 25 O. St.  
 308.

*Oregon.*

*Nottage v. Portland*, 35 Or. 539,  
 76 Am. St. Rep. 513, 58 Pac. 883;  
*Brand v. Multnomah Co.*, 38 Or.  
 79, 50 L. R. A. 389, 84 Am. St.  
 Rep. 772, 60 Pac. 390, 62 Pac.  
 209; *Thomas v. Portland*, 40 Or.  
 50, 66 Pac. 439; *Oregon R. E. Co.*  
*v. Portland*, 40 Or. 56, 66 Pac.  
 442; *Oregon R. E. Co. v. Gambell*,  
 41 Or. 61, 66 Pac. 441.

*Pennsylvania.*

*Townsend v. Wilson*, 9 Pa. St.  
 270; *Schenley v. Commonwealth*,  
 36 Pa. St. 29, 78 Am. Dec. 359;  
*Appeal of Hewitt*, 88 Pa. St. 55;  
*Hershberger v. Pittsburgh*, 115 Pa.  
 St. 78, 8 Atl. 381.

*Texas.*

*Hutcheson v. Storrie*, 92 Tex.  
 685, 45 L. R. A. 289, 71 Am. St.  
 Rep. 884, 51 S. W. 848.

*Reassessments — Usually author-*  
*ized.*

*Goodrich v. Chicago*, 218 Ill. 18,  
 75 N. E. 805; *Duniway v. Port-*  
*land (Or.)*, 81 Pac. 845; *State v.*  
*District Court (Minn.)*, 106 N. W.  
 306.

Under such proceedings, whether  
 the original proceeding is still  
 pending is a question of fact.  
*Cratty v. Chicago*, 217 Ill. 453, 75  
 N. E. 343.



have dispensed with the omitted proceedings in the first instance, such as the unauthorized meetings or proceedings of a statutory board.<sup>2</sup> An act curing a defect in assessment proceedings is not unconstitutional as an attempt by the legislature to exercise judicial power. And the legislature may, by the subsequent passage of a curative act, dispense with the compliance by the city of any acts which the legislature had power to dispense with in advance, and thereby render the act of the city legal.<sup>3</sup>

**817.** It is within the power of the legislature to cure proceedings for a street improvement that are void because based on a petition that did not have the requisite number of signers, for, if the legislature had chosen, it could have provided for making the improvement without any petition whatever.<sup>4</sup> A statute providing that where the corporate authorities have attempted to levy any tax or assessment for improvement, which tax or assessment may have been informal, for the want of sufficient authority, or other cause, the council shall relevy and re-assess any such assessment or tax, is a valid and binding statute of which all persons are bound to take notice and what may be done under it, and no new notice of a re-assessment under such act is necessary.<sup>5</sup> A statute declaring the surface of a bridge approach to be the established grade of a street upon which it is located, and which it entirely occupies, cures any irregularities in the original proceedings, though such statute was passed after a *nisi prius* decision to enjoin the continuance of such approach.<sup>6</sup> An act providing that after an assessment has been

<sup>2</sup> *Emporia v. Norton*, 13 Kan. 569; *First Nat. Bank v. Isaacs*, 161 Ind. 278, 68 N. E. 288.

<sup>3</sup> *Mason v. Spencer*, 35 Kan. 512, 11 Pac. 402.

*Jurisdictional defects.*

Where proceedings are void, the assessment cannot be validated by a subsequent ordinance designed to cure the jurisdictional defect. *Hub-*

*bell, Son & Co. v. Bennet Bros.* (Iowa), 106 N. W. 375.

<sup>4</sup> *Nottage v. Portland*, 35 Or. 539, 76 Am. St. Rep. 513, 58 Pac. 883.

<sup>5</sup> *Manly v. Emlan*, 46 Kan. 655, 27 Pac. 844.

<sup>6</sup> *Brand v. Multnomah Co.*, 38 Or. 79, 50 L. R. A. 389, 84 Am. St. Rep. 772, 60 Pac. 390, 62 Pac. 209.



adjudged void the municipality may maintain an action against the owners of the property assessed, is not a taking of property without due process of law, where the parties affected are allowed a day and time to be heard on the right and manner of the assessment,<sup>7</sup> and one validating a city ordinance for the grading and paving of certain streets, which had become null and void for want of being recorded, is not unconstitutional, because it provides that the omission to record shall not affect or impair the lien of the assessments against the lot owners.<sup>8</sup>

**818.** Where the legislature has power in the first instance to authorize the making of a contract on a certain notice which was given, it can legalize it when made upon such notice,<sup>9</sup> and a curative act designed to validate previous defective and void street improvement proceedings, and providing for an action to recover the amount of the assessment from the owner of the property charged, is available as a defense to an action against the city to recover the amount already paid on a void street assessment.<sup>10</sup> Although the statutory requirement that the preliminary resolution be published is substantial and peremptory, as be-

<sup>7</sup> *Thomas v. Portland*, 40 Or. 50, 66 Pac. 439.

<sup>8</sup> *Schenley v. Commonwealth*, 36 Pa. St. 29, 78 Am. Dec. 359; *Eno v. Mayor, etc.*, 68 N. Y. 214.

<sup>9</sup> *Windsor v. Des Moines*, 101 Ia. 343, 70 Pac. 214.

<sup>10</sup> *Nottage v. Portland*, 35 Or. 539, 76 Am. St. Rep. 513, 58 Pac. 883.

A charter providing that if any street improvement assessment theretofore or thereafter made in such city shall be found or adjudged to be invalid for any reason whatever, the city shall have power to bring actions against the owners of the land charged with the improvement for their respective shares of the expense of the

work, is not unconstitutional as a usurpation of judicial authority, but is a validating act, though it does not use any of the words "ratify," "confirm," or "validate." Such an act is not void as authorizing a taking of property without notice and an opportunity to be heard on the validity of the assessment, where the owner originally had notice of the proceedings, and was accorded an opportunity to be heard on the amount he should pay. If an opportunity for hearing is granted at some stage of the proceedings, there is not a taking without due process of law. *Nottage v. Portland*, 35 Or. 539, 76 Am. St. Rep. 513, 58 Pac. 883.



tween the city and owners of the property assessed, failure to do so is a defect which may be cured by legislative act.<sup>11</sup> The failure of the commissioners or other assessing board or officers to take the requisite oath, can be cured by subsequent legislative enactment upon the same general principle permeating through the other cases.<sup>12</sup>

### Limitations upon legislative power.

**819.** Although the legislature is vested with great and elastic powers to pass curative acts, it by no means follows that it is omnipotent in that respect, even where not restrained by constitutional inhibition. It cannot validate an assessment which is void for want of jurisdiction,<sup>13</sup> and the sale of land to satisfy a void street assessment which the legislature has unconstitutionally attempted to validate is a taking of private property "without due process of law," and is in effect merely a legislative judgment.<sup>14</sup> It cannot validate a void tax unless it has the power to make such tax valid originally, nor cure the omission of a step which it could not have permissively omitted before. Thus an act

<sup>11</sup> *Upington v. Oviatt*, 24 O. St. 232.

<sup>12</sup> See "Commissioners," Ch. ix, Sec. 509. Also see *Sinclair v. Learned*, 51 Mich. 335, 16 N. W. 672; *Clementi v. Jackson*, 92 N. Y. 591; *Townsend v. Wilson*, 9 Pa. St. 270; *Smith v. Hard*, 59 Vt. 13, 8 Atl. 317; *Koehler v. Dobberpuhl*, 56 Wis. 480, 14 N. W. 644. But see the case of *Bartlett v. Wilson*, 59 Vt. 23, 8 Atl. 321, decided at same time as *Smith v. Hard*, *supra*.

<sup>13</sup> *Brady v. King*, 53 Cal. 44.

An assessment which is void for want of jurisdiction to order the work cannot be validated by failure to take the statutory appeal. And neither the filing of the remonstrance or the failure to file

can supply the lack of power. *De Haven v. Berendes*, 135 Cal. 178, 67 Pac. 786.

Where an assessment is absolutely void because of the want of authority by municipal authorities to make the improvement out of which the assessment arose, a statute providing against the setting aside of assessments because of irregularity, or defect in form or illegality in the making and levying of the same, can have no remedial or curative effect whatever. *State v. Stockton*, 61 N. J. L. 520, 39 Atl. 921.

<sup>14</sup> *Brady v. King*, 53 Cal. 44; *Schumacker v. Toberman*, 56 Cal. 508; *Conway v. Cable*, 37 Ill. 82, 87 Am. Dec. 240.



confirming all assessments theretofore laid in a city does not embrace invalid assessments laid without any authority or jurisdiction, nor does one confirming an assessment, and declaring it in all respects regular, apply to or cover fraud.<sup>15</sup> The legislature cannot pass a law validating by estoppel an act that it is forbidden by the law to authorize,<sup>16</sup> nor can it levy an assessment in an incorporated city, for the purpose of improving a street in a manner that is not uniform and equal, nor validate such an assessment made by the municipal authorities;<sup>17</sup> nor validate a street grading proceeding where there has been no notice to the property owner.<sup>18</sup>

**820.** The passage of an ordinance ordering a public improvement, after the work has been done, is ineffective as a ratification of an improvement which has been illegally ordered and completed without compliance with the city charter.<sup>19</sup> And where a city has no power to make a contract for the purchase of an easement for street purposes, it cannot ratify such a contract by its subsequent acts, although in both these cases the power might be delegated by the legislature.<sup>20</sup> An act attempting to validate a void assessment for the street improvement on a city lot, if it has that effect, does not by relation make the assessment valid as of the date when it was left, but only validates it at the date of the passage of the act,<sup>21</sup> and a street assessment levied by a town which was illegally incorporated under a statute cannot be validated by the reincorporation of such town under authority

<sup>15</sup> *People v. Brooklyn*, 71 N. Y. 495; *Dederer v. Voorhies*, 81 N. Y. 153.

<sup>16</sup> *Hutcheson v. Storrie*, 92 Tex. 685, 45 L. R. A. 289, 71 Am. St. Rep. 884, 51 S. W. 848.

<sup>17</sup> *People v. Lynch*, 51 Cal. 15, 21 Am. Rep. 677.

<sup>18</sup> *Hershberger v. Pittsburgh*, 115 Pa. St. 787, 8 Atl. 381.

<sup>19</sup> *Buckley v. Tacoma*, 9 Wash. 253, 37 Pac. 441.

<sup>20</sup> *Trester v. Sheboygan*, 87 Wis. 496, 58 N. W. 747.

<sup>21</sup> *Reis v. Graf*, 51 Cal. 86; *People v. Kinsman*, 51 Cal. 92.

And pending, brought to enforce the tax, are not affected by such act. *People v. O'Neil*, 51 Cal. 91.

Where rights have been held vested prior to such curative legislation. See *Daniells v. Watertown*, 61 Mich. 514, 28 N. W. 673.



of another statute two years later in date.<sup>22</sup> A charter provision that, if, on completion of a street improvement, when the cost of the same has been by the council declared to be a charge on the abutting property, any assessments levied to defray the cost thereof are adjudged to be invalid, the city may bring actions against the owners of abutting property on which the cost of such improvement might be charged, and recover the cost of such improvement, was not intended to and does not in and of itself cure or confirm defective assessments, but was intended to afford a new remedy for the enforcement of assessments that have been judicially declared void, and only such are affected.<sup>23</sup> And under such or similar statutes, a void assessment cannot be cured, ratified or confirmed in the absence of an adjudication that the assessment is invalid.<sup>24</sup>

It is not a valid objection to curative legislation that it may effect pending suits. The legislature may modify existing remedies, or take them away and grant new ones, provided an ample remedy for existing rights be given, and the judgment rendered under such modified remedy be sufficient to do justice between the parties.<sup>25</sup>

<sup>22</sup> *Medical Lake v. Smith*, 7 Wash. 195, 34 Pac. 835.

<sup>23</sup> *Thomas v. Portland*, 40 Or. 50, 66 Pac. 439; *Oregon R. E. Co. v. Portland*, 40 Or. 56, 66 Pac. 442.

<sup>24</sup> *Oregon R. E. Co. v. Gambell*, 41 Or. 61, 66 Pac. 441.

<sup>25</sup> *Sidway v. Lawson*, 58 Ark. 117, 23 S. W. 648; *Middleton v. St. Augustine*, 42 Fla. 287, 89 Am. St. Rep. 287, 29 So. 421; *Ferry v. Campbell*, 110 Ia. 290, 50 L. R. A. 92, 81 N. W. 604; *Hepburn v. Curts*, 7 Watts 300, 32 Am. Dec. 766.

*Vested rights.*

A tax laid by authority of law, or an assessment for benefits con-

ferred by a local improvement, creates a duty and obligation which may be enforced by any means, which the legislature may from time to time adopt. Individuals upon whom, or against whose property, such duties and obligations arise, have no vested right in the remedy which was in force when the duty or obligation arose. Until the tax or assessment is satisfied and the discharge of the premises therefrom, in virtue of the law then in force, has become a vested right, there is no contract with the public to be violated by the adoption of more stringent measures to enforce payment of these public dues. In re



**Retroactive laws.**

**821.** In the absence of a constitutional restriction a legislature may validate taxation or assessment proceedings which have been carried on in a way not provided by law,

Commissioners of Elizabeth, 49 N. J. L. 488, 10 Atl. 563.

*When may be divested.*

If an act of the legislature be within the legitimate scope of legislation, it is not a valid objection that it divests vested rights. *Grim v. Weissenberg School Dist.*, 57 Pa. St. 433, 98 Am. Dec. 237. Also, *id.*

If the legislature has antecedent power to authorize a tax, it can cure, by a retroactive law, an irregularity or want of authority in levying it, though thereby a right of action which had been vested in an individual should be divested.

A tax was levied for paying bounties, and plaintiff, under threat of distress, paid the tax under protest about Aug. 15, and then on Aug. 20, brought suit to recover the amount so paid, claiming the tax to be illegal. On Aug. 25, the Assembly passed an act ratifying the validity of the assessment of the tax, and all proceedings relating thereto. Oct. 13 plaintiff obtained judgment for \$48.11.

On appeal, the opinion was written by Judge Sharswood, and goes upon the theory that there are no constitutional restrictions prohibiting retrospective laws. He says, "All acts curing irregularities in legal proceedings, necessarily divest vested rights of the parties by closing the mouths of those who could otherwise avail

themselves of such irregularities to escape from the fulfilment of what is a moral obligation; and, but for the irregularity, would be a legal liability." With all due respect to the eminent jurist who wrote the opinion, it is submitted that it is dangerously near the border line of confiscation.

*Recovery under void contract.*

A curative statute for avoiding the effect of irregularities in procedure does not authorize recovery by a city of a special assessment for paving done under a void contract. *Allen v. Davenport*, 65 C. C. A. 641, 132 Fed. 209.

*Determining judicial question.*

Where a board of supervisors had attempted to open a road without observing certain legal requirements, a subsequent act of the legislature purporting to legalize the proceedings was held void, because it was an effort to determine a question essentially judicial. *Seibert v. Linton*, 5 W. Va. 57.

*Judgment not nullified by.*

Where suit has been once brought against a property owner for the recovery of the amount of a special assessment, and it has been duly and finally adjudged that the assessment is invalid and that no recovery can be had thereon, no legalizing statute subsequently enacted will operate to nullify the effect of that judgment, and subject that property



but in a way that might have been originally adopted, and may also retrospectively declare immaterial statutory requirements that might have been dispensed with in the first instance.<sup>26</sup> Where the state constitution forbids such legislation, the legislature is powerless to directly validate a void assessment.<sup>27</sup> Laws will not be declared retrospective unless the intent of the legislature to make them so is clearly manifest, and they are subject to strict construction. Re-assessment laws are not subject, as a rule, to these objections, as they are broader and more comprehensive in their scope, and the trend of curative legislation now is strongly in that direction.

### **Jurisdiction.**

**822.** A very late and very able work on Limitations of the Taxing Power, in dealing with the subject of "jurisdictional" defects and requirements divides them into two classes; those which are jurisdictional for the local taxing officers, and those which are jurisdictional in the legislature itself, because the people, the superiors of the legislature, have in written constitutions or inherent restraints upon legislative power, declared they are essential. The former class, such as omissions to describe property, or to file rolls at the time and in the manner prescribed by statute, are jurisdictional because the legislature has ordained that the taxing power shall be exercised in that particular way, but the legislature may change the way, or dispense with it. But the second class, as well as those requirements, such as notice, which are constitutional, or designed to protect vested

to another suit for recovery upon the same demand, and so, when an assessment and a certificate thereon have been duly adjudged void, a subsequent act of the legislature validating the assessment cannot validate the certificate. *McManus*

*v. Hornaday* (Iowa), 100 N. W. 33.

<sup>26</sup> *Nottage v. Portland*, 35 Or. 539, 76 Am. St. Rep. 513, 58 Pac. 883.

<sup>27</sup> *St. Louis v. Clemens*, 52 Mo. 133.



rights, cannot be dispensed with by legislative enactment, or the effect of omission avoided by curative statute.<sup>28</sup>

### Reassessment statutes.

**823.** Owing to the former tendency of the courts to construe all tax proceedings in favor of the tax payer, many cases occurred where the mere non-observance of a very technical matter permitted the tax payer to profit by the neglect, and obtain the benefit of the improvement, while contributing nothing to its payment, to the great detriment both of the contractors and the municipalities. To remedy these evils, curative or reassessment statutes have been passed by several legislatures, and their validity generally admitted. These statutes are commonly in the furtherance of justice, and it may be accepted as a general statement that in all except certain jurisdictional matters, if the defect that makes the assessment void is an irregularity or error that the legislature might originally have authorized, or an omission to do that which it was competent for the legislature to dispense with by statute, it is within the legislative prerogative to authorize by subsequent act the correction of such error or omission, and allow the local authorities to make a new assessment in place of the one void for irregularity or error,<sup>29</sup> and which will be no violation of the constitution

<sup>28</sup> Gray, *Limitations of Taxing Power and Public Indebtedness*, p. 616.

#### *Initial law governs.*

In making a street improvement, and in assessing the cost upon the abutting property, the authorities should be governed by the law in force at the time of the passage of the ordinance for the improvement, with respect to the manner of assessment and the rights and liabilities of abutting owner. *Cincinnati v. Seasongood*, 46 O. St. 296, 21 N. E. 630.

#### *United States.*

<sup>29</sup> *Spencer v. Merchant*, 125 U. S. 345, 31 L. ed. 763, 8 Sup. Ct. Rep. 921; *Lyon v. Alley*, 130 U. S. 177, 32 L. ed. 899, 9 Sup. Ct. Rep. 480; *Farrell v. West Chicago Park Commissioners*, 181 U. S. 404, 45 L. ed. 924, 21 Sup. Ct. Rep. 609.

#### *Arkansas.*

*Rector v. Board of Improvement*, 50 Ark. 116, 6 S. W. 519.

#### *California.*

*Himmelman v. Cofran*, 36 Cal. 411; *Dyer v. Scalmanini*, 69 Cal.



637, 11 Pac. 327; Wood v. Strother, 76 Cal. 545, 9 Am. St. Rep. 249, 18 Pac. 766; Gill v. Oakland, 124 Cal. 335, 57 Pac. 150; Ede v. Cuneo, 126 Cal. 167, 58 Pac. 538; Westall v. Altschul, 126 Cal. 164, 58 Pac. 458; Harnung v. McCarthy, 126 Cal. 17, 58 Pac. 303; Reid v. Clay, 134 Cal. 207, 66 Pac. 262.

*Connecticut.*

Harris v. Ansonia, 73 Conn. 359, 47 Atl. 672.

*Illinois.*

Lafin v. Chicago, 48 Ill. 449; Workman v. Chicago, 61 Ill. 463; Wells v. Chicago, 66 Ill. 280; Chicago v. Wright, 80 Ill. 579; Russell etc. Dist. v. Benson, 125 Ill. 490, 17 N. E. 814; Pardridge v. Hyde Park, 131 Ill. 537, 23 N. E. 345; Freeport St. R. Co. v. Freeport, 151 Ill. 451, 38 N. E. 137; Philadelphia etc. Coal Co. v. Chicago, 158 Ill. 9, 41 N. E. 1102; West Chicago Park Comrs. v. Sweet, 167 Ill. 326, 47 N. E. 728; W. Chi. Park Comrs. v. Farber, 171 Ill. 146, 49 N. E. 427; Foster v. Alton, 173 Ill. 587, 51 N. E. 76; Cummings v. West Chicago Park Comrs., 181 Ill. 136, 54 N. E. 941; Farber v. West Chicago Park Comrs., 182 Ill. 250, 55 N. E. 325; People v. Pontiac, 185 Ill. 437, 56 N. E. 1114; Markley v. Chicago, 89 Ill. 276; Chicago v. Noonan, 210 Ill. 18, 71 N. E. 32; Lusk v. Chicago, 211 Ill. 183, 71 N. E. 878; Chicago v. Sherman, 212 Ill. 498, 72 N. E. 396; Alton v. Foster, 74 Ill. App. 511.

*Indiana.*

Musselman v. Logansport, 29 Ind. 533.

*Iowa.*

Tuttle v. Polk, 84 Ia. 12, 50 N.

W. 38; Gill v. Patton, 118 Ia. 88, 91 N. W. 904.

*Kansas.*

Emporia v. Norton, 13 Kan. 569, 16 Kan. 236; Emporia v. Bates, 16 Kan. 495; Newman v. Emporia, 41 Kan. 583, 21 Pac. 593, and see same case, 32 Kan. 456, 4 Pac. 815; Manley v. Emlen, 46 Kan. 655, 57 Pac. 844; Parker v. Atchison, 48 Kan. 574, 30 Pac. 20.

*Kentucky.*

Cooper v. Nevin, 90 Ky. 85, 13 S. W. 841.

*Maryland.*

Baltimore v. Ullman, 79 Md. 469, 30 Atl. 43.

*Massachusetts.*

Warren v. Mayor, etc., 187 Mass. 290, 72 N. E. 1022; Jordan v. Mayor, etc., Ib.; Hall v. Street Commissioners, 177 Mass. 434, 59 N. E. 68; Gardiner v. Collins, 188 Mass. 223, 74 N. E. 341.

*Michigan.*

Brevort v. Detroit, 24 Mich. 322; People v. Supervisors, 26 Mich. 22; French v. Lansing, 30 Mich. 379; Byram v. Detroit, 50 Mich. 56, 12 N. W. 912, 14 N. W. 698; Townsend v. Manistee, 88 Mich. 408, 50 N. W. 321; Corliss v. Highland Park, 132 Mich. 152, 93 N. W. 254, 610, 95 N. W. 416; Smith v. Detroit, 120 Mich. 572, 79 N. W. 808.

*Minnesota.*

Carpenter v. St. Paul, 23 Minn. 232; St. Paul v. Mullen, 27 Minn. 78, 6 N. W. 424; State v. Ensign, 55 Minn. 278, 56 N. W. 1006; Re Piedmont Ave., 59 Minn. 522, 61 N. W. 678; State v. Egan, 64 Minn. 331, 67 N. W. 77; State v. District Court, 68 Minn. 242, 71 N. W. 27; State v. District Court,



77 Minn. 248, 79 N. W. 971; State v. District Court (Minn.), 103 N. W. 744; State v. District Court (Minn.), 103 N. W. 881.

*New Jersey.*

Bergen v. State, 32 N. J. L. 490; State v. Newark, 34 N. J. L. 236; State v. County of Bergen, 44 N. J. L. 599; Elizabeth v. State, 45 N. J. L. 157; In re Comrs. of Elizabeth, 49 N. J. L. 488, 10 Atl. 363; Howard etc. Institution v. Newark, 52 N. J. L. 1, 18 Atl. 672; Protestant etc. Home v. Newark, 52 N. J. L. 138, 18 Atl. 572; Fountain v. Newark, 57 N. J. Eq. 76, 40 Atl. 212; Brewer v. Elizabeth, 66 N. J. L. 547, 49 Atl. 480.

*New York.*

Howell v. Buffalo, 37 N. Y. 267; In re Van Antwerp, 56 N. Y. 261; Tingue v. Port Chester, 101 N. Y. 294, 4 N. E. 625; Jones v. Tonawanda, 158 N. Y. 438, 53 N. E. 280.

*North Dakota.*

Bridge v. Grand Forks, 1 N. Dak. 309, 10 L. R. A. 165, 47 N. W. 390.

*Ohio.*

Butler v. Toledo, 5 O. St. 225; Raymond v. Cleveland, 42 O. St. 522.

*Oregon.*

Dowell v. Portland, 13 Or. 248, 10 Pac. 308; Nottage v. Portland, 35 Or. 539, 76 Am. St. Rep. 513, 58 Pac. 883; Dumway v. Portland (Or.), 81 Pac. 945.

*Pennsylvania.*

Hepburn v. Curtis, 7 Watts, 300, 32 Am. Dec. 760; Schenley v. Commonwealth, 36 Pa. St. 29, 78 Am. Dec. 359; Kay v. Penn. R. Co., 65 Pa. St. 277, 3 Am. Rep. 628; Menges v. Dentler, 33 Pac.

495, 75 Am. Dec. 616; Grim v. School Dist., 57 Pa. St. 433, 98 Am. Dec. 237; Huidekoper v. Meadville, 83 Pa. St. 156; Erie v. Reed, 113 Pa. St. 468, 6 Atl. 679; Omega St., 152 Pa. St. 129, 25 Atl. 528; Shiloh St., 152 Pa. St. 136, 25 Atl. 530; Twenty Eighth St., 158 Pa. St. 464, 27 Atl. 1109; Morewood Ave., 159 Pa. St. 20, 28 Atl. 123, 132; Chester v. Black, 132 Pa. St. 571, 6 L. R. A. 802, 19 Atl. 276; Bingham v. Pittsburgh, 147 Pa. St. 353, 23 Atl. 395; Chester v. Pennell, 169 Pa. St. 300, 32 Atl. 408.

*Vermont.*

Boyden v. Brattleboro, 65 Vt. 504, 27 Atl. 164.

*Washington.*

Soule v. Seattle, 6 Wash. 315, 33 Pac. 384, 1080; Frederick v. Seattle, 13 Wash. 428, 43 Pac. 364; Cline v. Seattle, 13 Wash. 444, 43 Pac. 367; New Whatcom v. Bellingham Bay Imp. Co., 16 Wash. 131, 47 Pac. 236; State v. Ballard, 16 Wash. 418, 47 Pac. 970; Ryan v. Sumner, 17 Wash. 228, 49 Pac. 487; Tumwater v. Pix, 18 Wash. 153, 51 Pac. 353; Phillips v. Olympia, 21 Wash. 153, 57 Pac. 347; Heath v. McCrea, 20 Wash. 342, 55 Pac. 432; Annie Wright Seminary v. Tacoma, 23 Wash. 109, 62 Pac. 444; Port Angeles v. Lauridsen, 26 Wash. 153, 66 Pac. 403; McNamee v. Tacoma, 24 Wash. 591, 64 Pac. 791; Alexander v. Tacoma, 35 Wash. 366, 77 Pac. 686.

*Wisconsin.*

May v. Holdridge, 23 Wis. 93; Dean v. Charlton, 23 Wis. 590, 99 Am. Dec. 205; Mills v. Charlton, 29 Wis. 400, 9 Am. Rep. 578; Dean v. Borschenius, 30 Wis. 236;



of the United States.<sup>30</sup> But where an assessment is void because of a defect or omission which deprives the assessing power of jurisdiction, a reassessment, after the work is done, is illegal.<sup>31</sup> The original error cannot be cured by repeti-

Dill v. Roberts, 30 Wis. 178; Rork v. Smith, 55 Wis. 67, 12 N. W. 408; Sanderson v. Herman, 108 Wis. 662, 84 N. W. 890, 85 N. W. 141; Schmitgen v. La Crosse, 117 Wis. 158, 94 N. W. 84; Haubner v. Milwaukee, 124 Wis. 153, 101 N. W. 930, 102 N. W. 930.

<sup>30</sup> Spencer v. Merchant, 125 U. S. 345, 31 L. ed. 763, 8 Sup. Ct. Rep. 921.

"There being no express constitutional declaration or prohibition directly applicable to the powers or subject of taxation, and none which, in terms, secure equality or uniformity in the distribution of public burthens, either general or local, there is no clause to which the citizen can with certainty, appeal for protection against an oppressive and ruinous discrimination, under color of the taxing power, unless it be that which prohibits the taking of private property for public use without compensation. . . . This is the great conservative principle of the constitution, by which the rights of private property are to be preserved from violation under public authority; and we should feel bound to give it, as has heretofore been done, a liberal construction for the attainment of so important and valuable an object." Marshall, C. J., in Cheany v. Houser, 9 B. Monroe, 341.

<sup>31</sup> Martin v. Oskaloosa (Iowa), 99 N. W. 557; Hedge v. Same, Ross v. Same.

In these cases, the defect complained of was the assessment according to frontage, instead of according to benefits, as required by statute, and the work done was therefore without authority sufficient in law to charge the abutting owners with liability for its cost. The court say: "Under the ordinance in existence at the time of the work, the cost of such work could not be assessed against, or be made a lien upon, the abutting property. Whatever of obligation existed on account of such work rested solely upon the city. The liability of the abutting owners was the liability that was common to all the taxpayers in the city. Therefrom it is not conceivable that any other conclusion can be drawn than that the attempt to make the debt thus resting upon the city as a whole a charge upon any particular property within its corporate limits was without even the semblance of authority, and was wholly void.

See, also, Zalesky v. Cedar Rapids, 118 Iowa, 714, 92 N. W. 657, which holds that the defects intended to be cured are those inherent in the time or manner of the proceeding, the machinery of the law having once been properly put in motion. It was not intended jurisdictional defects should be cured by such a decision.

But the rule in Minnesota is to the contrary. State v. District Court (Minn.), 103 N. W. 881;



tion, nor can an expense not legally capable of being assessed against private property be made a charge against such property by reassessment proceedings. This would be confiscation, not reassessment.<sup>32</sup> A tax levied in violation of the constitutional rule of uniformity cannot be legalized by a subsequent act or a reassessment,<sup>33</sup> nor can the legislature provide for reassessment when there was no law authorizing an assessment in the first instance, nor can the constitutional requirement of notice, or "due process of law" be overridden.<sup>34</sup> In any case, express statutory authority is necessary,<sup>35</sup> and the power to make a special assessment is not exhausted by its first exercise.<sup>36</sup> It may be levied for work already done,<sup>37</sup> or for work unauthorized when the improvement was constructed,<sup>38</sup> and such authorization is not a denial of due process of law.<sup>39</sup> The petition for a new as-

St. Paul v. Mullen, 27 Minn. 78, 6 N. W. 424; Sec. 36, art. 4, Const. Minn.

<sup>32</sup> Workman v. Chicago, 61 Ill. 463; Schnitgen v. La Crosse, 117 Wis. 158, 94 N. W. 84; Rork v. Smith, 55 Wis. 67, 12 N. W. 408.

<sup>33</sup> Dean v. Borschenius, 30 Wis. 236; and see Weeks v. Milwaukee, 10 Wis. 243.

<sup>34</sup> Dean v. Borschenius, 30 Wis. 236; Dietz v. Neenah, 91 Wis. 422, 64 N. W. 299; Schnitgen v. La Crosse, 117 Wis. 158, 94 N. W. 84.

But the right to be heard as to the amount of the assessment does not include the right to be heard as to the nature of the improvement. And where the statute authorizes an assessment "because of such work having been done without authority of law," the words "without authority of law" refer to assessments which are without authority of law by reason of defects in the proceedings, and not to such as could not be

made under any circumstances because no law authorizes them. Schnitgen v. La Crosse, *supra*.

<sup>35</sup> Tingue v. Port Chester, 101 N. Y. 294, 4 N. E. 625; Dowell v. Portland, 13 Or. 248, 10 Pac. 308.

<sup>36</sup> Freeport St. R. Co. v. Freeport, 151 Ill. 451, 38 N. E. 137.

<sup>37</sup> Warren v. Comrs., 187 Mass. 290, 72 N. E. 1022; Chester v. Pennell, 169 Pa. St. 300, 32 Atl. 408; Seattle v. Kelleher, 195 U. S. 351, 49 L. ed. 232, 25 Sup. Ct. Rep. 44.

The provisions of a statute providing for a reassessment whenever a special assessment is either invalid, or its invalidity is questioned, is not limited in its operation to assessments made prior to its passage. Gill v. Patton, 118 Ia. 88, 91 N. W. 904.

<sup>38</sup> Seattle v. Kelleher, 195 U. S. 351, 49 L. ed. 232, 25 Sup. Ct. Rep. 44.

<sup>39</sup> Martin v. Oskaloosa, 126 Ia. 680, 102 N. W. 529.

But a statute authorizing the



assessment to pay for a completed improvement need not state its actual cost,<sup>40</sup> and upon the levying of such new assessment, the expenses of the former assessment cannot be legally included.<sup>41</sup> But the validity of a reassessment for street paving is not affected, nor subject to collateral attack, because it includes the cost of keeping the street in repair for five years.<sup>42</sup> In making a new assessment for work already completed the city is not required to do unnecessary things, such as the appointing of commissioners to estimate the cost;<sup>43</sup> and when an ordinance is invalid because of defective description of work to be done or materials to be used, an ordinance authorizing a supplemental assessment need not describe the work in detail, under the provisions of the Illinois statute.<sup>44</sup> The order of the court for a reassessment to be made because of defects in the former reassessment ought to specify such former defects so as to be a guide for the local authorities.<sup>45</sup>

### Constitutionality of.

**824.** A statute authorizing the reassessment of an invalid special assessment is not unconstitutional if it omits no requirement nor condition which the legislature could not have dispensed with as prerequisite to the original assessment.<sup>46</sup> A new assessment, pursuant to new legislation,

council to correct omissions or irregularities in proceedings rendering a tax invalid, does not authorize the validating of an invalid assessment by ordinance. *McManus v. Hornaday*, 124 Iowa, 267, 104 Am. St. Rep. 316, 100 N. W. 33.

<sup>40</sup> *Adcock v. Chicago*, 172 Ill. 24, 49 N. E. 1008.

<sup>41</sup> *Laffin v. Chicago*, 48 Ill. 449; *Farr v. West Chicago Park Comrs.*, 167 Ill. 355, 46 N. E. 893.

<sup>42</sup> *Alexander v. Tacoma*, 35 Wash. 366, 77 Pac. 686. But see,

*Young v. Tacoma*, 31 Wash. 153, 71 Pac. 742.

<sup>43</sup> *Gorton v. Chicago*, 201 Ill. 534, 66 N. E. 541.

<sup>44</sup> *Chicago v. Sherman*, 212 Ill. 498, 72 N. E. 396; *Markley v. Chicago*, 190 Ill. 276, 60 N. E. 512; *Chicago v. Hulbert*, 205 Ill. 346, 68 N. E. 786.

<sup>45</sup> *State v. Ensign*, 55 Minn. 278, 56 N. W. 1006.

<sup>46</sup> *Sanderson v. Herman*, 108 Wis. 662, 84 N. W. 890, 85 N. W. 141.

The original proceedings having



may be imposed on lands where a previous unconstitutional assessment had been vacated in equity;<sup>47</sup> and a statute authorizing a municipal corporation to re-assess the expense of a public improvement charged upon the owners and occupants of lands benefited thereby, in proportion to the amount of such benefit, is constitutional, though passed after the improvement has been made and paid for by the corporation.<sup>48</sup> But a tax levied in contravention of the constitutional rule of uniformity, though levied in pursuance of a previous legislative act, or a tax fraudulently and corruptly laid, and unjust and partial in its operation against the provisions of laws existing at the time, cannot be aided or made effectual by a subsequent act for its reassessment.<sup>49</sup>

### Validity of.

**825.** The power to correct, amend and validate taxes and assessments by curative legislation, or to provide for re-levy or reassessment where the tax or assessment is invalidated on account of errors or omissions in the levy or assess-

failed for reasons which the legislature may lawfully obviate, and the basis for taxation still remaining, namely, the public benefit or improvement received, for which the legislature say the property of the citizens should pay, a reassessment may be authorized. *Mills v. Charlton*, 29 Wis. p. 417, 9 Am. Rep. 578.

<sup>47</sup> *Howard etc. Institution v. Newark*, 52 N. J. L. 1, 18 Atl. 672.

<sup>48</sup> *Howell v. Buffalo*, 37 N. Y. 267.

*Additional assessments for benefits.*

In Indiana the board of commissioners has authority to levy an additional assessment to pay for the expense of constructing a gravel road not exceeding the spe-

cial benefits conferred upon the land to pay the cost of the improvement, in case the original assessment proves insufficient, and it may do so of its own motion without a petition. *Commissioners v. Tullen*, 111 Ind. 410, 12 N. E. 298. <sup>49</sup> *Dean v. Borschenius*, 30 Wis. 236.

As to constitutionality of a statute for a reassessment which provides that those who have paid the original invalid assessment without protest shall not be subject to another assessment, see *Warren v. Mayor etc.*, 187 Mass. 290, 72 N. E. 1022.

*Equalizing boards without judicial power.*

A statute authorizing city councils to sit as boards of equalization and pass upon the validity of



ment, is an essential attribute of the power vested in the legislature in its control over the sovereign power of taxation, and is necessarily without limit other than that imposed by the restrictions or limitations of the organic law, in cases where the legislature could originally authorize the tax or assessment;<sup>50</sup> but it cannot make valid, retrospectively, what it could not originally have authorized.<sup>51</sup> The payment of an illegal assessment for a public improvement which has been set aside on appeal by other owners, does not relieve the land owner from paying the balance of an increased reassessment under statutory authority, after applying the amount promptly paid.<sup>52</sup> The validity of the statutory reassessment, on a new hearing, is not dependent on the consent of the land owners to the improvement,<sup>53</sup> nor are objections to the prior assessment relevant, where the power to make it is not impugned.<sup>54</sup> Where the original assessment has been declared void, a new assessment to pay for the improvement is based upon the ordinance providing for the improvement, and not on the void assessment.<sup>55</sup> Special charter provisions for reassessment are not repealed by a general law to the effect that whenever any local assessment shall have been set aside, the cost may be reassessed in the manner provided by such act.<sup>56</sup> Jurisdictional defects in the proceedings necessary to a valid assessment will be cured by a reassessment only when there is express statutory authority therefor.<sup>57</sup>

reassessments is not unconstitutional as conferring judicial power on such bodies. *Heath v. McCrea*, 20 Wash. 342, 55 Pac. 432.

<sup>50</sup> *In re Commissioners of Elizabeth*, 49 N. J. L. 488, 10 Atl. 363.

<sup>51</sup> *People v. Supervisors*, 26 Mich. 22.

<sup>52</sup> *P. & R. C. & I. Co. v. Chicago*, 158 Ill. 9, 41 N. E. 1102.

<sup>53</sup> *Jones v. Tonawanda*, 158 N. Y. 438, 53 N. E. 280.

<sup>54</sup> *State v. South Orange*, 49 N. J. L. 104, 6 Atl. 312.

<sup>55</sup> *Farr v. West Chicago Park Comrs.*, 167 Ill. 355, 46 N. E. 893.

<sup>56</sup> *State v. Egan*, 64 Minn. 331, 67 N. W. 77.

<sup>57</sup> *State v. District Court (Minn.)*, 103 N. W. 881.



**Construction of.**

**826.** A retrospective effect will not be given a statute unless it clearly appears that such was the intention of the legislature, particularly if the rights of the public or of individuals may be injuriously affected thereby.<sup>58</sup> The Pennsylvania supreme court holds that where the legislature has antecedent power to authorize a tax, it can cure, by retroactive law, an irregularity or want of authority in levying it, though thereby a right of action which had been vested in an individual should be divested,<sup>59</sup> notwithstanding its previous decisions that the law of the case when it became complete is an inherent element in it, and if changed or annulled, the right is annulled, justice denied, and the due course of law is violated.<sup>60</sup> It has been held that whatever the legislature may authorize to be done by a municipal corporation, it may do itself directly, and make a reassessment itself,<sup>61</sup> although it is manifest the general statement is too broad and sweeping. A tax laid by authority of law, or an assessment for benefits conferred by a local improvement, creates a duty and obligation which may be enforced by any means which the legislature may from time to time adopt. Individuals upon whom or against whose property such duties and obligations arise, have no vested right in the remedy which was in force when the duty or obligation arose. Until the tax or assessment is satisfied,

<sup>58</sup> Russell etc. District v. Benson, 125 Ill. 490, 17 N. E. 814.

<sup>59</sup> Chester v. Black, 132 Pa. St. 571, 6 L. R. A. 802, 19 Atl. 276; Grim v. School District, 57 Pa. St. 433, 98 Am. Dec. 237; Huidekoper v. Meadville, 83 Pa. St. 156; Erie v. Reed, 113 Pa. St. 468, 6 Atl. 679.

<sup>60</sup> Kay v. Penn. R. Co., 65 Pa. St. 277, 3 Am. Rep. 628; Menges v. Deutler, 33 Pa. 495, 75 Am. Dec. 616.

"The legislature, provided it

does not violate the constitutional prohibitions, may pass retroactive laws, such as in their opinion may affect suits pending, and give to a party a remedy which he did not previously possess, or modify an existing remedy, or remove an impediment in the way of legal proceedings." Hepburn v. Curtis, 7 Watts, 300, 32 Am. Dec. 760; Schenley v. Commonwealth, 36 Pa. St. 29, 78 Am. Dec. 359.

<sup>61</sup> In re Van Antwerp, 56 N. Y.

261.



there is no contract with the public to be violated by the adoption of more stringent measures to enforce payment of these public dues.<sup>62</sup> But if more than one construction of the statute be possible, the one least onerous to the taxpayer should be adopted, especially in the case of special assessments,<sup>63</sup> although legislative acts providing for a review and reassessment of benefits and damages will be liberally construed to favor such reassessment, and every legal intendment will be made against prosecutors who have the benefit of the improvement and make no objection until after the final remedial assessment is made and confirmed.<sup>64</sup> A statute authorizing a reassessment where the original assessment has been declared invalid does not contemplate a direct proceeding for adjudicating the invalidity of the assessment upon any particular lot, but it is sufficient if the illegality of the assessment has been declared in litigation involving other lots.<sup>65</sup> Where such a statute requires the court, in any action arising from an improper assessment of benefits and damages, to stay proceedings and order a new assessment when the original assessment has been declared invalid, it is error to refuse compliance with such requirement.<sup>66</sup>

<sup>62</sup> *In re Commissioners of Elizabeth*, 49 N. J. L. 488, 10 Atl. 363.

"The intention seems to be that nothing shall prevent or stand in the way of repeated reassessments until they shall result in the property paying its proper share of the cost of the improvement." *State v. District Court*, 68 Minn. 242, 71 N. W. 27, by Mitchell, J.

<sup>63</sup> *Barber Asphalt Paving Co. v. Watt*, 51 La. An. 1345, 26 So. 70.

In construing statutes authorizing reassessment of special taxes for street improvements, all reasonable doubts as to the intent of the legislature should be re-

solved in favor of the citizen, and the act should have only such effect as the legislature clearly intended, but the language is not to be turned from its natural and obvious import, so as to defeat the legislative intent. *Dean v. Borschenius*, 30 Wis. 236.

<sup>64</sup> *State v. County of Bergen*, 44 N. J. L. 599.

<sup>65</sup> *Port Angeles v. Lauridsen*, 26 Wash. 153, 66 Pac. 403.

<sup>66</sup> *Haubner v. Milwaukee*, 124 Wis. 153, 101 N. W. 930, 102 N. W. 578; *Cody v. Cicero*, 203 Ill. 322, 67 N. E. 859.



**Must be based on benefits.**

827. Like the original assessment, the new or supplemental benefit must have regard for the benefits conferred, and be tested thereby.<sup>67</sup> When so made, and it appears further that the property was equitably and proportionately

<sup>67</sup> Kadderly v. Portland, 44 Or. 118, 74 Pac. 710, 75 Pac. 222.

*Correcting invalid assessment — Extent.*

Under a statute which provides that where a special assessment is invalid because of irregularities or omissions, the council may "take all necessary steps to correct the same, and to reassess and to levy the same . . . with the same force and effect as an original levy," the certificate theretofore issued on such tax is not made valid by action of the council pursuant to the statute. McManus v. Hornaday, 124 Iowa, 267, 104 Am. St. Rep. 316, 100 N. W. 33.

Such statute authorizes the correction of informalities and irregularities in proceeding only, and cannot be resorted to for the purpose of curing defects, or as a cover for omissions jurisdictional in character. Martin v. Oskaloosa (Iowa), 99 N. W. 557; Hedge v. Same (Iowa), 99 N. W. 557; Ross v. Same (Iowa), 99 N. W. 557.

*Changing words in statute.*

When it is necessary to effectuate the plain purposes of a statute, the word "or" may be changed to "and" or "nor." Folmsbee v. Amsterdam, 142 N. Y. 118, 36 N. E. 821.

*Under new charter.*

For a case of reassessment under a charter granted after the original assessment, see Kadderly v.

Portland, 44 Or. 118, 74 Pac. 710, 75 Pac. 222.

*Validating warrants.*

Under the charter of the city of Portland, the nature of a reassessment to take the place of one invalidated is to supplement the regular proceeding, and to carry to a successful termination that which was inaugurated primarily; and it is effective, if regularly pursued, not only to secure a valid assessment of benefits, but to reach back and validate the warrants, so far at least, as the reassessed benefits are sufficient for that purpose. Duniway v. Portland (Ore.), 81 Pac. 945.

*Invalid attempt at incorporation.*

Contracts for street work which are illegal by reason of an invalid attempt at incorporation, may be validated by a subsequent legal incorporation act so providing. And legislation may validate any contract that could be directly authorized in the first instance. State v. Ballard, 16 Wash. 418, 47 Pac. 970.

*Decision as to facts in original proceeding not conclusive.*

In an action to enforce a reassessment upon land benefited by a street improvement, in pursuance of charter and statutory provisions therefor, the decision of the court in a former cause declaring the assessment invalid for any reason, is not conclusive of any fact appearing in issue at the trial upon



assessed, and that the sum assessed against any parcel of land does not exceed the benefits received, the new assessment is valid, and the statute authorizing it is not unconstitutional as authorizing the taking under the guise of taxation, of private property for public use without compensation.<sup>68</sup> The original order of the corporate authorities in

the reassessment. *Ryan v. Sumner*, 17 Wash. 228, 49 Pac. 487.  
*Not a re-opening of a judgment.*

It is a general rule (without exception in any mere matter of private right) that a statute which annuls the judgment of a court of competent jurisdiction, and defeats vested rights, is void; but the reassessment of a tax under a new grant of authority is not a re-opening of the judgment by which a former assessment was declared invalid and proceedings thereunder restrained. *Mills v. Charlton*, 29 Wis. 400, 9 Am. Rep. 578.

The statute under consideration was one authorizing a reassessment to pay for a patented pavement.

*Personal liability.*

After an assessment for street improvements had been declared void, the legislature authorized a reassessment. In the interim, the lot owner by deed with the usual covenants of warranty against incumbrances sold the rear portion of the property fronting on another and parallel street. As he was the person ultimately liable for the entire amount of the reassessment, it became unimportant as to whether the reassessment was against all the property, or only on the part abutting the street which was improved. *Evans v. Sharp*, 29 Wis. 564.

It seems as if this decision were dangerously near the border line as to the personal liability of a property owner for a special assessment tax.

<sup>68</sup> *McNamee v. Tacoma*, 24 Wash. 591, 64 Pac. 791; *Fogg v. Hoquiam*, 23 Wash. 340, 63 Pac. 234.  
*Discontinuance caused by injunction.*

The fact that after a street improvement was begun a portion of it was stopped by injunction, and the improvement of two intermediate blocks was discontinued, does not invalidate a reassessment for the completed portions, where the assessment is made according to benefits and the plaintiff shows no actual injury. *Lewis v. Seattle*, 28 Wash. 639, 69 Pac. 393.

*Variation from former assessment — Different values.*

The fact that upon a reassessment there were discrepancies as compared with the original assessment, or that the property on the respective sides of the avenue is not assessed exactly the same amount per front foot, falls far short of proving fraud, mistake of fact, or the adoption of an erroneous rule or principle of law in making the assessment. *State v. District Court*, 68 Minn. 242, 71 N. W. 27.

*Jurisdictional errors cured.*

The charter of St. Paul provides that "no error or omission



proceedings to construct a free gravel road is not a final determination of the question of benefits which precludes the assessing board from making a second assessment to meet a deficit in cost,<sup>69</sup> but it must appear from the report that they did in fact ascertain and determine the actual and peculiar benefit received by each landowner,<sup>70</sup> and an application for confirmation of a new assessment is properly denied where it appears that the property has not been benefited in a greater amount than that paid under a previous assessment.<sup>71</sup> Where the original assessment is inadequate, the court may, upon due petition refer the matter to commissioners to reassess benefits to pay for completing the work, or the deficit in case the work be completed;<sup>72</sup> and where the first estimate of cost is too low, and a supplemental assessment has been ordered, the amount first ascertained as benefits is a *prima facie* adjudication thereof, and is final where it is specially found that the property is benefited no more than the amount which is assessed against it,<sup>73</sup> but there is no estoppel on the part of the city to collect upon a new assessment an amount greater than the first assessment which was paid by the owner, where the record fails to show that the original assessment is equal to the full benefit the property may receive.<sup>74</sup> But where the city has passed an ordinance declaring certain assessments illegal, and provided for a reassessment pursuant to statute, it cannot successfully assert the validity of the original assessment, nor successfully resist mandamus proceedings to compel a reassess-

or irregularity, *whether jurisdictional or otherwise, shall prevent a reassessment to the extent of the benefits conferred by such improvement.*" State v. District Court, 68 Minn. 242, 71 N. W. 27.

<sup>69</sup> Kline v. Commissioners, 152 Ind. 321, 51 N. E. 476.

<sup>70</sup> State v. Perth Amboy, 59 N. J. L. 335, 36 Atl. 666.

<sup>71</sup> W. Chi. Park Comrs. v. Met. W. S. El. R. Co, 182 Ill. 246, 55 N. E. 344.

<sup>72</sup> Rogers v. Voorhees, 124 Ind. 465, 24 N. E. 374.

<sup>73</sup> McChesney v. Chicago, 188 Ill. 423, 58 N. E. 982.

<sup>74</sup> Freeport St. R. Co. v. Freeport, 151 Ill. 451, 38 N. E. 137.



ment.<sup>75</sup> Where the benefits have been finally and conclusively determined, and the amount thereof paid by the property owner, the power to further assess is exhausted,<sup>76</sup> and the fact that under a reassessment for benefits the property was charged precisely the amount found in the original assessment under the front-foot rule, is not conclusive as to the new assessment not being made on the basis of, and according to, the benefits actually conferred by the improvement.<sup>77</sup>

### Statute of limitations.

**828.** The only limitation to the right of a municipality to make a re-assessment, unless restricted by its charter or a general statute, is where the lapse of time is so long, and the laches of the city is so great, that the right has become stale, and the city must be deemed to have waived or abandoned it.<sup>78</sup> In cases where the statute fixes a time limit, municipal corporations are bound equally with individuals, but it commences to run only from the time a valid assessment is made, as otherwise there is no confirmation.<sup>79</sup> And where several terms have elapsed between the confirmation of an assessment and an order denying the sale, so that the court has lost jurisdiction in the premises, an order subsequently made denying the sale is not equivalent to setting aside the confirmation, and is insufficient to authorize a reassessment not made within the statutory limit of five years after the confirmation of the original assessment.<sup>80</sup>

<sup>75</sup> *Phillips v. Olympia*, 21 Wash. 153, 57 Pac. 347.

<sup>76</sup> *Cicero v. Green*, 211 Ill. 241, 71 N. E. 884.

Here the benefits precisely equalled the amount of the assessment, as found by the jury, and confirmation of its report precluded any consideration of the question of benefits in proceedings for a new assessment.

<sup>77</sup> *Alexander v. Tacoma*, 35 Wash. 366, 77 Pac. 686.

<sup>78</sup> *State v. District Court*, 68 Minn. 242, 71 N. W. 27.

<sup>79</sup> *Murray v. Chicago*, 175 Ill. 340, 51 N. E. 654; *Kline v. Commissioners*, 152 Ind. 321, 51 N. E. 476; *Fogg v. Hoquiam*, 23 Wash. 340, 63 Pac. 234.

<sup>80</sup> *Doremus v. Chicago*, 212 Ill. 513, 72 N. E. 403.



**Continuation of original proceedings.**

**829.** The proceedings under a new assessment are merely a continuance of the original proceedings, and not a new one. Thus after an application for judgment upon an assessment has been denied on jurisdictional grounds, and a reassessment has been made, and certiorari issued to review the reassessment, the latter proceedings are but a continuation of the original action, and objections thereto may be maintained by those who have paid the original levy, if injured thereby.<sup>81</sup> And as a reassessment is but a re-apportionment of the cost and expense of a local improvement, the imposition may be made either upon the same lands, or part of the same lands, and it may also include other lands.<sup>82</sup>

**Payment of interest.**

**830.** In making a reassessment to cover the cost of a street improvement, the prior assessment having been declared void, the city should include in such new assessment the accrued interest upon the sums due upon such assessment, and mandamus will lie to compel the city to apply money in the special fund provided by the reassessment to the payment of the oldest outstanding warrant, together with accrued interest thereon, even though the fund will be exhausted thereby to the exclusion of some of the outstanding warrants.<sup>83</sup>

<sup>81</sup> State v. District Court (Minn.), 104 N. W. 553.

Under a statute repealing the general laws then in force granting power to make reassessments for street improvements, but providing that "No suit, prosecution or proceeding shall be in any manner affected by such change, but the same shall stand or proceed as if no such change had been made," a reassessment then pending, but under injunction, was considered *a proceeding* within the meaning

of the saving clause, and the council authorized to reassess under the old law. Raymond v. Cleveland, 42 O. St. 522; Chicago v. Noonan, 210 Ill. 18, 71 N. E. 32.

<sup>82</sup> Raymond v. Cleveland, 42 O. St. 522.

<sup>83</sup> Philadelphia M. & T. Co. v. New Whatcom, 19 Wash. 225, 52 Pac. 1063; Heath v. McCrea, 20 Wash. 342, 55 Pac. 432; Lewis v. Seattle, 28 Wash. 639, 69 Pac. 393; Young v. Tacoma, 31 Wash. 153, 71 Pac. 742.



**Duty of property owner.**

**831.** Notice of the proceedings may ordinarily be presumed from the record, and it is the duty of the property owner to appear at the proper time and place, and make known his objections.<sup>84</sup> If he have notice, actual or constructive, and has failed to so appear and object to the confirmation of the assessment as levied, he cannot subsequently raise the objection that his property was assessed in a sum

If there be a reassessment and the sum so assessed be less than that of the original assessment, the lesser sum should be taken from the larger, and interest given as damages only on the balance from the date of payment. *Mayor v. O'Callaghan*, 41 N. J. L. 349.

*Subrogation by city.*

In an action by a city, after a reassessment, to have itself subrogated to the rights of the original warrant holders, whose claims against a street improvement fund the city has been compelled to pay by reason of negligence in failing to provide the special fund, parties against whom a reassessment has been levied cannot question the cities' right to subrogation, where they have paid neither the original assessment nor the reassessment. *Port Angeles v. Lauridsen*, 26 Wash. 153, 66 Pac. 403.

Property owners who have paid an original assessment may object to a reassessment on the ground that property formerly assessed has been assessed at a lower rate, and such objection, if sustained, is fatal. *State v. District Court (Minn.)*, 104 N. W. 553.

A supplemental assessment may

be provided for to cover a deficiency. *Cicero v. Skinner (Ill.)*, 77 N. E. 137.

Cost of collecting and disbursing, and accrued interest on contractors vouchers may be included in. *Id.*

A supplemental assessment need not necessarily be payable in one instalment. *Conway v. Chicago*, 219 Ill. 295, 76 N. E. 384.

*Interest*

Is not allowable on a supplemental assessment payable in one instalment, but provision for such payment does not invalidate the entire assessment. *Conway v. Chicago*, 219 Ill. 295, 76 N. E. 384. And a special assessment for unpaid interest vouchers cannot properly include interest thereon. *Cratty v. Chicago*, 217 Ill. 453, 75 N. E. 343.

The Illinois statute fixing rate of interest on instalments of assessments is valid. *Hulbert v. Chicago*, 217 Ill. 286, 74 N. E. 726. Special assessment vouchers issued in payment of local improvements bear interest at the legal rate. *Chicago v. People*, 116 Ill. App. 564.

<sup>84</sup> *Martin v. Oskaloosa*, 126 Ia. 680, 102 N. W. 529.



more than double the cost of improving the street in front of his property.<sup>85</sup>

### When reassessments may be ordered.

**832.** As the right of reassessment is one purely of statutory creation, it is to the statutes of each state that the inquirer must turn for exact information as to when such reassessment may be authorized. To include such statutes in this work would be improper, but numerous concrete examples are gathered together in this section which well illustrate the tendency of the legislatures to broaden the scope of such statutes, and of the courts to liberally construe them.

**833.** The fact that certain property owners have paid the amount of a void assessment is not of itself a reason why a new one should not be made,<sup>86</sup> and it may be made if the assessment has been adjudged to be void for causes affecting the assessment itself, and not the proceedings on which it rests;<sup>87</sup> under the California statute, there may be a second supplemental assessment to pay expenses of a street opening if the first assessment and a supplementary assessment do not provide sufficient funds;<sup>88</sup> where the original assessment is void, a new assessment to make up a deficiency must conform to the statute which prescribes that the original mode shall be followed, although in such case the new assessment will be also void;<sup>89</sup> if the original ordinance prove defective, it may be amended, if not absolutely void, or the defect cured by a supplemental ordinance and a reassessment made;<sup>90</sup> neither an invalid ordinance, nor the voluntary payment by a property holder of an illegal assess-

<sup>85</sup> *Tumwater v. Pix*, 18 Wash. 153, 51 Pac. 353; *Alexander v. Tacoma*, 35 Wash. 366, 77 Pac. 686.

*California.*

<sup>86</sup> *Wood v. Strother*, 76 Cal. 545, 9 Am. St. Rep. 249, 18 Pac. 766.

<sup>87</sup> *Ibid.*

<sup>88</sup> *Gill v. Oakland*, 124 Cal. 335, 57 Pac. 150.

*Illinois.*

<sup>89</sup> *Workman v. Chicago*, 61 Ill. 463; *Union etc. Ass'n v. Chicago*, 61 Ill. 439; *Bowen v. Chicago*, 61 Ill. 268.

<sup>90</sup> *East St. Louis v. Albrecht*, 150 Ill. 506, 37 N. E. 934.



ment will take away the right to order a reassessment, where the illegal levy is set aside as to all other property holders, nor is it necessary that an ordinance authorizing the same should precede the doing of the work; <sup>91</sup> the fact that an invalid ordinance provides for assessing "contiguous property" does not affect the right of the authorities to levy a new assessment on property benefited to pay for an improvement constructed under such ordinance; <sup>92</sup> an ordinance which has been declared void on appeal for the sole reason that it attempted to divide the payments into installments may afford a proper basis for a new assessment; <sup>93</sup> where the work has been completed, if the statute so provides; <sup>94</sup> where a judgment of confirmation is reversed, it is the duty of the city to cause a new assessment to be levied, where the improvement has been completed by the contractor under an ordinance providing that he shall be paid by special assessment. <sup>95</sup>

**834.** Where the statute provides for a reassessment when the first assessment for a public improvement is insufficient, it must be an "actual" and not an "estimated" insufficiency, that can be ascertained only after the work is completed, and consequently the recommendation of the board that the improvement be made, and other steps in the proceedings which are essential to the validity of the first assessment, are unnecessary. The additional assessment is not a new one, but a supplemental one, and not a proceeding *de novo*; <sup>96</sup> and it is no objection to a new assessment levied pursuant to mandamus from the supreme court that the objectors were not parties to the mandamus proceeding; <sup>97</sup>

<sup>91</sup> Freeport St. R. Co. v. Freeport, 151 Ill. 451, 38 N. E. 137.

<sup>92</sup> West Chicago Park Comrs. v. Farber, 171 Ill. 146, 49 N. E. 427.

<sup>93</sup> Ibid.

<sup>94</sup> Foster v. Alton, 173 Ill. 587, 51 N. E. 76.

<sup>95</sup> Markley v. Chicago, 189 Ill. 276.

<sup>96</sup> Chicago v. Noonan, 210 Ill. 18, 71 N. E. 32, and see Lusk v. Chicago, 211 Ill. 183, 71 N. E. 878.

<sup>97</sup> Johnson v. People, 202 Ill. 306, 66 N. E. 1081.



where there is a deficit, and a proper petition is made;<sup>98</sup> that vouchers have been accepted by the contractors does not release claims against the municipality, except the right to have the assessments collected, and does not prevent supplemental assessments.<sup>99</sup>

**835.** Where the statute provides that improvements shall be constructed under direction, and to the satisfaction of a board, and the cost is to be determined after the work is completed and accepted by such board, a supplemental assessment may not be made to defray the cost where the first one is insufficient, until the amount of the deficiency is accurately determined, which cannot be until the board has ascertained whether the improvement has been completed in accordance with the terms of the contract and ordinance, accepted by the board, and its cost ascertained by them;<sup>1</sup> where the proceedings are to cover additional costs of construction of a free gravel road, under the Indiana statute, there is no question open except the validity and amount of the additional assessment;<sup>2</sup> and an additional assessment thereof cannot be defeated by the fact that the cost of the improvement has been fully paid by the county, and that the purpose of the new assessment was to reimburse the county.<sup>3</sup>

**836.** Where an assessment for a street improvement was illegal because of failure to obtain and submit to the council an estimate of the cost, a subsequent general act authorizing a reassessment and relevy in all cases of prior insufficient assessment and levy, cured the defect in question, and permits the city to proceed to reassess and collect.<sup>4</sup> In pursuance of a curative act a relevy was made by ordi-

<sup>98</sup> *Chicago v. Noonan, supra.*

<sup>99</sup> *Cicero v. Green*, 211 Ill. 241, 71 N. E. 884.

<sup>1</sup> *Sheriffs v. Chicago*, 213 Ill. 620, 73 N. E. 367.  
*Indiana.*

<sup>2</sup> *Goodwin v. Commissioners*, 146 Ind. 164, 44 N. E. 1110.

<sup>3</sup> *Kline v. Commissioners*, 152 Ind. 321, 51 N. E. 476.

*Kansas.*

<sup>4</sup> *Emporia v. Norton*, 13 Kan. 569; *Emporia v. Bates*, 16 Kan. 495.



nance with all due formality of the entire assessment which had been previously declared invalid, with interest, but no new notice of the levy was given except by the publication of the ordinance relieving the assessment. In an action to enjoin the collection of the assessment, the court held that sufficient notice and opportunity to oppose the same were given; that the method prescribed by the statute under which the assessment was apportioned is not so unequal and unjust in its operation as to make it invalid, and that the collection in the present instance should not be enjoined;<sup>5</sup> where a street has been paved, and the expense against the property benefited has been assessed under an ordinance subsequently declared void, the legislature has power to authorize the city to levy special assessments against such property to the extent of the special benefits derived by such property;<sup>6</sup> where an assessment disregarded the statutory requirements that the work should all be done by contract, that the number of contracts should not exceed five, and that when work was to be done at a cost of over \$2000, proposals therefor should be advertised for — a tax laid upon the property benefited by the work is void, but may be reassessed under legislative authority;<sup>7</sup> for repaving, where the first assessment was invalid because no apportionment was provided for by the act under which it was made;<sup>8</sup> where the amount exceeds the statutory limit;<sup>9</sup> and in such case, the proper amount should be assessed on the local district,

<sup>5</sup> *Newman v. Emporia*, 41 Kan. 583, 21 Pac. 593. See same case, 32 Kan. 456, 4 Pac. 815.  
*Kentucky*.

The court which has declared an assessment illegal, may order a reassessment apportioned as required by statute. *Orth v. Park*, 117 Ky. 779, 79 S. W. 206, 80 S. W. 1108, 81 S. W. 251.

*Maryland*.

<sup>6</sup> *Mayor, etc. v. Ullman*, 79 Md. 469, 30 Atl. 43.

*Massachusetts*.

<sup>7</sup> *Warren v. Mayor, etc.*, 187 Mass. 290, 72 N. E. 1022.

*Michigan*.

<sup>8</sup> *Brevoort v. Detroit*, 24 Mich. 322.

<sup>9</sup> *Corliss v. Highland Park*, 132 Mich. 152, 93 N. W. 254, 610, 95 N. W. 416.



and the balance on the municipality at large;<sup>10</sup> where the original assessment was void by reason of the work being illegally let;<sup>11</sup> if a local assessment has been set aside as to certain owners, and on the mutual understanding that it was void, the city refunded to the other owners the amounts paid by them, the fact that the judgment did not include all the owners was no defense to charter proceedings for a reassessment;<sup>12</sup> a reassessment is not void because one notice was given and a meeting held to fix the assessment district, and afterwards a second notice was given and a meeting held for placing the assessment upon the specific lands within this district.<sup>13</sup>

**837.** Where an assessment for street improvements has been laid under a void act and the same was brought before the court by certiorari, and at that time an act had been passed whereby an assessment could be made for such improvement, it is incumbent on the court after setting aside the original assessment to have a proper assessment made under the statutory authority conferred so to do;<sup>14</sup> where there is a deficit in the original assessment;<sup>15</sup> where an assessment has been declared void because of the want of the jurisdictional requirement of a property owner's prior petition, the legislature may, in authorizing a reassessment, dispense with such requirement, since it had the power originally to provide for the doing of the work without such petition,<sup>16</sup> and such reassessment may be made in accord-

<sup>10</sup> *Corliss v. Highland Park*, 132 Mich. 152, 93 N. W. 254, 610, 95 N. W. 416, where the statute limited a local sewer assessment to 5 per cent of the valuation of the property included in the assessment district.  
*Minnesota.*

<sup>11</sup> *St. Paul v. Mullen*, 27 Minn. 78, 6 N. W. 424.

<sup>12</sup> *State v. Egan*, 64 Minn. 334, 67 N. W. 77.

<sup>13</sup> *State v. District Court* (Minn.), 103 N. W. 744.  
*New Jersey.*

<sup>14</sup> *Elizabeth v. State*, 45 N. J. L. 157.  
*Ohio.*

<sup>15</sup> *Butler v. Toledo*, 5 O. St. 225.  
*Washington.*

<sup>16</sup> *Frederick v. Seattle*, 13 Wash. 428, 43 Pac. 364.



ance with the laws existing at the time of such new assessment;<sup>17</sup> under a statute authorizing a reassessment in cases where the original assessment "has been declared void by any court, either directly or by virtue of any decision of such court," no prior adjudication of the invalidity of the assessment in a direct proceeding is necessary before the city can proceed to reassess, it being sufficient if the courts in other cases have determined the illegality of assessments levied in the same manner;<sup>18</sup> and the city has jurisdiction to order a reassessment when a portion of an assessment has been invalidated at the suit of a part of the property owners affected thereby;<sup>19</sup> where after objections by a property owner, an assessment is set aside as invalid, and a new assessment made pursuant to statute, and such owner objects to such new assessment, and appears to contest the same, when the hearing is postponed to a day certain, and on such day postponed to no fixed day, but with the understanding that it be called up after notice to the parties interested, and afterwards an ordinance is passed repealing all old proceedings and authorizing another new assessment — no notice of such new proceedings, other than the statutory one, is required to be given to the objecting owner;<sup>20</sup> because special improvement bonds issued by a city are in the hands of a third person for value, affords no reason why a new assessment should not be made and new bonds issued. It is not the levying of a tax for the benefit of a private person, if the work for which the original assessment was made was public work.<sup>21</sup>

<sup>17</sup> *Cline v. Seattle*, 13 Wash. 444, 43 Pac. 367.

The new assessment district need not be the same as the old one.

<sup>18</sup> *State v. Ballard*, 16 Wash. 418, 47 Pac. 970; *Tumwater v. Pix*, 18 Wash. 153, 51 Pac. 353.

<sup>19</sup> *Young v. Tacoma*, 31 Wash. 153, 71 Pac. 742.

<sup>20</sup> *Alexander v. Tacoma*, 35 Wash. 366, 77 Pac. 686.

*Wisconsin*.

<sup>21</sup> *Schnitgen v. La Crosse*, 117 Wis. 158, 94 N. W. 84.

For a case showing procedure generally, see *Duniway v. Portland (Or.)*, 81 Pac. 945.



**When not permitted.**

**838.** Where a sewer was placed on private grounds, the municipality became a trespasser, and there being at the time of the completion of the sewer no liability on the part of the landowner to pay any proportion of the expenses of its construction, a statute thereafter passed authorizing the municipality, by a new assessment, to impose upon the owner the payment of a portion of the expense, is such retroactive legislation as is prohibited by the Georgia constitution, and therefore void;<sup>22</sup> where the original ordinance for a street improvement providing it should be paid in a single sum, was afterwards amended so that it should be payable in installments, and the cost is not increased thereby, a reassessment is unnecessary;<sup>23</sup> an act authorizing a new assessment to pay for an improvement completed under a former ordinance which has been declared invalid, is void;<sup>24</sup> where there is a finding by the jury on the question of benefits, a new assessment cannot be had to supply a deficiency;<sup>25</sup> where a judgment in a special assessment proceeding is reversed and remanded to allow proof that a certain technical term had a definite, well-known and established meaning, such judgment is not a final judgment disposing of the cause, or that the assessment was invalid, or that the ordinance was so insufficient as to make collection under it impossible. A new ordinance for a reassessment in such case is unnecessary, and without effect;<sup>26</sup> when a special assessment, based on the estimated cost of a proposed improvement, is levied and confirmed, and the contract is let for a sum greater than the assessment, a supplemental assessment cannot be levied for the excess of such contract price before the improvement is completed.<sup>27</sup>

*Georgia.*

<sup>22</sup> *Holliday v. Atlanta*, 96 Ga. 377, 23 S. E. 406.

*Illinois.*

<sup>23</sup> *Trimble v. Chicago*, 168 Ill. 567, 48 N. E. 416.

<sup>24</sup> *West Chicago Park Comrs. v.*

*Farber*, 171 Ill. 146, 49 N. E. 427.

<sup>25</sup> *Cicero v. Green*, 211 Ill. 241, 71 N. E. 884.

<sup>26</sup> *Holden v. Chicago*, 212 Ill.

289, 72 N. E. 435.

<sup>27</sup> *Chicago v. Richardson*, 213

Ill. 96, 72 N. E. 791.



**839.** Under a statute authorizing the payment of a special assessment at any time, with interest from the date of maturity to time of payment, the holder of a voucher who does not know that payments were in fact made some time before its presentation for payment is not entitled to a supplemental assessment to cover any loss of interest;<sup>28</sup> where the board has made a final order levying an assessment for a gravel road, its jurisdiction to assess land under the original notice is exhausted, and in case the first assessment proves insufficient, a new one cannot be legally levied without new notice, and, if levied, its collection may be enjoined;<sup>29</sup> where property owners assessed for a public improvement in a city have paid the assessment and afterwards it has been set aside, the city cannot levy upon them another assessment for the same improvement until it has refunded the money paid;<sup>30</sup> where there has been a sale under a void street improvement assessment, and payment to the city of the amount thereof, such proceedings exhaust the power of sale in the city, and a subsequent reassessment to the true owner and sale thereunder, after refunding the money obtained on the first sale, is void, and an injunction will lie to restrain the second sale;<sup>31</sup>

**840.** Where street improvements are made by a city without compliance with the plain provisions of the charter, which are conditions precedent to the exercise of the power, the city cannot reimburse itself for its outlay by assessing

<sup>28</sup> "Special assessment vouchers are creatures of the statute, and are issued and received in pursuance of statutory provisions, and the holders and owners thereof are chargeable with notice of such provisions of the statute as if set forth and at large in the vouchers and each of them." *Wilmette v. People*, 214 Ill. 107, 73 N. E. 327. *Indiana*.

<sup>29</sup> *Commissioners v. Gurver*, 115

Ind. 224, 17 N. E. 290; *Commissioners v. Jamison*, 115 Ind. 597, 17 N. E. 294, and thirteen other similar cases. *New Jersey*.

<sup>30</sup> *Bayonne v. Morris*, 61 N. J. L. 127, 38 Atl. 819. *Oregon*.

<sup>31</sup> *Dowell v. Portland*, 13 Or. 248, 10 Pac. 308.



the property benefited.<sup>32</sup> A statute authorizing the reassessment of a tax or assessment which has been set aside and declared void by a court “in consequence of any irregularity in any of the proceedings in levying” it, or of “any omission to comply with the forms of law” under which it was made, does not apply to a case where the tax itself was not authorized by law;<sup>33</sup> where street work was done under a contract with a city whose charter required previous notice to the lot-owners to do such work, and such notice was not given, and the work was not done according to the plans and specifications, no legal charge was created against the lots, and the common council had no power to order a reassessment under the provisions of an act giving it such power where a tax has been declared void for some irregularity, “if the lands were properly assessable” (i. e. chargeable with the particular tax sought to be re-assessed and levied thereon), “and the tax was the proper amount which should have been assessed against such lands.”<sup>34</sup>

**841.** It is apparent from a study of the cases that legislative authority is absolutely necessary for authority to

*Washington.*

<sup>32</sup> *Buckley v. Tacoma*, 9 Wash. 253, 37 Pac. 441. See, also, *Newman v. Emporia*, 32 Kan. 456, 4 Pac. 815.

*Wisconsin.*

<sup>33</sup> *Dean v. Charlton*, 23 Wis. 590. 99 Am. Dec. 205.

<sup>34</sup> *Rork v. Smith*, 55 Wis. 67, 12 N. W. 408.

*Duty of city to make.*

*Reilly v. Albany*, 112 N. Y. 30, 19 N. E. 508.

*Evidence sufficient to sustain invalidity.*

In an action to enforce a reassessment of the costs of local improvements, a finding that the property had been duly assessed under proceedings which were in-

valid is supported by the introduction in evidence of the original assessment roll, pleadings, findings and judgment of the superior court and judgment of the supreme court declaring said assessment ineffectual and void. *New Whatcom v. Bellingham etc. Co.*, 16 Wash. 131, 47 Pac. 236.

*Laches.*

Where no reassessment can be made of a void assessment, plaintiff's laches in bringing suit to quiet his title should not deprive him of his remedy. *Carter v. Cermansky*, 126 Iowa, 506, 102 N. W. 438; *Gallaher v. Garland*, 126 Iowa, 206, 101 N. W. 867.

*Estoppel to deny invalidity.*

Where in an action to enforce a



make additional assessments, and that it is not exhausted by a single exercise of such authority, which, being exercised under the sovereign power of taxation, may return again and again to the work in hand, until the object of securing proper contribution from benefited parties has been accomplished.

street assessment, the defendants averred the assessment was invalid, and it was so held, a reassessment was made, and defendants set up the first assessment as a bar. *Held*, they were estopped to deny the invalidity of the first assessment, and that plaintiffs could introduce evidence of the estoppel without pleading it. *Dyer v. Scalmanini*, 69 Cal. 637, 11 Pac. 327.



# INDEX.

(The abbreviation s. a. means special assessments.)

(References are to section numbers.)

## A.

### ABANDONMENT—

- of proceedings, 463.
- what is not an, 463n.
- when owner may recover back for, 463n, 772n, 774.
- what is an, 639.
- failure of consideration, 772n, 774.

### ABUTTING FOOT—

- synonymous with "front foot," 226n.
- assessment made by, when not objectionable, 508n.

### ABUTTING OWNER—

- liability of municipal corporation to, 248.
- remedy for illegal assessment of, 321n.
- distinction between resident and non-resident — petition, 333.
- failure of, to object, as presumption of waiver of notice, 374.
- liability of for s. a. on corner lots, 401.
- liability of, limited to correct amount of s. a., 515.
- no charge against, for s. a. until valid ordinance passed, 419.
- assessment of entire cost of work on, 424.
- objection of, to street work does not prevent, 442.
- improving street by, does not preclude other improvement, 447n.
- not liable for s. a. if time for completion wrongly extended, 457.
- penalty clause in contract not for benefit of, 457.
- liability of, on contract, 461n.
- cannot be assessed for paving viaduct approach, 537.
- assessment must be made in name of, if statute requires, 555.
- assessment against, when names unknown, 555.
- may contest assessment, 563.
- rights of, as to change of established grade, 583.
- obligation of to pay for paving purely statutory, 588.
- liability of, when material variance in cost, 594.
- on opposite sides of street should be assessed equally, 594.
- liability of, for paving opposite public grounds, 594n.
- want of consent of, 622n.
- right of access of, as inviolate as right to property, 641.
- title of, to soil in street — removal of, 664n.



## INDEX.

(References are to section numbers.)

### ABUTTING PROPERTY—

- definition of, 303.
- in general, 303, 304, 322.
- must be charged with cost of street work, 404.
- assessability of non-abutting property, 434n.
- council agent of law in making contract chargeable on, 451.
- cannot be taxed for temporary improvements, 590.
- assessment of non-abutting property, 622n.
- damages to, from change of grade—how estimated, 665n.

### ACTUAL NOTICE—

- definition of, 361.
- when necessary, 361, 362.

### ACQUIESCENCE—

- waiver and — same as estoppel — may prevent contest of s. a., 737.

### ADEQUATE REMEDY AT LAW—

- where party aggrieved has, equity will not interfere, 799.
- except under some appropriate head of equity jurisdiction—  
when, 797.

### ADJACENT PROPERTY—

- definition of term, 305.

### ADJOINING PROPERTY—

- definition of term, 306.
- payment for grading, 786n.

### ADJOURNMENTS—

- from time to time after notice, 366.

### ADMINISTRATOR—

- authority of, to bind estate by signature to petition, 332n.

### ADOPTION—

- of ordinance, 382, 382n.

### ADVERTISING AND PRINTING—

- when expense of, included in cost of work, 526.

### AFFIDAVIT—

- of mailing of notice, 365.
- defect in, when not available as a defense, 366.
- averment contradicting, of posting, 815n.

### AGRICULTURAL LANDS—

- assessable under certain conditions, 294, 476, 502n.
- temporary occupation as, creates no exemption from s. a., 316n.
- where no benefits result, s. a. erroneous, 497.



## INDEX.

(References are to section numbers.)

### ALABAMA—

when "tax" does not include "special assessment," 22.  
clause in constitution of, as to equality and uniformity, 68.

### AMBIGUOUS FACTS—

when power to levy s. a. will not presume error, 621n.

### AMENDMENT—

or repeal of ordinance can only be by ordinance, 383.  
effect of amending law under which passed, 434n.  
of law pending improvement proceedings, 438n.

### AMOUNT OF ASSESSMENT—

modification of, 574.  
must appear in dollars and cents to authorize judgment, 574.

### APPEAL—

city charter giving right of, but not providing for notice, unconstitutional, 143.  
where, given, property rights not affected without due process, 144.  
power of Legislature as to, almost unlimited, 146.  
proper remedy where extra work included in s. a., 455n.  
unnecessary when contract let without notice, 461n.  
return of commissioners on, not conclusive, 520.  
damages on, appeal, 657n.  
Legislature cannot make, only remedy, when certiorari allowed by constitution, 745.  
does not raise question of validity of assessment, but of amount, 747n.  
regulation by statute, 755.  
when allowable, 756.  
what matters considered on, 757.  
when, exclusive remedy, 758.  
not where the proceedings are invalid—may recover in trespass, 758n.  
nor when there is an unauthorized change of grade, 759.  
when appeal not exclusive remedy, 760, 761n.  
unnecessary from decision of limited tribunal beyond its jurisdiction, 760.  
fraudulent representations by city officers, 760n.  
non-compliance with contract, 760n.  
cost of unauthorized work, 760n.  
assessment for work already done, 760n.  
waiver of right to appeal, 761.  
an, waives all questions as to the regularity of the assessment, 761.  
burden of proof on, 762.  
miscellaneous cases on, 762n.  
failure to take statutory, will not validate void s. a., 819.



## INDEX.

(References are to section numbers.)

### APPEARANCE—

- notice waived by, 350n, 374, 375.
- legal defect in notice, not waived by, 376.

### APPLICATION—

- for confirmation of s. a. may include delinquent general taxes, 624.
- of equity principles to varying states of facts, 809-815.
- equity will restrain sale of property for illegal tax, 810.
- owners of property assessed may enjoin diversion of fund, 811.
- assessment on part of property improved, 812n.
- apportionment of reduction in amount of, 812n.
- extrinsic evidence of cost of work, 812n.
- conditions precedent to making valid s. a. not to be omitted, 813.
- omission of conditions precedent—filing specifications, 813n.
- for judgment in excess of cost, refused, 814.
- collection larger than allowed, 814n.
- omission to assess property in district, 814n.
- sale of several lots together, 814n.
- delay—shortage of fund—recovery of costs of suit, 814n.

### APPOINTMENT—

- of commissioners or appraisers, 510-513.

### APPORIONMENT—

- some system of, necessary for taxation, in every form, 11, 54, 210.
- rule of, under police power, may be made according to benefits, 40.
- s. a. under police power, unconstitutional because no, 42.
- rule of, in Wisconsin constitution, 120.
- limitation on power of s. a., 203.
- courts will not interfere with legislative discretion over, 211, 212.
- is a purely legislative function, 211n, 212.
- question of fraud in, reviewable by courts, 212.
- principles of equality and uniformity apply to, 214.
- notice and hearing essential, 218.
- by front foot rule, 219-226.
- by area, 229-230.
- when statute provides no rule of, city may adopt fair, 231.
- in general, 465-469.
- fixing taxing district, 465.
- rule of, must be applied in good faith, 467.
- must appear on the face of the proceedings, 467.
- absolute equality not expected in, 468.
- reported to Council by city engineer, ratified by Council, is its act, 468.
- constituent parts of same improvement, 469n.
- between remainderman and tenant by courtesy, 469.
- legislative discretion over, not a levy, but adoption of a rule, 469n.
- between leasehold and remainderman, 495.



## INDEX.

(References are to section numbers.)

### APPORTIONMENT (Continued).

disregard of, by taxing power vitiates s. a., 501.  
may be on frontage basis, if Legislature directs, 501.  
evidence as to rule of, 571n.  
construction of, statute by highest State court conclusive on U. S.  
Supreme Court, 588.  
erroneous, makes s. a. void, 622n.  
determination as to, between public and owners, 755n.  
of tax between life tenant and remainderman, 789n.  
of reduction in amount of assessment, 812n.  
reassessment is a reapportionment, 829.

### APPRAISERS

SEE COMMISSIONERS.

when report as to s. a. not a compliance with statute, 481.  
principle upon which s. a. made, must appear in, report, 481.  
should be free from legal disability, 511.  
must take oath before entering on duties, when statute requires, 514.  
when failure so to do does not invalidate s. a., 514.  
after appointment are *de facto* officers without oath, 514.  
do not have to be re-sworn in making re-appraisal, 514n.  
judgment of, conclusive in absence of fraud or mistake, 515.  
report of, *prima facie* evidence of its validity, 516.  
errors in — amendment, 516n.  
must act jointly — signatures, 517.  
death or absence of one, 518.  
objections to report of — when made, 519.  
as witnesses, 521.  
presumptions as to acts of, 523.  
salaries of local board not included in cost of work, 527n.

### ARBITRARY ASSESSMENT—

for an, for cost of work, see 475n, 622n.

### ARBITRARY LEGISLATION—

Fourteenth Amendment a safeguard against, 138.  
fixing taxing district not subject to unrestricted or, 213.

### ARBITRARY POWER—

right to fix district and apportion benefits does not give, 440.

### AREA—

assessment by, upheld, 75n, 229-230, 555.  
for drains frequently upheld, 264.  
invalid, where law requires s. a. by benefits, 469.  
upon size or width of lot, not considering value, void, 555.  
certificate of city engineer as to assessment by, and benefits, 555n.



## INDEX.

(References are to section numbers.)

### ARKANSAS—

- when "tax" does not include "special assessment," 22.
- clause in constitution of as to equality and uniformity, 69.

### ARID LANDS—

See IRRIGATING ARID LANDS.

### ARTICLES OF CONFEDERATION—

- provision in, as to state sovereignty, 52.

### ASSESSMENT—

- See SPECIAL ASSESSMENTS; BENEFITS; ASSESSMENT ROLL.
- meaning of, in constitution, 50.
- of cost of work, 58, 556.
- by area, upheld, 75n, 230, 555.
- by benefits, does not conflict with equality, etc., clause, 104n.
- imposition of, within taxing power of Legislature, 122.
- when notice of, required, 142, 326.
- void, when made after performance of contract, p. 173n.
- must show upon its face compliance with statute, 186n.
- according to cost, 227-228.
- by area, 229-230.
- by value, 231.
- by benefits, 232.
- charge on property recoverable of future owner, 248n.
- additional, 254.
- conveyances to avoid, 303, 322.
- initiatory proceedings, 325, 326.
- omitting lot from — fraud, 461n.
- objection that area of, is too small unavailing, 469.
- rule for, of benefits, 475.
- under front foot rule — compliance with statute, 481.
- objections to — when made, 484.
- in excess of value of property, 485.
- benefit, held valid, 496.
  - invalid, 497-499.
- extended report of an approved, 496n.
- illegal agreement vitiates, 497.
- uniform, improper where advantages to lots vary, 499.
- must not exceed benefits, 499n, 502n.
- under front foot rule, 500-508.
- by frontage must operate uniformly, 501n.
- each lot liable, not exceeding maximum, 501n.
- valid under frontage rule, 506.
- invalid under frontage rule, 507, 508.
- making, before estimate of cost, 527n.
- in excess of cost of work, invalid, 527, 527n.
- of each parcel separately, 541.



## INDEX.

(References are to section numbers.)

### ASSESSMENT (Continued).

- omission of lot from, 542.
  - to assess horse railway renders s. a. void, 542n.
- against whom, made, 550.
- when, may be made, 551.
- requisites in making, 552.
- as a ministerial act, 553.
- of property in two assessment districts, 553.
- by size or area, 555.
- when should be made against property sold, 558.
- what, proceedings must show, 559.
- who may contest, 563.
- credit for previous void, 563.
- amount of assessment — modification, 574.
- error and amendment, 575.
- for sewers by benefits, 599-603.
- separate — invalidity of one, 620n.
- consolidation of several, 621n.
- at specified percentage, 621n.
- for work already done, 621n.
- mere informalities in, 621n.
- contributions by public as affecting, 621n.
- agreement between city and owners, 621n.
- will be set aside when grossly unequal, 621n.
- made on erroneous assumption, 622n.
- when entire, invalidated, 622n.
- an, which is illegal, not aided by ratification, or redemption provisions, 700.
- unconstitutional, need not be declared void to obtain recovery, 775.
- valid on its face, 782.
- invalid on its face, 783.
- rule as to recovery back same in taxes and, 784.
- in excess of benefits, constitutes a taking, and injunction may issue, 795.
- may become confiscation, 796n.
- void for defect of jurisdiction, incurable by reassessment, 823.

### ASSESSMENT DISTRICTS—

See TAXING DISTRICTS.

### ASSESSMENT ROLL—

- in general, 548.
- existence of, a fact essential to jurisdiction, 548.
- form and general outline, if provided by statute, to be followed,
  - competency of, as evidence — instructions, 571n.
- if lost or destroyed, correct copy may be restored by order, 571n.
- omission to certify duplicate, 620n.
- filing of, in wrong place, 621n.



## INDEX.

(References are to section numbers.)

### ASSESSMENT ROLL (Continued).

- wrong heading in, 621n.
- insufficient return on, 622n.
- objections to, not urged at confirmation, deemed waived, 629n.
- amount of both benefits and damages appearing in, 720n.

### ASSENT—

- requiring, of certain proportion of property owners, 436n.

### ASSIGNMENT—

- of contract for work not against public policy, 460.
- does not terminate same, 460.

### ASSUMPSIT—

- will not lie to collect paving assessment, 686n.
- nor for construction of a sewer, 686n.
- will lie to enforce tax when no other method provided by statute, 766.

### ATTORNEY—

- effect of signature to petition by, 332.

### ATTORNEY FEE—

- when, for lien foreclosure may be included in cost of work, 526.

### AUTHORITY—

- that for which there is competent, is not a nuisance, 581.

## B.

### BENEFITS.

- sole ground for authority to levy special assessments, 3, 11, 12, 12a, 14, 20n, 30, 31, 32, 33, 36, 37, 38, 39, 54, 106, 204, 206, 209, 212, 220, 223, 228, 232, 233-241, 248, 254, 263, 279, 286, 287, 289, 292, 296, 301, 420, 470, 480, 523n, 550, 552, 555, 587, 602, 613, 614, 642, 654.
- difference in mode of ascertaining, between special taxation and special assessment, 19.
- but not for special taxation, 19.
- but land owner may have question of, submitted to a jury, 19.
- preservation of public health is a, 43.
- drains may be constructed without consideration of, 43n.
- review of, matter of legislative discretion, 146.
- offset of, and damages, 156, 483, 499, 536, 645, 654.
- limit of legislative determination as to, 180.
- when courts will not interfere with legislative standard of, 181.
- repavement as constituting a, 185.
- a limitation on power of s. a., 203.
- when, held unnecessary, 205n.



## INDEX.

(References are to section numbers.)

### BENEFITS (Continued).

- can be determined only by a reasonable assessment, 223n.
- when, are basis of s. a., the return of commissioners must show it, 224.
- principle of, a limitation on amount of assessment, 225, 499n.
- no necessary inconsistency between front foot and, rules, 225.
- are a question of fact, 228.
- cannot be assessed on property outside of district, 228.
- assessment by, requires actual view of property, 232.
- in general, 233-241, 470.
- railroad property, when not susceptible of, 246.
- repairing and maintenance do not cause, 250.
- bridges and viaducts may cause, 255.
- special, must attach to taxed property, 256n.
- apportionment according to, proper, 257.
- to contiguous property by sewers limit of s. a., 269.
- principle of, applicable to irrigation arid lands, 271.
- enhancement in value of fee only correct standard of, 289.
  - is limit of assessment for, 706.
- ordinance excluding consideration of, void, 420, 420n.
- ordinance requiring paving between tracks not evidence of, 432.
- when law requires, and damages both assessed, proceedings in disregard are *coram non judice*, 436.
- "several benefits"—"special benefits"—distinction, 470.
- conflicting decisions as to, 471-474.
- must be actual and not constructive or arbitrary, 472.
- s. a. in excess of, is taking without compensation, 472.
- principle of, denied in Iowa formerly, 473.
- principle of, acknowledged to an extent wider than application, 474.
- turnpike franchise—when not susceptible of, 474n.
- finality of assessments for, 474n.
- rule for assessment of, 475.
- amount assessed cannot exceed the special, 476.
- are a question of fact, 477.
  - and this implies a hearing, 477.
  - for determination by local authorities, 478.
- when assessment for, may become confiscation, 478n.
- record of s. a. for, must affirmatively show compliance with essentials, 480.
- assessment under rule of, not necessarily vitiated if made by frontage, 481.
- future, not to be considered, 482, 604.
- confining s. a. for, to contiguous property, is not necessarily a special tax, 485.
- assessments in excess of value of premises, 486-494.
- miscellaneous rulings on assessments for, 495.



## INDEX.

(References are to section numbers.)

### **BENEFITS (Continued).**

- may be assessed against lots in one ward to pay for land condemned in another for park, 495.
- assessments for, held valid, 496.
- invalid, 497-499.
- reclamation statute of California requires s. a. according to, 496.
- evidence of, and damages in street openings, 496n.
- when, assessed against and dedicated for street, 496n.
- rule of, enhancement in value, 499n.
- no, no liability, 499n.
- growth of principle of, 501.
- principle of, a limitation on frontage rule, 501n.
- finding of commissioners on, conclusive except for fraud or mistake, 515.
- squares formed by street intersections assessable for, 538.
- assessed in gross on several lots, 541n.
- assessment must not exceed, conferred, 552.
- evidence as to, 571, 571n.
- assessments for sewers by, 599-603.
- review of, for sidewalks, 619.
- improper consideration of, 622n.
- over-assessment of, 630n.
- meaning of term "special benefits," 642n.
- verdict where, less than damages, 642n.
- no offset of, against damages for unlawful change of grade, 644.
- special as against general — change of grade, 665n.
- immaterial that, and damages both appear on assessment roll, 720n.
- certiorari not proper to review amount of, 750.
- evidence as to, must appear in record, or court will not review, 750.
- assessment exceeding, 750n.
- reassessment statutes must be based on, 827.
- amount of, limit of reassessment, 827.

### **BIDS AND BIDDERS—**

- written proposal, bid and written acceptance constitute binding contract, 448.
- free competition in bidding a material right, 449, 452.
- right to reject any and all bids usually reserved, 450.
- bidders should have ample information on which to base bids, 450n.
- division of contract after receipt of bids, 450n.
- Council may choose between — when, 451.
- when contract may be let in separate parts because, unsatisfactory, 455.
- combination of — delay, 815n.

### **BLOCK—**

- definition of, 311.



## INDEX.

(References are to section numbers.)

### BOARD OF PUBLIC WORKS—

duty of, to determine what is reasonable time, 357.  
determination of, conclusive against collateral attack, 357.  
vested with large powers as to determining improvements, 509.  
has been held to be a fair and impartial tribunal, 641.

### BOND ACT—

validity of legislative, 532, 562.

### BONDS—

issuing, for parks, 82n.  
priority of street improvement, 132.  
inaccuracy in, when does not avoid s. a., 402.  
failure to require, from contractor, 461n.  
void, when contract *ultra vires*, 461n.  
irregularity in preliminary, 621n.  
requiring two, with one bid, 621n.  
assessment to pay improvement bonds — estoppel, 731n.  
action commenced after issuance, as to conclusiveness, 737n.  
as proof of regularity of proceeding, 800n.

### BREAKWATER—

See LEVEES.

may be constructed by s. a., 50n, 258.

### BRIDGES AND VIADUCTS—255.

probable effect of construction of in future, on benefits, not considered, 482, 482n.  
constructing approaches to two, as one improvement, 545.  
collection for, in district created in county, not made by elected county officers, 689.

### BUILDING—

the word, as used in the statutes, includes paving, 588.

### BUILDINGS—

must be included in compensation when there is a taking, 652.  
removal of dangerous, 653n, 655.  
duty of owner to use reasonable care in protection of, 655.

### BURDEN OF PROOF—

See EVIDENCE.

## C.

### CALIFORNIA—

distinction between "tax" and "special assessment," 11.  
when "tax" does not include "special assessment," 24.  
meaning of "assessment" in constitution of, 36.



## INDEX.

(References are to section numbers.)

### CALIFORNIA (Continued).

equality and uniformity clause in constitution of, 71-73.  
constitutional provisions as to taking, 154.

### CAVEAT EMPTOR—

application of maxim, 702, 743.

### CEMETERIES—

are subject to s. a., 205n.  
unless specially exempt by statute, 317.  
property of, not subject to sale for unpaid s. a., 702n.

### CERTIFICATE—

when, for work done, illegal, 450n.  
failure to furnish, as to benefits, renders s. a. illegal, 480.  
of city engineer, as to assessment by area and benefits, 555n.  
what must appear on, of contractor for street work, 561, 561n.  
of s. a., liability for payment, 668-676.  
usual medium of collection, 680.  
assignment of—of what holder chargeable with notice, 679n.  
title under tax, is *stricti juris*.  
date when, to be issued determined by the contract, 740n.  
insufficient statement in, 794n.  
including work chargeable to city, 794n.  
when assignee of, not bound by judgment, 815n.

### CERTIFICATE OF ASSESSOR—

is jurisdictional, and cannot speak in doubtful terms, 438.  
ambiguity in, 501n.  
when controlling, 506n.  
not conclusive as to assent of proprietors, 521.  
of tax sale, 530n.  
when objection that, does not show basis of s. a., without force, 560.

### CERTIORARI—

when petitioners for, cannot object to certain omissions, 526.  
in general, 745.  
when writ of, will issue, 746, 747.  
action of court upon, 748.  
when writ of, will not issue, 749.  
assessment of benefits improperly made will not justify, 750.  
to whom writ directed, 752.  
answer to petition for, 752a.  
pleading and practice, 753.  
amending record on, 753n.  
when averments of answer taken as true, 753n.  
when court will not interfere, 754.  
when, the property remedy for irregularities, etc., 799.



## INDEX.

(References are to section numbers.)

### CHINESE LABOR—

- conditions in contract prohibiting employment of, void, 443.
- forbidding employment of, or alien labor, a restriction, 452.
- unconstitutionality of statute forbidding, 452n.

### CITIES—

See MUNICIPAL CORPORATIONS.

### CITY ATTORNEY—

- when not chargeable with notice, 359n.

### CITY CHARTERS—

- are public acts, of which courts take judicial notice, 196, 576.
- provisions in, when not limitations on power of Council, 196.
- conflict between general and special, 201n, 214.
- provisions in, as to notice, cannot be limited by Council, 353.
- in Missouri, are not public acts, 576.

### CITY OF CHICAGO STANDARD—

- insufficient as term of description for fire-hydrant, 427.

### CITY ENGINEER—

- ordinance directing, to make repairs without notice, 400.
  - to have street graded, 403.
  - paved, if advisable, 405.
- certain details properly to, 408.
- cannot order sidewalks except as by ordinance, 409.
- may determine if materials comply with ordinance, 430.
- effect of ordinance requiring, to advertise for proposals, 431.
- may not vary work so as to change cost, 431.
- attempt to vest discretionary powers in Council and, void, 445.
- powers over sewers which Council cannot delegate to, 446.
- discretionary power of Council cannot be delegated to, and street superintendent, 447.
- cannot increase cost of improvement after contract let, 447.
- cannot vary street improvement contract made by Council, 455.
- determination by, of materials to be used, avoids contract, 456.
- when contract with, shows his disqualifications as appraiser, 512.
- surveying by, or assistant, not added to cost of work, 525.
- presumption that, prepared plans, etc., according to ordinance, 534.
- may make assessment when required by statute, 553.
- certificate of, for assessment by area and benefits, 555n.
  - of compliance with contract—how satisfied, 561n.
- must comply with instructions of Council as to report on work, 561.

### CLERICAL ERRORS—

See OMISSION.

- in omitting letter from given name of commissioners, does not vitiate s. a., 512.



## INDEX.

(References are to section numbers.)

### CLERICAL ERRORS (Continued).

- in given name of a commissioner, 523n.
- caption in assessment roll for a "special tax" amendable as, 540.
- in name of property owner, 550.
- amendments to correct mere, allowable, 575.
- but improper erasures not allowable, 575.
- changing words in statutes, 827n.

### CLOUD ON TITLE—

See EQUITY.

- equity will interfere to prevent or remove, where it affects substantial rights, 790.
- where s. a. is void on its face there is no, to remove, 791.
- where certificate of sale is a, 791n.
- s. a. made under unconstitutional statute is no, 791.
- extrinsic evidence in suits to remove, 793, 793n.
- failure to object in time prevents owner from disputing s. a. in suit to remove, 794.

### COERCION—

- in law or fact, or ignorance—when necessary for recovery of void tax, 773.

### COLLATERAL ATTACK—

- creation of drainage districts not subject to, 265.
- judgment of confirmation where want of jurisdiction, subject to, 265.
- conclusiveness of determination of board of public works, 357.
- on condemnation ordinance, 399.
- ordinance for paving, 405.
- curbing, 408.
- upon jurisdiction, 438.
- commissioners for error of judgment is not competent, 515n.
- report of commissioners as to view of premises subject to, 522.
- determination of corporate limits not subject to, 537.
- assessment of two lots together not subject to, 541n.
- erroneous omission from assessment of property on one side of street, 542n.
- on judgment confirmation, in mandamus for payment inadmissible, 631n.
- where there is jurisdiction, as to prior irregularities inadmissible, 633.
- instances where, not permitted, 634.
- recital of jurisdictional facts conclusive against, 635.

### COLLECTION—

- in general, 679.
- method of, almost uniformly prescribed by charter, 679.
- occasionally, through same process as general taxes, 680.



## INDEX.

(References are to section numbers.)

### COLLECTION (Continued).

in practice, usually enforceable through certificates, 680.  
of an assessment an entirety — must stand or fall as a whole, 680.  
from owners is collection from the property, 679n.  
by city, 681.  
must show affirmatively compliance with legal requirements, 681.  
no recovery where assessment illegal, 681n.  
duty of city to make — levy of tax, 681n.  
mere irregularity will not prevent, 681n.  
by contractor, 682.  
from property exempt from execution, 686.  
who may make, 689.  
pleading in proceeding for, 691.  
what complaint must aver, 691n.  
when complaint sufficient, 691n, 692n.  
counterclaim — demurrer, 692.  
when demand for payment unnecessary — oral return, 692n.  
joinder of actions, 692n.  
    plaintiffs, 692n.  
parties defendant, 692n.  
what sum is “properly chargeable,” 697n.  
from railroads, 701.  
defenses to, proceedings, 703.

### COLORADO—

when “tax” does not include “special assessment,” 25.  
power of s. a. attributed to police power in, 40, 50.  
equality and uniformity clause in constitution of, 74, 75.

### COLLUSION—

proof of, between bidders, will avoid contract, 449, 450.

### COMMISSIONERS—

See APPRAISERS.

must actually view premises, 232.  
fixing of district may be left to, 232.  
legal defect in notice of filing report of, not waived by appearance, 376.  
appointment of, before passage of ordinance, invalid, 419.  
duty of, in making assessment for benefits, 475.  
when report of, fatally defective for failure to certify benefits, 479.  
in general, 509.  
appointment and qualifications of, 510-513.  
oath of, 514, 818.  
judgment of, 515, 516.  
must act jointly — signatures, 517.  
death or absence of one, 518.  
objections to report of — when made, 519.



## INDEX.

(References are to section numbers.)

### COMMISSIONERS (Continued).

evidence of, 520.  
as witnesses, 521.  
view of premises by, 522.  
presumption as to acts of, 523.  
decisions as to powers and duties of, 523n.  
sessions of board of — recess, 523n.  
approval of board of, 523n.  
legality of board of — how questioned, 523n.  
reference to, 523n.  
cannot assess street not named in order, 523n.  
proof of notice of meetings of, 523n.  
time for making s. a. usually in the discretion of, 551.  
mandatory requirement as to certifying assessment for construction, 560.  
evidence as to disqualifications of, 571n.  
confirmation of report of, is a judgment, 630n.  
when determination of, as to what property benefited, final, 759.  
validity of acts of, may be inquired into by *quo warranto*, 765.  
charge that, are not freeholders, 815.

### COMMON COUNCIL—

Legislature may vest, with power of s. a., 216.  
may construct sewers under authority to maintain streets, 267.  
acts *quasi* judicially in determining sufficiency of petition, 335.  
proceedings of, not void because member is a petitioner, 336.  
judges of necessity of the work, 342.  
after jurisdiction acquired, may take further necessary action, 436.  
as a tribunal, 436n.  
powers of — in general, 439.  
discretion of, 440, 441.  
what, may do, 442.  
    may not do, 443.  
cannot bargain not to open or extend a street in future, 443.  
powers of, in letting contracts, 451.  
powers which cannot be delegated by, to city engineer, 446, 447.  
control of, over s. a. funds, 447n.  
may advertise for bids and let contract before passing ordinance, 449.  
powers of in letting contracts, 451.  
interest of member of, in contract, 461n.  
reference of contract to committee of, 461n.  
power of fixing taxing districts usually vested in, 465.  
action of, in determining what property benefited, final, 501n.  
when, must appoint commissioners for each particular case, 510.  
cannot instruct commissioners how to make assessment, 510.  
primarily judges of competency of commissioners appointed by them, 511n.



## INDEX.

(References are to section numbers.)

### COMMON COUNCIL (Continued).

- when adoption of resolution for advertising, etc., adopts plans, 534.
- may determine material for continuous pavement at street intersections, 538.
- has authority, under statute, to ordain what sewers shall be main sewers, 600.
- charter authority to lay down *necessary* sewers, a limitation on, 601.
- power of, over sidewalks, 618.
- ratification of assessment by, 621n.
- members of, being taxpayers, does not invalidate s. a., 621n.
- confirmation by, conclusive only when made so by statute, 632.
- certiorari should run to the, and not to the city clerk, 752.
- when action of, final, 758n.

### COMPENSATION—

See also **FOURTEENTH AMENDMENT; TAKING.**

- when, of appraisers included in cost of work, 526.
- commissions and cost of collection, when included, 526.
- must be made for land taken, 536.

### COMPLAINT—

See **PLEADING.**

- allegation in, as to giving notice, 356.

### COMPLETION OF WORK—

- when two weeks late, and lien established before suit brought, 690.

### COMPLIANCE—

- substantial, with statute, 621n.
- non-with charter provisions, 622n.

### COMPUTATION—

See **TIME.**

### CONCLUSIVENESS—

- of improvement bond, 562.
- judgment of confirmation, 630.
- assessment, 630n.

### CONDEMNATION—

- Legislature may authorize, of fee-simple of lands for streets, 535.
- proceedings for, are an entirety, 535.
- s. a. collateral to, 535n.
- hearing on necessity for, 535n.
- assessing amount on property not taken, 535n.
- effects of, 536.
- bar to second proceedings—abandonment, 536n.
- dismissal of proceedings, 536n.



## INDEX.

(References are to section numbers.)

### CONDEMNATION (Continued).

effect of judgment of — who must enter, 536n.  
procedure in — how jury sworn, 536n.  
interest on award for land taken runs from date of judgment of,  
664.

### CONDITIONS PRECEDENT—

to right of s. a. are jurisdictional, and usually mandatory, 323.  
notice may be, to passage of valid ordinance, 350.  
giving notice in manner prescribed a, to jurisdiction, 376.  
legal enactment of ordinance, to valid s. a., 380.  
unanimous vote on ordinance, to entry of order, 38.  
statutory requirements as to filing proof of publication are, 437.  
requirement of charter as to plans, etc., is a, to valid s. a., 534n.  
in general — strict compliance with, necessary, 529.  
determining amount of s. a. not, to entry of judgment, 574a.  
to acquiring title under tax deed or certificate must be followed,  
741.  
no presumption that, are not performed, 804.  
to making of valid s. a. must not be omitted, or result a nullity,  
813.  
omission of, 813n.

### CONFIRMATION—

See JUDGMENT OF CONFIRMATION.

a necessary step in s. a. proceedings, 326.  
objections to sufficiency of petition may be heard on application  
for, 340.  
defects in description should be objected to before, 540.  
no objection to, that city has not acquired title, 546.  
making substantial changes in roll without formal order, error, 549.  
in general, 623.  
application for, 624.  
objections to, 627.  
issue on hearing of objections to, 629n.  
if judgment regular on its face, court has jurisdiction to confirm,  
630.  
of report of commissioners is a judgment, 630n.  
n order of, has force and effect of a judgment, 631n.  
by Common Council conclusive only if made so by statute, 632.  
as to, of assessments generally, 632n.  
when, of engineer's report does not prevent a hearing, 632.  
statute requiring s. a. to be completed in four months, mandatory,  
639.  
agreement between city and objecting owner as to, valid, 639.  
after, and letting of contract, city cannot stay proceedings, 639.  
on application for, evidence of benefits to other property not admissible,  
667.



## INDEX.

(References are to section numbers.)

### CONFIRMATION BY COMMON COUNCIL—

See CONFIRMATION; COUNCIL.

### CONNECTICUT—

when "tax" does not include "special assessments," 26.  
definition of s. a., 38n.

### CONSEQUENTIAL DAMAGES—

See DAMAGES; TRESPASS.

### CONSIDERATION—

recovery back for failure of, 774, 786.

### CONSTITUTION, FEDERAL—

a grant of power, 50.  
restraints on Congress by, not restraints on States, unless specific, 51.  
matters in which, does not control State authorities, 128.  
State legislatures may provide what hearing is conclusive under, 146.

### CONSTITUTIONS, STATE—

not grants of power, but apportion the inherent powers, 51, 121.  
unnecessary for, to confer power of s. a., 51.  
authority for s. a. in, 67.  
limitations in, as to indebtedness, do not apply to s. a., 124.

### CONSTRUCTIVE NOTICE—

definition of, 361.  
statutory compliance sufficient, 375.

### CONSTRUCTION OF CONTRACT—

made according to provisions of statute, or ordinance thereunder, 461.  
Legislature may ratify *ultra vires* contract, 461.  
that contractor will make no claim against city on s. a. certificate, 678n.

### CONSTRUCTION OF POWER OF SPECIAL ASSESSMENT—

subject to strict construction, 183.  
a continuing power, 185.

### CONSTRUCTION OF STATUTES—

in general, 195-201.  
by those directed to act under a statute, of great weight, 196.  
when general act supersedes special or local acts, 196.  
repeals by implication not favored, 200.  
as to re-enactment of statute, with modifications, 200.  
canons of, not arbitrary or infallible, 201n.



## INDEX.

(References are to section numbers.)

### CONSTRUCTION OF STATUTES (Continued).

- ordinances construed same as statutes, 386.
  - but must be reasonable, 388.
- void provision in does not necessarily vitiate entire, 415.
- how frontage determined, 505.

### CONTESTING ASSESSMENT—

- who may contest assessment, 563.
- only person injured may complain, 563, 565, 588n.
- he cannot complain that assessment is oppressive to others, 563, 563n.

### CONTINUATION—

- reassessment is a, of original proceedings, 829.

### CONTIGUOUS PROPERTY—

- only, assessable for special taxation, 19.
- street or alley not, 217.
- assessment against, for sewers, limited to benefits, 269.
- easement of railroad is, 289.
- definition of, 307, 307n.
- as used in Illinois Constitution, applies to special taxation only, 307n.
- not necessarily benefited by special taxation, 485n.
- ordinance may provide for s. a. against only, 537.

### CONTRACT—

- when charter provision not a, 185.
- when franchise ordinance not a, 386.
- right to reject any proposal, when in conflict with statute, 400.
- forfeited because not performed in time, cannot be vitalized, 419.
- statute requiring, to be let to lowest bidder, 421.
- irregularities between, and ordinance, 436n.
- in general, 448.
- bids and bidders, 449.
- lowest bidder, 450.
- Council may not foreclose legislative control by letting, 441.
- powers of Council in letting, 451.
- provisions tending to increase cost, 452.
- guarantee of work for a term of years, 453.
- performance of, 454, 455.
- description of work, 456.
- time for completion, 457.
- extra work, day labor, 458.
- patented articles — monopoly, 459.
- assignment of, 460.
- construction of, 461.
- must be properly executed, 461n.



## INDEX.

(References are to section numbers.)

### CONTRACT (Continued).

liability of city on, 462.  
abandonment of proceedings, 463.  
construction of grading contract, 582n.  
for paving illegally let, 597n.  
building of two disconnected sewers may be legally let in one, 606n.  
increase in amount over, price, 621n.  
after letting of, city cannot stay proceedings, 639.  
let prior to charter change, 681.  
induced by fraud, 683.  
defective or unfinished, 684, 815n.  
improperly let, 740n.  
non-compliance with — remedy of aggrieved party by appeal, 760n.  
relief against fraudulent, in equity, 797.  
duty of city in letting — performance of not considered, 815n.  
recovery under void, 820n.

### CONTRACTOR—

failure to require bond from, 461n.  
appropriating material for his own use, 461n.  
private agreement with, 461n.  
rights of action of, against city, under contract, 462.  
pay from proceeds of s. a., 462n.  
who is commissioner may spread tax under Illinois statute, 513.  
fixing prices — forestalling competition, 523n.  
how certificate of city engineer as to compliance with contract, satisfied, 561n.  
what must appear on face of, certificate for street work, 561.  
liability of city for wrong-doing of, 664n.  
when stipulation of, not to sue city, void, 673.  
contract not to sue city avoided by unnecessary delay, 675.  
liability of city to, on *ultra vires* contract, 676.  
extent of, vested rights, 679.  
where, agrees to look solely to proceeds of s. a., 679.  
may enforce collection by foreclosure of lien, 680.  
collection by, 682.  
chargeable with legal notice, 682n.  
remedy of, for collection of s. a., 685.  
recovery by, for money misappropriated by city, 685n.

### CONVEYANCES—

to avoid assessment, 303, 322, 494n, 563.

### CORNER LOTS—

See Lot or Lots.  
validity of s. a. on, 401.



## INDEX.

(References are to section numbers.)

### CORPORATIONS, MUNICIPAL—

only, may exercise right of s. a., 207.  
may be organized within limits of another for s. a. purposes, 215.  
land in different, may be taken for parks, 215n.  
same control of street improvements as private owner has of his land, 248.  
drainage districts are usually public corporations, 265.  
includes counties under Minnesota Constitution, 282.  
property owned by, usually not subject to s. a., 283.  
cannot hold private property in trust to evade s. a., 297.  
exempt from taxation, 316n.  
may not sign petition for an improvement, 333.  
must act by ordinance on legislative matters, 380.  
powers of, 439.  
cannot delegate to boards or officers its discretionary power, 444.  
but may delegate ministerial powers, like superintendents, etc., 445.  
liability of, to contractor when assessment invalid, 462, 462n.  
cannot assess property beyond corporate limits, 537.  
may construct sewers by districts or otherwise, 606.  
will be estopped under substantially same conditions as individuals, 724.  
burden is on, to prove estoppel of property owner, 724.  
when, cannot assert invalidity, of its own assessment roll, 724.  
authority of, to refund illegal s. a., 785.  
acting beyond its jurisdiction may be enjoined, 787.  
duty of, to make reassessments, 840n.

### COST OF ASSESSMENT—

deducting, illegally added, does not avoid s. a., 401.  
what items may be included in, 525, 526.  
part of, illegally incurred — when immaterial, 526n.  
what expenses may not be included in, 527, 528.

### COST OF WORK—

assessment of, 58, 434n, 556.  
ordinance taxing abutter one-third, 88n.  
assessment of, does not violate Fourteenth Amendment, 126, 127.  
on abutting property authorized under Constitution of Iowa.  
in general, 227-228, 402.  
system of, provides for no apportionment, 227.  
for sewers may be equitable, 230.  
estimate of, 346, 406.  
ordinance increasing, after hearing, void, 416.  
must be estimated under ordinance authorizing the improvement, 417.  
assessment of entire, on abutting owners, invalid, 424.  
increase of, by city engineer after contract let, avoids s. a., 447.  
ascertainment of, essential to justice, 448.



## INDEX.

(References are to section numbers.)

### COST OF WORK (Continued).

- outside of contract, 451n.
- provisions tending to increase, 452.
- conditions tending to increase, may vitiate proceedings, 452.
  - disregarded by courts, 452.
- excess of, to be paid out of general fund, 469, 499n.
- arbitrary assessment for, 475n.
- that amount assessed exactly equals, not of necessity invalid, 479.
- valid assessment of, Oregon, 501n.
- s. a. on lots according to front or size, does not authorize tax for, 507n.
- what expenses may be included in, 525, 526.
  - not be included in, 527, 528.
- assessment based on, of very doubtful validity, 552, 556-558.
- when, in front of various lots differs, uniform assessment not justifiable, 573.
- when assessment of, for sewers not invalid, 605.
- for constructing sidewalks, 620.
- what cost bill must show, 620n.
- arbitrary addition to, 622n.
- when interest may be included in, 721.
- when unauthorized may be corrected on appeal, 760n.
- extrinsic evidence of, 813n.

### COUNTRY ROAD—

See STREETS.

- change to city street by extension of limits imposes no new servitude, 535.

### COURTS—

- will not impute to Legislature nullifying intentions, 124.
  - take judicial notice of city charters, 196.
- may review question as to whether improvement be local, 205.
  - of fraudulent apportionment, 212.
- may revise sewer assessments, 263.
  - determine sufficiency of ordinance, 385.
- cannot delay passing on legal questions until after jury trial, 385.
- will not declare ordinance unreasonable unless plainly so, 388.
  - ordinarily review discretion of Common Council, 440, 440n, 441, 451, 619.
- power delegated to municipality by Legislature not reviewable by, 445.
- but, will scrutinize any attempted departure from the rule, 444n.
- charges of fraud and corruption in Council reviewable by, 451.
- will disregard restrictions, increasing cost, regardless of form, 452.
- may interfere to vacate s. a. when taxing district made by fraud, 466.



## INDEX.

(References are to section numbers.)

### COURTS (Continued).

- may declare taxing district unreasonable, but cannot make a new one, 466.
- will invalidate s. a. for benefits when physical conditions require, 475.
- when, without jurisdiction to proceed, 524n.
- cannot declare as immaterial that which Legislature prescribes, 559.
- should be quick to relieve wrong, but not to find technical objections, 567.
- may restore correct copy for assessment roll lost or destroyed, 571n.
- when, may modify amount of assessment, 574.
- will rectify abuses in change of grade in obvious cases, 583.
- division of, upon finality of decision of local tribunal as to benefits, 602.
- in absence of fraud, or unreasonableness of ordinance, no interference by, 606.
- on certiorari, will examine proceedings only as to jurisdiction, 748.
  - when court will not interfere, 754.
- to, of equity property owners must most frequently apply in s. a. proceedings, 787.
- when, of equity will entertain bill to restrain collection of tax, 788.
- when statute forbidding, to act premature, 789n.
- will determine if the object be a public one, 796.
- of equity will not deny relief because amount involved not large, 808, 808n.

### CROSSWALK—

- laying is pavement within the statute, 587.

### CULVERTS—

- are essential parts of roadway, and subjects of s. a., 251.
- not a part of the sidewalk, 251.

### CURBING AND GUTTERING—

- not a part of the sidewalk, but subject to s. a., 251.
- may be included in estimate for street work, 405.
- ordinances regarding, 408.
- invalid, ordinances, 425.
- not included in macadamizing, 461n.
- when law directing, invalid as to part, 555n, p. 44.
- a necessary part of paving, 588.
- statutory provisions regarding, 588n.

### CURATIVE ACTS—

- See REASSESSMENTS; LEGISLATURE, POWER OF.
- in general, 816-818.
- limitations upon legislative power, 819-820.
- retroactive laws, 821.
- jurisdiction, 822.



## INDEX.

(References are to section numbers.)

### D.

#### DAMAGED—

definition of, 166.

#### DAMAGES—

consequential, for change of grade, 166.

provision in contract for indemnity against, valid, 452.

must be assessed when statute requires, 497.

when payment of, improper, 497.

for change of grade — when photograph admissible, 522.

offer of sale as evidence of, 571n.

witnesses as to value, 571n.

award of — depreciation by change in size of lots, 571n.

statute requiring, to be paid or tendered, before change of grade,  
mandatory, 584.

where assessment for, should be made at same time as benefits, 585.  
in general, 640.

determination of authorities on, not conclusive, 641.

may be recovered where property injured, under constitution pro-  
vision against "damaging," 641.

total disregard of statutory provisions entitles owners to, 641.

injury caused by negligence of city entitles party to, 641.

when city liable for, 642.

removal of lateral support may cause, 642.

when city not liable for, 643.

nominal — nonsuit — appeal, 643n.

from change of grade, 644.

complete when grade is changed, 644.

do not depend on after use of lot, 644.

recoverable for grading street before grade legally established, 646.

consequential, recoverable in trespass *quare clausum*, 644n.

not waived by signing petition, when grade made lower, 647.

not affected by use to which street put after change of grade, 648.

not recoverable for change of grade ordered, but not made, 649.

provisions for, in new charter inconsistent with old one, 649.

none caused by passage of ordinance for change of grade, 650.

caused by grading several years after assessment, 649n.

liability for, under ordinance, 649n.

opinion of witness as to benefit or injury, 649n.

failure of city to fix all grades, 649n.

proof necessary to establish change of grade in action for, 649n.

for taking, 651-653.

measure of — in general, 654.

belong to the owner of the property, 653n, 662.

measure of, for change of grade, is depreciation in value, 654.

general rule is difference in value before and after grading, 655.

in assessing, jury may not indulge in vague conjectures, 656.



## INDEX.

(References are to section numbers.)

### DAMAGES (Continued).

- increased facilities for travel — when not to be considered, 656n.
- should include all improvements made between report and adoption, 655.
- should include the value of the improvements, 655.
- for land subject to a restricted use, 656.
- destruction of shade trees an element, 657.
- power of Legislature to fix measure of, 657n.
- measure of — change of grade — in general, 658.
- to whom, belong, 662.
- consequential — municipality not liable for, when acting with due care, 663.
- true rule as to, 663.
- interest on award as an element of, 664.
- for unauthorized removal of sidewalk — its value as down, 767.

### DAY LABOR—

- use of, not authorized as extra work, 458.

### DEATH—

- of petitioner does not prevent counting his name, 338.

### DEDICATION—

- of property to public use, waiver of claim for damages, etc., 267, 297.
- city cannot accept, of land and waive future s. a., 315, 498.
- in general, 580.

### DE FACTO AND DE JURE—

- de facto* official paper, 368.
- officers, 579.
- corporation, 621n.
- assessment by usurper, 622n.
- acts of *de facto* officer, 801n.

### DEFENSES—

- to collection proceedings, 703.
- legislative omnipotence over, 703n.
- work improperly performed, 703n.
- sufficient averment of non-performance, 703n.
- what, available, 704, 705.
- when claim of non-performance available, 703n.
- when alteration not injurious, 703n.
- assessment in wrong name, 705n.
- city's account of expense, 705n.
- arbitrary overassessment of benefits, 705n.
- what affidavit for misrepresentation must contain, 705n.
- opening street to less than established with, 705n.



## INDEX.

(References are to section numbers.)

### DEFENSES (Continued).

owner's knowledge of invalidity of proceedings, 705n.  
blending of legal and illegal items, 705n.  
that statute is unconstitutional, 705n.  
omission of notice — collateral attack, 705n.  
deduction for repairs, 705n.  
when grantor not liable, 705n.  
to collection proceedings not available, 706.  
failure to register tax bills, 706n.  
overassessment of others, 706n.  
delay in completion — mere irregularities, 706n.  
not an original pavement, 706n.  
in foreclosure of liens, 714.

### DEFINITIONS—

distinction between s. a. and tax, 9.  
comparative, of s. a. and taxes, 18.  
distinction between s. a. and special taxation, 19.  
of taxes and assessments, 36.  
of special assessments, 37, 38.  
authors, of Taxation by Special Assessment, 57.  
law of the land, 109n.  
due process of law, 137.  
“damaged,” 166.  
local improvement, 205.  
“abutting” property, 303.  
“adjacent” property, 305.  
“adjoining” property, 306.  
“contiguous” property, 307.  
“local” or “vicinity” property, 308.  
“square,” 310.  
“block,” 311.  
Lord Holt's, of Tax, 318.  
actual notice, 361.  
constructive notice, 361.  
assessment, 378n.  
concrete, 378n.  
corporate authorities, 378n.  
for 378n.  
frontage of lot, 378n.  
frontage on street, 378n.  
highway commissioners, 378n.  
local improvement, 378n.  
lot, 378n.  
macadamizing, 378n.  
maintain, 378n.  
occupied, 378n.



## INDEX.

(References are to section numbers.)

### DEFINITIONS (Continued).

owners, 378n.  
party aggrieved, 378n.  
relaying, 378n.  
resident freeholders, 378n.  
special benefits, 378n.  
street, 378n.  
tax certificate, 378n.  
to, 378n.  
unoccupied, 378n.  
jurisdiction, 622n.  
delivered, 593n.

### DELAWARE—

equality and uniformity clause in Constitution of, 77.

### DELEGATION—

of power or authority by Legislature, 430, 444, 607n.  
when not subject to judicial review, 444.

### De MINIMIS NON CURAT LEX—

See MAXIMS.  
application of maxim, 57, 477, 808.

### DEMURRER—

See PLEADINGS.  
when improperly sustained, 740n.  
in suits in equity, 807.

### DESCRIPTION OF PROPERTY—

necessity for accurate, subject to s. a., 539.  
requisites of— what must be shown, 539.  
when insufficiency of, does not invalidate s. a. on other property,  
540.  
insufficiency of, not ground for dismissal application for judgment,  
540.  
defects in, should be objected to before confirmation, 540.  
variance— unintelligible— railroad right of way, 540n.  
amendment to, allowable on application for confirmation, 540n.  
error in, 815n.

### DISCRETION, LEGISLATIVE—

See COUNCIL.  
review of benefits matter of, 146.  
courts will not interfere with, 191n, 211.  
within, to fix principle of assessment on city lots, 225n.  
property subject to s. a., 279.  
common council vested with substantial, 440.  
elements allowable in cost of work are within, 525.



## INDEX.

(References are to section numbers.)

### DISCRETIONARY POWERS—

See COUNCIL; CITY ENGINEER.  
of council in letting contract, 451.

### DISCRIMINATION—

what is not a, between resident and non-resident owners, 164n, 333.  
unjust, between owners avoids tax, 622n.

### DISMISSAL—

of petition, 339.

### DISTINCTIONS—

between taxes and assessments, 312.

### DITCH—

cost of repairing, when payable by s. a., 294.

### DOLLARS AND DOLLAR MARKS—

finding that city's share of s. a. is "no dollars" not fatal, 515.  
figures construed to mean dollars, 577n.  
omission of, formerly held fatal, 578.  
rule changed in Illinois by statute.

### DOUBLE ASSESSMENT—

avoids the tax, 622, 762n.

### DRAINAGE AND DRAINAGE DISTRICTS—

may be had and made under police power, 40, 41.  
Wisconsin statutes for, made under police power, 43.  
within police power; consideration of benefits unnecessary, 43n.  
power of legislature to create corporations for purposes of, 192.  
apportionment by area in, cases universally sustained, 229.  
value not infrequent, 231.  
finding of benefit to, 294n.  
jurisdiction as to, derived entirely from statute, 613.  
lands outside of, may be taxed for connection with, 613.  
drainage commissioners cannot create debt in advance, 613.  
cannot ordinarily divide lands into three classes and assess  
arbitrarily, 613.  
method of assessment in, 613, 614.  
assessment for, per lineal foot, 614n.  
when objections to assessment for, should be made, 614.  
legality of may be inquired into on *quo warranto*, 765.

### DRAINS AND SEWERS—

See SEWERS.  
in general, 263, 270.  
right of way of railroad assessable for, 290.  
agricultural lands subject to s. a. for, 293.



## INDEX.

(References are to section numbers.)

### DUE PROCESS—

- definition of, law of the land, 109n.
- no distinction as to, between Fifth and Fourteenth Amendments, 125.
- synonymous with "law of the land," 134.
- construction and meaning of, 135.
- in taxation matters, notice and hearing essential to, 136.
- definition of, 137.
- instances of what constitutes, 138, 139.
- not necessarily judicial process, 140.
- requisites of— notice, 141.
- where appeal given, property rights not affected without, 144.
- where assessment only enforceable by action, 144.
- what notice sufficient to constitute, 146.
- afforded where hearing may be had before board making assessment, 146.
- frontage rule is not a taking without, 146.

## E.

### EASEMENT—

- is property, and subject to s. a. in Illinois, 289.
- when assessable, 292.
- franchise and road not severable, 293.
- city may not purchase, for street purposes, 535.
- contract for, for sewer construction grants no rights of entry for making a connection, 598.
- compensation for impairment of, of access, 653.

### EASEMENT OF ACCESS—

- is property, 152, 303, 653.

### EIGHT HOUR LAW—

See CHINESE LABOR.

- when labor on public work limited to, contract void, 417, 452.

### ELECTION—

- of remedies by tax payer, 789n.

### ELEVATED RAILWAY—

- subject to s. a. in Illinois, 285.

### EMINENT DOMAIN—

- property taken by right of, is beyond the individual's share, 15n.
- power of, as authority for s. a., 45, 46.
  - taxation essential to exercise of power of, 47.
  - insufficient for purposes of s. a., 47.
- in general, 535.
- propriety of exercise of right of, a legislative question, 535.
- city cannot encroach on private property, except by, 642.



## INDEX.

(References are to section numbers.)

### ENFORCEMENT—

may be reached by foreclosure of lien, 715.  
in general, 715.

### ENHANCEMENT IN VALUE—

See BENEFITS.

is the only ground for levy of s. a., 206.

### ENTIRETY—

assessment is an — if void for one reason, void for any, 552.  
benefits under judgment are an, 625n.

### EQUALITY AND UNIFORMITY—

is the essence of taxation, of every form, 11.  
rule of, violated by tax on all land, not including improvements,  
17.  
special assessments not subject to rule of, in Indiana, 28n.  
clause in state constitutions as to, of taxation, 67.  
do not apply to assessments, 91n.  
can never be but an approximation, 114n.  
objections as to, when too late to be heard, 129.  
arbitrary legislative determination of benefits, contrary to, 182.  
principles of, apply to apportionment, 214.  
rule sustained by assessments according to area, 229.  
either ad valorem or specific tax, 229.  
assessment at specified percentage of cost, 621n.

### EQUALIZATION BOARD—

duly convened acts judically — jurisdiction conclusive, 635.

### EQUITY—

See INJUNCTION.

right of owners to maintain suit in, for imperfect performance, 455.  
may intervene when remedy by mandamus insufficient, 965n.  
will interfere when assessment void, 760n.  
waiving objections to hearing on appeal, prevents suit in, 761, 761n.  
courts of, have jurisdiction when illegality of tax not apparent on  
face, 761n.  
when suit in, maintainable to recover tax illegal from facts outside,  
771.  
in general, 782-789.  
injunction — when premature, 790.  
cloud on title, 791.  
apparent defect, 792.  
extrinsic evidence, 793.  
failure to make timely objection, 794.  
assessment in excess of benefits, 795, 796.  
fraud, 797.



## INDEX.

(References are to section numbers.)

### EQUITY (Continued).

- nuisance, 798.
- adequate remedy at law, 799.
- payment or tender, 800.
- when, will not interfere, 801-803.
- burden of proof, 804.
- parties, 805.
- pleadings, 806, 807.
- de minimis non curat lex*, 808.
- application of principles of, to special facts, 809-815.

### EQUIVALENTS, THEORY OF—

- applies to s. a., 3.
- does not apply to general taxation, 3.

### ERROR AND AMENDMENT—

- of assessment, 575.

### ESTIMATE OF COST—

See COST OF WORK.

- customary to prepare and file, 524.
- requirements for, when made by statute, are mandatory, 524.
- strict compliance with requirements for, 524n.
- sufficiency of itemized, 527, 528.

### ESTOPPEL—

See WAIVER; LACHES.

- by signing petition, 338, 647, 725.
- of owner to question description of lands on assessment roll, 540.
- payment on misdescribed property no, 540n.
- when payment neither waiver nor, 720.
- in general, 723.
- equity recognizes and tolerates, but does not encourage, 723n.
- of municipality, 724.
- no, to deny invalidity of proceedings by signing petition, 725.
- to deny jurisdiction— not waived by standing by, 726.
- after jurisdiction acquired, there may be, by irregularities, 726.
- when landowner estopped, 727, 728.
- tendency towards strict application of doctrine, 728.
- active participation in an improvement is an, 729.
- payment without protest creates, 728.
- acceptance of improvement conclusive on property owner, 730.
- married women, as to separate property, subject to rules of, same as if sole, 730.
- unconstitutionality of statute as an, 731.
- taking action before completion of work, 732.
- elements of — jurisdiction, 733.



## INDEX.

(References are to section numbers.)

### ESTOPPEL (Continued).

- when grantee not estopped, 734.
- landowner not estopped, 735.
- instances of acts not amounting to, 734n.
- laches of owners as creating, 736.
- to deny invalidity of first assessment — evidence, 840n.

### EVIDENCE—

- burden of proof, 432, 558, 569, 694, 738, 762, 800n, 804.
- prima facie* proof, 432, 570, 693.
- records of commissioners not conclusive, but facts *dehors* may be shown, 520, 523.
- commissioners as witnesses, 521.
- declarations of commissioners and their clerks inadmissible as, 521.
- as to making estimate of cost, 527n.
- statute as to bond act being conclusive, of prior proceedings, 532.
- onus of establishing error on party objecting, 558.
- in general, 568.
- as to benefits, 571.
- complying with charter, 570n.
- parol, to explain record, 571n.
- miscellaneous cases as to, 571n.
- of benefits — when error, 605n.
- assessment not set aside on conflicting, 621n.
- of liability of water company to lay pipes — when not admissible, 624.
- prima facie*, of benefits, 630n.
- proof necessary to establish change of grade, 649n.
- opinion of witness as to benefit or injury, 649n.
- of non-experts as to damages, 657n.
- as to damages in street opening, 664n.
  - necessity of improvement excluded on question of benefits, 667.
- in proceedings for collection of the tax, 693.
  - prima facie* proof in, 693.
  - burden of proof in, 694.
- in *scire facias*, should be received when relevant, 693n.
- of non-assessment of other property — when irrelevant, 693n.
- in foreclosure of lien, 713.
- exorbitant prices as, of fraud, 739n.
- of benefits in fact must appear in record or court will not review, 750, 750n.
  - work not completed — inaccessibility of sewer, 754n.
  - conveyance made *prima facie* evidence of regularity, 792n.
  - to sustain invalidity of reassessment, 840n.

### EXECUTOR—

- signature to petition by, 332.



## INDEX.

(References are to section numbers.)

### EXEMPTIONS—

- meaning of, as to municipal property, 282n.
- from taxation are not, from s. a., 282n.
- in general, 312-316.
- of cemeteries, 317.
- property of educational, religious and charitable institutions, 318, 319.
- questions of, strictly construed, 319.
- of homesteads, 320.
- railroad and street railway property, 321, 321n.
- constitutional provision of Illinois regarding, 533.
- from execution will not prevent collection of s. a., 686.

### EXTRA WORK—

See WORK.

- performance of without order, 451.
- does not necessarily vitiate s. a., 455.
- authority to order, or material, usually in board or officer, 458.
- authority to contract for, 458.
- does not authorize use of day labor, 458.

### EXTRINSIC EVIDENCE—

- when receivable, 571n, 760, 793, 793n, 813n.

## F.

### FAILURE—

See OMISSION.

- of consideration, 774.
- recovery back for, of consideration, 786.
- to make timely objection, 791.
- to give notice to abate nuisance, 794n.
- of commissioners to take oath—how cured, 818.

### FARMS—

See AGRICULTURAL LANDS.

- act for drainage of, not for a public purpose, 266.
- lands of, subject to s. a. for sewer, when enhanced in value, 270.
- not usually subject to s. a., 295n.

### FEDERAL COURTS—

- validity of front foot rule settled in, 146.
- construction of statute by highest state court, conclusive on, 201.

### FIFTH AMENDMENT—

- comparison of, with Fourteenth Amendment, 125.

### FIGURES, ABBREVIATIONS AND NAMES—

- may be used to designate lands against which judgment is asked, 577.
- middle initial of a name immaterial, 577.



## INDEX.

(References are to section numbers.)

### FILLING—

- assessment for, under sidewalk, 506n.
- exorbitant price for, as evidence of fraud, 739n.

### FLAT STONES—

- insufficiency of term as a description, 425.
- distinction between macadamizing and use of, in gutters, 587.

### FLORIDA—

- equality and uniformity clause in constitution of, 78.

### FORECLOSURE OF LIEN—

- attorney fee in, when included in cost of work, 526.
- foreclosure, 712.
- evidence in, 713.
- defense in foreclosure, 714.
- enforcement of lien, 715.

### FOURTEENTH AMENDMENT—

- importance of, 125.
- comparison of, with Fifth Amendment, 125.
- assessment of cost of work does not violate, 126, 131.
- act making street improvement bonds prior lien, does not violate, 132.
- equal protection of the laws, 133.
- due process of law, 134-136.
- is a restraint on all departments of government, 135.
- system of delusive exactness should not be built on, 140.
- frontage rule not violative of, 146.
- offset of benefits against damages not objectionable to, 157.
- invalidates s. a. in substantial excess of benefits, 220, 502.
- annual tax of ten cents per lineal foot of water pipe violates, 262n.

### FRANCHISE—

- construction of, as to s. a., 284.
- grading may increase street railway facilities, but no benefit to, 286, 292n.
- when liable for s. a., 292n.
- road and, not severable, 293.
- only owners of turnpike, may contest character of, used as street, 563n.

### FRAUD—

- charges of, and corruption in council, reviewable by courts, 451.
- omitting lot from assessment, 461n.
- vacating s. a. for — effect on other lands, 463.
- finding of commissioners conclusive except for, or mistake, 515, 523.



## INDEX.

(References are to section numbers.)

### FRAUD (Continued).

assessing owners for paving which railway is liable for, is a, 639n.  
contract induced by, 683.  
court may commit error but cannot be guilty of, 738.  
that s. a. was fraudulently made may always be shown, 738.  
exorbitant prices as evidence of, 739n.  
in prices for filling and rock excavation, 739n.  
but payment in depreciated warrants will be considered, 739.  
general rules of pleading, applicable in s. a. cases, 740.  
not established by proof that s. a. is inequitable, 740n, 797n.  
remedy for fraudulent assessment, 740n.  
fraudulent representations by city officers, 760n.  
equity will relieve against, to prevent irreparable injury, 797.  
pleading—insufficient allegation as to, 797n.

### FREEHOLDER—

commissioner must be a disinterested, if statute requires, 511n.

### FRONTAGE—

records and plats are the tests in determining, 299.

### FRONT FOOT RULE—

adjudged proper in North Dakota, 102.  
adopted in Pennsylvania in 1700, 105.  
formerly in Virginia, 115.  
not repugnant to Fourteenth Amendment, 130, 146, 508n.  
validity of, settled in Federal Courts, 131.  
apportionment by, 219–226.  
not applicable in rural or suburban districts, 223.  
“front foot” synonymous with “abutting foot,” 226n.  
sewers frequently laid by, 264, 605.  
no cause for apprehension if confined to sidewalks, 426n.  
assessments by—compliance with statute, 481.  
in general, 500.  
as a principle, 501.  
not repugnant to organic act of S. Dakota, 501n.  
as a convenience, 502, 503.  
how frontage determined, 504, 505.  
assessments valid under, 506.  
assessments invalid under, 507, 508.  
when not arbitrary, and coincides with benefits, 539.  
under, property on both sides of street should be assessed, 542n.

### FRONTING PROPERTY—

meaning of the term, 309.

### FUTURE BENEFITS—

assessments sustainable only on ground of present benefits, 604.  
for benefits to accrue in future are invalid, 604, 604n.



## INDEX.

(References are to section numbers.)

### G.

#### GENERAL FUND—

payment from—total cost may be paid out of, 719.  
city may pay contractor from, and then levy s. a., 719.

#### GENERAL MANAGER—

authority of, to sign petition, presumed, 330.

#### GENERAL TAXATION—

See TAXATION; TAXES.

what subjects embraced in, 2.  
no limit to legislative power over, except constitutional, 3.  
theory of equivalents not applicable to, 3.  
payment of s. a. in part by, 721n.

#### GEORGIA—

when "tax" does not include "special assessment," 27.  
equality and uniformity clause in constitution of, 79.  
assessment exceeding value of property, 487.

#### GRADE OF STREET—

must be established by ordinance, 380.  
sufficiency of ordinance fixing, 404.  
purpose of ordinance concerning, to intelligently estimate cost, 406.  
ordinance for change of, for railroad elevation confined to necessary limits, 424.  
when may be regulated without establishing fixed grade, 445.  
when change of, insufficient to entitle owner to damages, 586.  
proceedings for, must show affirmatively compliance with law, 586.  
damages for change of, 644, 658.  
for unlawful, city liable for all damages without consideration of benefits, 644.  
use to which street put after, does not affect damages, 648.  
city liable for, causing accumulation or wrong discharge of water, 648.  
no damages caused by passage of ordinance for, 650.  
amount of damages for, usually fixed by legislature, 658.  
no damages at common law for change of, made with due care and skill, 659.  
amount of special tax paid an item of damage, 660n.

#### GRADING—

See STREETS.

what work included in, 403.  
in general, 582.  
change of—general provisions, 583-585.  
is an improvement, 586.



## INDEX.

(References are to section numbers.)

### GRADING (Continued).

putting macadamizing material on city street, not a change of grade, 586.

amount paid for previous, to be considered as to damages, 660n.

### GRANTEE—

when not estopped, 734.

### GRANTOR—

when not liable for unpaid tax, 705n, 722.

### GUARANTY—

when contract provision for repair deemed a, 405.

of work for term of years, 453.

when increased price for, and repairs does not vitiate s. a., 453n.

### GUARDIAN—

authority of, to bind ward by signature to petition, 322n.

## H.

### HEARING—

notice, and opportunity for, requisites of due process, 141.

opportunity for, as essential as notice, 145.

when failure to provide for, not unconstitutional, 145.

power of legislature as to, almost unlimited, 146.

sufficiency of, to constitute due process, 146.

what notice and, sufficient, 148.

when land-owners not entitled to, 177.

### HOMESTEADS—

not usually exempt from s. a., 320.

### HOURS OF WORK—

See EIGHT HOUR DAY.

not limitable by contract, 443.

fixing number of daily, a restriction, 452.

### HOUSE CONNECTION SLANTS—

See SEWERS.

improper placing of, 428.

## I.

### IDAHO—

equality and uniformity clause in constitution of, 80.

### IGNORANCE—

or coercion in law or fact—when necessary to recovery of illegal tax, 773.

strangers, of defects in proceedings no defense, 788n.



## INDEX.

(References are to section numbers.)

### ILLINOIS—

- distinction between "tax" and "special assessment" in, 12.
- power of special taxation granted by constitution of 1870, 19.
- when "tax" does not include "special assessment," 28.
- definition of s. a. in, 38n.
- s. a. formerly authorized in, under eminent domain, 46, 47.
- equality and uniformity clause in constitution of, 81-84.
- constitutional provision as to assessment for corporate purposes, 193.
- as to power of s. a. or special taxation, 200.
- special taxation, 217.
- provisions of drainage act of 1885, 265.
- sufficiency of sewers under statute of, 414.
- statute of, regarding nature, character, etc., of proposed improvement, 418.
- constitutional provision as to exemption from s. a., 533.
- statute prohibiting levy of s. a. until land is acquired, 536.
- that benefits cannot offset against land actually taken, 536.
- under drainage act, s. a. limited to benefits and void as to excess, 613.

### IMPEACHING—

- report of commissioners, 519n.

### IMPROPER PERFORMANCE OF CONTRACT—

See CONTRACT.

- modification in order to conform.

### IMPROVEMENT—

- when assessable in part on entire city, 247.
- power of municipality as to, 248.
- not exempt from s. a. by ordinance, 314.
- necessity for, determined by ordinance, 379.
- ordinance must be adopted before, commenced, 380.
- first step towards, passage of ordinance specifying nature, etc., 381, 381n.
- omission to state location of, 390.
- only one, embraced in one ordinance, 392, 406.
- objections to ordinance as providing double, 412.
- if cannot be described in ordinance, not payable by s. a., 416.
- findings of council as to unsafety, not conclusive, 436n.
- determination of necessity for making, vested in council, 440, 440n.
- compliance with charter as to ordering, 447n.
- no liability of city for abandoning, merely contemplated, 463.
- an entirety — abandoning part is fatal to whole, 463.
- must be single, 544.
- what constitutes a single, 545.
- street grading is an, 586.



## INDEX.

(References are to section numbers.)

### IMPROVEMENT (Continued).

- a pavement involves the idea of a permanent, 591.
- sidewalk on each side of street may be included in a single, 61B.
- prior improvement, 621n.
- deviation from plan and character of, 622n.
- change of—dirt road for macadam, 622n.
- when, causes injury, should be made at general expense, 642.
- active participation in causing, as an estoppel, 729.

### INACCURACIES—

- mere, in description, will not invalidate ordinance, 434n.

### INCIDENTAL EXPENSES—

- when, may be included in cost of work, 526.

### INDEBTEDNESS—

- constitutional limitation on, not applicable to s. a., 124.

### INDIANA—

- when "tax" does not include "special assessment," 28a.
- rule of equality and uniformity in, does not apply to s. a., 28a.
- drainage of swamp lands in, valid under police power, 43.
- equality and uniformity clause in constitution of, 85.
- statute of 1883 for repairing public drains in, constitutional, 265.

### IN INVITUM—

- s. a. proceedings are, 539.

### INITIATORY PROCEEDINGS—

- in general, 323-326.

### INJUNCTIONS—

See EQUITY.

- will lie when municipality seeks to act beyond its jurisdiction, 787.
- when will issue to restrain collection of tax, 788.
- will issue to stop threatened act that will injure property, 788.
  - restrain exercise of unauthorized power, 789.
  - public officers proceeding illegally under claim of right, 789.
- any tax payer aggrieved by illegal contract may bring, 789.
- when premature, 790.
- will issue when assessment is in excess of benefits, 795.
  - when property so situated that it cannot possibly be benefited, 796.
- to restrain sale of property for invalid s. a. to abate nuisance, 798.
- unreasonable delay in bringing suit, 799n.
- will not issue to restrain tax except, 802.
- when, will not issue, 803.
- burden of establishing right to permanent, 804.
- parties to—any tax payer may commence proceeding—when, 805.



## INDEX.

(References are to section numbers.)

### INJUNCTIONS (Continued).

owners of property assessed may enjoin diversion of fund, 811.  
may issue to prevent threatened trespass by city, 811.  
duty of court when preliminary, necessary to final decree, 812.  
perpetual, will be granted only when party shows clear right to,  
812.  
to restrain various improvements, 813n.  
ordering alley restored to original condition, 813n.  
interfering with discretion of officers, 813n.  
elevated bridge, 813n.  
restraining payment for imperfect work, 815n.  
perpetual, for failure to give notice, 815n.  
for void s. a.—when excess only void, 815n.  
what must appear to justify, 815n.

### IN REM—

judgment of confirmation is, and not against the land, 495.  
no defense to judgment, that limit of taxation is exceeded, 529.  
confirmation of assessment is a judgment *in rem*, 626.  
proceedings for collection of s. a. are, 669, 670.  
are exclusive, 686n.  
judgments for special taxes are, 697.

### INSTALLMENTS—

providing for payment in, no infringement on personal rights, 718.  
s. a. not invalidated by unauthorized division into, 718.

### INSTANCES—

of sufficiency of notice and hearing, 148.  
where notice has been held unnecessary, 149.  
of insufficiency of notice and hearing, 150.  
acts held constitutional, 168n.  
unconstitutional, 168n.  
of delegation of power, 184.  
of continuing power of s. a., 185.  
application of rules for statutory construction, 196–200.  
of what constitutes a public purpose, 209.  
of “abutting” property, 303, 304.  
of exemptions from s. a., 312–316.  
of valid and sufficient resolutions, 343–344.  
invalid and insufficient resolutions, 345.  
sufficient notice, 355–358.  
insufficient notice, 359.  
computation of time, 377.  
variance between work done and ordinance requirements, 391.  
ordinances, inaccurate, but valid, 394.  
sufficiently specific, 407, 408, 409, 414.  
not sufficiently specific, 418n.



## INDEX.

(References are to section numbers.)

### INSTANCES (Continued).

- invalid grade ordinances, 423.
- paving ordinances, 424.
- imperfect performance of contract, 455, 455n.
- invalid apportionment, 468.
- assessments in excess of value of property, 486-494.
- valid assessments, 506.
- invalid assessments, 507, 508.
- expenses added to cost of work, 525, 526.
  - not added to cost of work, 527, 528.
- what constitutes a single improvement, 545.
- conditions precedent to valid assessment, 547.
- valid assessments, 621.
- invalid assessments, 622.
- of collateral attack not permitted, 634.
- of estoppel of landowners, 727, 728.
- acts not amounting to an estoppel, 734n.
  - amounting to laches, 737.
- when reassessments ordered, 832-837.
  - not permitted, 838.

### INSUFFICIENT RESOLUTION—

See INVALID RESOLUTIONS.

### INTEREST—

- of officer, not always a disqualification, 509.
- on s. a. payable in installments — when included in cost of work, 526, 721.
- on award for land taken runs from date of judgment of condemnation, 664.
- after collection due, as penalty, 687n.
- payment of tax in installments, 718.
- chargeable only as provided by statute, 721.
- when may be included in cost of work, 721.
- allowed on illegal tax paid under protest, 778n.
- on accrued amounts should be included in a reassessment, 830.

### INTERSECTIONS OF STREETS—

See STREETS.

### INVALID ASSESSMENTS—

See PARKS.

- of country lands for city park, 526.
- instances of, 622.

### INVALID CONTRACTS—

See CONTRACTS.

See 461n.



## INDEX.

(References are to section numbers.)

### INVALID ORDINANCE—

- defective proceedings under, not cured by new assessment, 418.
- exclusion of consideration of benefits, makes, 420.
- for curbing, 425.
  - sidewalks, 426.
  - waterworks, 427.
  - for sewers, 428.
- improperly delegating power goes to the jurisdiction, 430.

### INVALID RESOLUTIONS—

See 345.

### INVALIDITY—

- of s. a. ordinances ordinarily as available to purchaser as to owner, 744.

### IOWA—

- statute of, assessing cost of work, not violative of Fourteenth Amendment, 126.
- cost of improvement chargeable to abutting property under, Constitution, 180.
- assessment in excess of value of property, 488.

### IRREPARABLE INJURY—

See INJUNCTION.

- equity will give relief to prevent, 797.

### IRRIGATION—

- s. a. for purpose of, of arid lands, 271.

## J.

### JOINDER—

- of valid and invalid taxes in same suit—statute of limitations, 530.

### JUDGMENT—

- confirmation of report of commissioners is a, 630n.
- effect of reversal of, 630n, 636.
- bar of, on action prematurely brought, 630n.
- when final, 631.
- by default, 630n.
- former, as defense, 630n.
- order of confirmation has force and conclusiveness of, 631n.
- in s. a. proceedings on same basis as, in ordinary tax matters, 633.
- regular proceedings have effect of, 776n.
- for more than full cost s. a. refused, 814.
- not nullified by legislation, 820n.
- reassessment not the reopening of a, 827n.



## INDEX.

(References are to section numbers.)

### JUDGMENT OF CONDEMNATION—

See CONDEMNATION.

### JUDGMENT OF COMMISSIONERS—

as to benefits is conclusive except for fraud or mistake, 515, 515n.

### JUDGMENT OF CONFIRMATION—

See CONFIRMATION.

proof of notice, in direct proceeding to review, 364.

repeal of ordinance pending appeal, will not vacate, subsequently, 387.

requiring payment in five installments, instead of seven, invalid, 421.

cannot be vacated on motion of city when obtained by it, 463.

that tax exceeds benefit must be made before, 484.

will not be reversed upon a question of fact, 481.

is *in rem*, and against the land itself, 495, 626.

will be denied where names signed to affidavit, roll and oath substantially differ, 512.

which includes cost of making, when will be set aside, 527.

will not be reversed because corporation owner not properly named, 548.

assessment roll may be altered and recast before, if statute permits, 549.

evidence of imperfect performance inadmissible on application for, 571n.

lot owner may show error in frontage on application for, 627n.

owners may object that benefits have been improperly assessed, 627n.

will not include owners who did not appear, because notice insufficient, 628.

taken by default, when reversible on appeal, 628.

jurisdiction to enter, 629.

court cannot render, on void ordinance, 629.

or against property as described in a plat never recorded, 629.

conclusiveness of judgment, 630, 713n.

unreasonable ordinance a defense to, 629n.

if judgment regular on its face, court has jurisdiction to give, 630.

confirmation of report of commissioners is a judgment, 630n.

so far final that appeal will lie, 631.

cannot be collaterally attacked in mandamus proceedings for payment, 631n.

cannot be collaterally impeached by showing affidavit mailing untrue, 634n.

in Illinois, is several as to each parcel, 636.

effect of reversal of, 636.

lack of proof of making assessment will prevent, 693.



## INDEX.

(References are to section numbers.)

### JUDGMENT OF SALE—

- objections to sufficiency of petition too late on application for, 340.
- when notice of application for, fatally defective, 359.
- when record cannot be impeached on application for, 360.
- void, unless proof of notice of making assessment is made, 360.
- objection to sufficiency of ordinance too late on, 385.
  - going to the jurisdiction available on application for, 436.
  - mode of construction too late on application for, 455n.
  - that two out of three commissioners signed report not competent, 519.
- that original plans were changed too late on application for, 627n.
- not rendered void by omission to include jurisdictional cause, 628.
- upon application for, judgment confirmation part of proceedings, 631.
- for unpaid installments must refer to list for description and amount, 637.
- objections to annul judgment confirmation may be made on application for, 637.
- an application for is an independent proceeding, 638.
- all matters proceeding such application are *res judicata*, 638.
- failure to state nature, etc., of improvement no defense unless ordinance void, 638.
- notice of delinquency or demand must be shown on application for, 637n.
- what objections cannot be urged on application for, 637n.
- of several lots for total amount of taxes assessed, unauthorized, 697.
- application for, prematurely brought, will not sustain, 697.
- sufficiency of notice of application for, to confer jurisdiction, 697.
- what may be shown on application for, 698.
- form and validity of, 699.
- prior assessment in bar, 698n.
- presumption in favor of, 699n.
- against county, 699n.
- cannot be impeached by proof of want of notice, 699n.

### JUDICIAL NOTICE—

- in California of San Francisco streets, 350.
- courts will not ordinarily take, of an official map, 540.
  - take, of city charters as public acts, 576.
- San Francisco streets as shown on official map, 576.
- abbreviations of which courts will take, 577.

### JURISDICTION—

- not acquired unless statutory provisions complied with, 328.
- challenging, 340.
- cannot be conferred retroactively, 331.
- conferring of, does not compel making of improvement, 339.



## INDEX.

(References are to section numbers.)

### JURISDICTION (Continued).

- notice and hearing essential to, 347, 348.
- exceeding, by commissioners limiting notice, 359.
- giving notice in manner prescribed essential to, 376.
- means of acquiring, may be prescribed by ordinance, 379.
- statutory requirements as to notice are essential to, and mandatory, 434n.
- in general, 435, 436.
- acquiring, by publication, 437.
- collateral attack on, 438.
- meaning of term "jurisdictional defects," 435n.
- requisites for, 438.
- where court has, to enter judgment, collateral attack ineffective, 438.
- making of valid contract a prerequisite to, and enforcement of s. a., 448.
- when presentation of remonstrance prevents, 451n.
- limited to property benefited, 499n.
- when court without, 524n.
- defects not going to the, 524n.
- existence of assessment roll a fact essential to, 548.
- ordinance fixing grade not jurisdictional, 584.
- of ordinance containing sufficient allegations of description, 625n.
- to enter judgment of confirmation, 629.
- where court has, judgment confirmation conclusive on prior proceedings, 630.
- of court to render judgment in s. a. proceedings is presumed, 633.
- when, of equalization board conclusive, 635.
- no estoppel to deny, 726.
- elements of estoppel, 733.
- when, to issue certiorari given by state constitution, legislature cannot make appeal only remedy, 745.
- courts will examine certiorari proceedings only as to, 748.
- questions affecting, are for judicial inquiry, 757.
- decision of limited tribunal beyond its, of no effect — appeal unnecessary, 760n.
- courts of equity have, when illegality of tax not apparent on face, 761n.
- when tax wholly void for lack of, statutory remedy not exclusive, 761n.
- failure of — when payment made, recoverable, 772.
- equity recognizes only those matters coming under some head of its, 787.
- of equity attaching to annul invalid certificate may restrain sale of personalty for tax, 788.
- defects in, not validated by curative act, 816n.
- divisible into two classes, 822.



## INDEX.

(References are to section numbers.)

### JURISDICTION (Continued).

- assessments void for want of, not curable by reassessment, 823n.
- defects in, when curable on reassessment, 825.
- curing, 827n.

### JUST COMPENSATION—

- meaning of term, 660n.

### JURY—

See PROCEDURE.

- to assess benefits and damages must be sworn, 169n.
- in general, 665.
- view of premises by, 666.
- questions for, 667.
- passes on benefits only, 667n.

## K.

### KANSAS—

- equality and uniformity clause in constitution of, 86.

### KENTUCKY—

- equality and uniformity clause in constitution of, statute authorizing work at exclusive cost of owners, not violative of Fourteenth Amendment, 127.
- offset of benefits and damages contrary to constitution of, 156.
- assessment in excess of value of property, 489.

## L.

### LACHES—

- duty of parties having objections to s. a. to act promptly, 736.
- knowledge of facts is an essential element of, 736.
- may prevent owner from compelling a mandamus, 736.
- when, will be imputed, 736.
- effect of, on application for certiorari, 751.
- when plaintiffs, should not deprive him of his remedy, 840n.

### LATERAL SUPPORT—

- removal of, a taking, 156.
- entitles owner to damages, 642.

### LAW OF THE LAND—

- the common law and statute law existing at the date of adoption of constitution, 109n.

### LEASE—

- lessees under, not liable for s. a. under agreement to pay all taxes, 20n, 34n.
- when covenantor in, must pay s. a., 721n.
- lessee liable for s. a., 722.
- cannot appeal from s. a., 756.



## INDEX.

(References are to section numbers.)

### LEGISLATURE, POWER OF—

over taxation, inherent and unlimited, except by constitution, 51, 54.

not omnipotent, but limited by legal principles, 54.  
discretion of, 82n.

limitation on, 82n.

no limitation on, over taxation, in New York, 100.

may not levy s. a. in S. Carolina, there being no constitutional authority, 109n.

limitation on taxing, 122.

imposition of an assessment within, 122.

cannot deprive councils of all discretion over local improvement, 123.

directly exercise power of s. a. in cities, 123.

constitutional limitation on indebtedness is limitation on, 124.

but not on power to provide by legislation for s. a., 124.

when provisions omitting notice, valid exercise of, 145.

as to fixing notice, hearing, or appeal, almost unlimited, 146.

within, to provide what hearing is conclusive under Federal constitution, 146.

to determine amount of tax, and property to be assessed, and method, 179, 279.

over taxation not without limit, 179.

a corporation within a county may be created, 192.

a corporation of a city and a county may be created, 192.

over payments, almost without limit, 194.

supreme within its proper sphere, 202.

within, to decide if proposed improvement be of public utility, 205.

can impose local tax only by consent of people of the district, 207.

beyond, to assess only part of city for a corporate purpose, 214.

to apportion a public burden on whole state, or part, undoubted, 216.

within, to determine all or part of property in district benefited, 225n.

within, to require persons using sewer to pay for privilege, 269.

to authorize park commissioners to exempt land from s. a., 315.

to prescribe notice and hearing, kind of, etc., 353, 361-367, 370.  
constructive notice, 367.

authorize power of supervision, 430.

to regulate public works cannot be foreclosed by municipal contracts, 441.

may create taxing districts, but cannot make the s. a., 467.

restricting time to sue for, or defend s. a. to thirty days, within, 531.

when beyond, to grant exemptions from s. a., 533.

within, to make improvement of different streets and erection of terminal station one improvement, 544.



## INDEX.

(References are to section numbers.)

### LEGISLATURE, POWER OF (Continued).

- extends to designation of persons to make assessment, 553.
- to fix measure of damages, 657n.
- over liens and priorities unquestioned, 707, 708.
- to cure errors and omissions to extent of immateriality, 816.
- such act not unconstitutional as exercise of judicial power, 816.
- to cure proceedings void because petition insufficiently signed, 817.
- jurisdictional defects cannot be validated, 817.
- when within, to legalize a contract made on certain notice, 818.
- limitations upon, to pass curative acts, 819.
- cannot validate an assessment void for want of jurisdiction, 819.
- not a valid objection that curative acts may affect pending suits, 820.
- cannot determine questions essentially judicial, 820n.

### LEGAL EXPENSES—

- when may be included in cost of work, 526.

### LEVEES, DYKES and BREAKWATERS—

- Legislature may fix value of lands for, and levy uniform specific tax, 229.
- in general, 258.

### LIABILITY—

See MUNICIPAL LIABILITY; PERSONAL LIABILITY.

- relieving officer from statutory, 461n.
- of abutting owner on the contract, 461n.
- of city to contractor on invalid assessment, 462.
- no, on city for abandoning contemplated improvement, 463.
- of abutting owners when material variance in cost, 594.
- for paving opposite public grounds, 594n.
- for cost of sidewalks, 620.
- city is liable for negligence in causing injury, 641, 664n.
- when city not liable for damages, 643.
- for damages for bringing streets to grade is wholly statutory, 643.
- personal, for payment of s. a., 668-670.
- municipal, for payment of s. a., 671-673.
- of petitioners for payment of s. a., 681n.
- when, for payment accrues, 721n.

### LICENSE—

- mere, not subject to s. a., 290.
- railroad property taxed as a, fee, 331.

### LIENS—

- priority of—making street improvement bonds superior, 132.
- when assessment enforceable only by action, 144.
- of s. a.—when may be contested, 225n.



## INDEX.

(References are to section numbers.)

### LIENS (Continued).

water rates enforceable as, 261.  
when attorney fee in foreclosure of, included in cost of work, 526.  
right to, exists only by force of statute, 559.  
creation of, by s. a. proceedings, 670n.  
in general — none unless authorized by statute, 707.  
priorities of, 708.  
of general taxes superior to s. a., 708n.  
defenses to, 708n.  
of prior mortgage, 708n.  
statute of limitations applies to, 708n.  
discharge of, 709.  
liability of purchasers of land, 709n.  
duty of purchaser — notice, 709n.  
payment of — covenant against, 709n.  
filing or establishing, 710.  
proceeding *in invitum* — statute must be strictly pursued, 710.  
when action maintainable, 710n.  
when, attach — several, not joint, 710n.  
deposit of amount — when not payment, 710n.  
when not released, 710n.  
enforcement — parties, 711.  
foreclosure of, 712.  
indebtedness beyond constitutional limit, 712n.  
evidence in foreclosure, 713.  
defense in foreclosure, 714.  
enforcement of, 715.

### LIFE TENANT—

should pay annual tax; s. a. ratably, 21n.  
not an owner who may sign petition, 328.  
apportionment between, and remainderman, 469, 590n, 722, 789n.  
when, should pay s. a., 550n, 710n.  
not entitled to contribution from remainderman, 710n.

### LIMITATION —

on power of s. a., 202.  
principle of benefits as, on amount assessed, 225.  
on municipal indebtedness no effect on s. a., 461n.  
amount of s. a., 527, 527a.  
that constitutional, on indebtedness exceeded is no defense to  
s. a., 529.  
power to exempt from s. a., 533.  
of time in which to bring action on the contract, 688.

### LIMITATIONS, STATUTE OF—

when running of, not barred, 436n, 530.  
benefits and frontage rule, a, on each other, 501n.



## INDEX.

(References are to section numbers.)

### **LIMITATIONS, STATUTE OF (Continued).**

- application to actions against city for violation of duty, 530.
- power of legislature in suits to vacate s. a., 531.
- may be pleaded in bar against city, 531.
- begins to run from the date of delinquency, in collection, 688.
- applies to liens, 708n.
- on payment or recovery from vacation of s. a., 779.
- on reassessments, 828.

### **LOCAL IMPROVEMENTS—**

See PUBLIC PURPOSE.

- all s. a. must embrace a, 205.
- meaning of the term, 205, 243.
- definition of, 206.
- no, where enhanced value does not result, 206, 206n.
- repairing and maintenance not elements of, 250.
- county roads and highways not a, 253-254.
- general system of waterworks not a, 259.
- but extensions, pipes and connections are a, 259.
- sewage pumping station may constitute, 263.
- street sweeping and sprinkling generally held not a, 272.
- street lighting may be a, 273.
- improvement of watercourses as, 274.
- costs and expenses of, confined to locality where made, 279.
- whether work is a, depends on special benefits to realty resulting, 299.
- petition for, must be specific, 336.
- necessity for, determined by ordinance, 379-381.
- does not require removal of all old street material, 406.
- waterworks, etc., as a, 410.
- assessment of proportion of costs of, cannot exceed benefits conferred, 475.
- public at large and private lands may both be benefited by a, 495.
- three elements must concur to make valid s. a. for a, 552.

### **"LOCAL" PROPERTY—**

- definition of, 308.

### **LOCAL TAXATION—**

See SPECIAL TAXATION.

### **LOCATION—**

- of property assessable, 302n.
- omission to state, of improvement, 390.

### **LOT OR LOTS—**

- what term includes, 289, 300.
- when, in fourth of a square, assessable, 299.



## INDEX.

(References are to section numbers.)

### LOT OR LOTS (Continued).

corner, assessability of, 309.  
each, liable under frontage rule, 501n.  
inequalities of insufficient to evade rule, 501n.  
frontage rule applicable to corner, 503n.  
    of different depth, 503n.  
owners of cannot attack s. a. collaterally because commissioners  
    took no oath, 514.  
each must be separately assessed, 541.  
assessment in gross on several lots, 541n.  
benefits assessed in gross on several, 541n.  
omission of, from assessment, 542.  
land cannot by city be divided into, for s. a. purposes, 543.  
property fronting on corner, assessable in two districts, 554.  
rights of, on s. a. to abate nuisance, 581, 581n.  
recommendation of owners of, as to change of grade, 586n.  
assessing lateral service pipes against vacant, 622n.  
judgment of sale against several, for gross tax, invalid, 697.

### LOUISIANA—

when "tax" does not include "special assessment," 30.  
definition of s. a., 39n.  
equality and uniformity clause in constitution of, 88, 89.  
levy of s. a. on personal property in, 275.

### LOWEST BIDDER—450.

may be rejected, if result of a combination, 449.  
council may award contract to, without proposals—when, 450.  
charter provisions as to, mandatory, 450.  
not entitled to contract as most "favorable" proposal, 450.  
after letting to, increasing amount of work vitiates contract, 454.

## M.

### MACADAMIZING—

See PAVING; STREETS.  
definition of, 378n, 587.  
power of council in ordering, of separate portions of street in one  
    contract, 451.  
does not include curbing, 461n.  
    sidewalks, 461n.  
authority for paving streets includes power of, 587.  
whether, pavement or not, 590, 590n.  
substitution of dirt road for, 622n.  
tax for, sufficient to authorize sale of land against which assessed,  
    700n.

### MAILING OF NOTICE—

See NOTICE.  
affidavit of, 365.



## INDEX.

(References are to section numbers.)

### MANDAMUS—

- a proper remedy to compel ministerial officers to perform their duty, 695.
- when, mandamus will not lie, 696.
- if remedy by, insufficient, equity may intervene, 695n.
- will not issue at relation of owner guilty of laches, 736.
- in general, 763-764.
- holder of warrants may proceed by, 763n.
- contractor not to entitled to after receiving final order, 763n.
- when property owner may have, to compel condemnation, 763n.

### MANDATORY STATUTES—

- or directory, 341, 383, 424.
- whether requirement of resolution is, 342.
- requirements for publication of ordinance usually, 434.
- charters requiring a distinct act to be done are, 436.
- statutory provisions as to assessment roll are, 548.
- statute requiring payment or tender of damages before change of grade, 584.
- charter and ordinance requirements as to notice are, 585.
- charter requirements that damages be ascertained before grading are, 641.

### MARYLAND—

- when "tax" does not include "special assessment," 31.
- definition of s. a., 39n.
- preservation of public health is a benefit under statute 1797, 43.
- equality and uniformity clause in constitution of, 90.
- assessment in excess of value of property, 490.

### MASSACHUSETTS—

- equality and uniformity clause in constitution of, 909.

### MASS MEETING—

- action of citizens at a, confers no authority, 445.

### MATERIAL—

- See CONTRACT; ORDINANCE; CITY ENGINEER.
- unauthorized change of, 621n.
- furnishing material not bid upon, 621n.
- evidence that less costly, would be better, inadmissible, 627.

### MAXIMS—

- sic utere tuo ut alienum non lædas*, 171n.
- stare decisis*, 148.
- de minimis non curat lex*, 57, 477, 808.
- respondeat superior*, 515n.
- idem sonans*, 577.



## INDEX.

(References are to section numbers.)

### **MAXIMS (Continued).**

*damnum absque injuria*, 663n, 664n.

*caveat emptor*, 702, 743.

he who seeks equity must do equity, 796.

### **MAY—**

when, means "must," in serving notice, 433.

### **MAYOR—**

authority of, to contract, 461n.

### **MERGER—**

in general, 716.

### **MERITS—**

of system of special assessment, 65, 66.

### **MICHIGAN—**

equality and uniformity clause in constitution of, 91.

validity of statutes fixing district and limit of assessment, 158.

constitutional provision as to title of tax laws,

### **MINISTERIAL ACT—**

assessment sometimes held to be a, 553.

### **MINNESOTA—**

definition of s. a. in, 39n.

drainage laws of, valid exercise of police power, 43.

equality and uniformity clause in constitution of, 92, 93.

constitutional provision as to counties being municipal corporations, 282.

### **MISSISSIPPI—**

equality and uniformity clause in constitution of, 94.

### **MISSOURI—**

when "tax" does not include "special assessment," 32.

s. a. under police power, unconstitutional in, 42.

equality and uniformity clause in constitution of, 95.

constitutional provisions as to property damaged for public use, 165.

### **MISTAKE—**

alleged, in lowest bid, does not authorize withdrawal, and contract awarded to next lowest bidder without re-advertising, 450.

finding of commissioners on benefits conclusive except for fraud or, 515.

payment under, 721n.

taxes paid under, of law may be recovered back, 779n.

contra, see 783n, 786n.



## INDEX.

(References are to section numbers.)

### MONOPOLY—

See **PATENTED ARTICLE.**

distinction between, and right to use patented article, 459.

### MUNICIPAL LIABILITY—

See **PERSONAL LIABILITY.**

none upon contract when time improperly extended, 457.

when street cut down in a manner other than statutory, 559.

none, when acting under legislative authority, with due care, 641, 642.

in grading streets same as that of a private person, 642.

when no, for damages, 643.

for change of grade, 644-649.

for negligence, 641, 664n.

for payment of special assessment certificates, 671.

great division in opinions of courts upon, 672.

is absolute after money is collected and paid into treasury, 673.

arising from the creation of a special fund, 674.

to pay from general fund, after accepting amount less than the s. a., 676.

to contractor on *ultra vires* contract, 676.

reasons for non-liability to pay s. a. certificates, 677, 678.

promise of city to pay after deficiency, 678n.

on failure of city to collect s. a., 678n.

agreement — exempt property, 678n.

where contractor agrees to look solely to s. a., 678n.

assumpsit — failure to collect assessment, 678n.

construction of statute as to, 678n.

to contractor who relied upon fraudulent city records, 739.

### MUNICIPAL OFFICERS—

in letting contracts, are public officers, 440.

cannot act as commissioners if paid by percentage of s. a., 512.

commissioners to appraise damages are public officers, 514n.

presumption that they do their duty unless contrary appears 523, 804.

### MUNICIPAL REVENUES—

classification of, 2.

importance of s. a. as a source of, 4, 53.

all taxes and assessments included under general term of, 20.

### MULTIPLICITY OF SUITS—

when injunction will lie to restrain, 788.

### MUTUALITY—

is a prime factor in estoppel, 734.



## INDEX.

(References are to section numbers.)

### N.

#### NAME—

- middle initial of, immaterial, 577.
- variance in spelling of, immaterial if *idem sonans*, 577.
- similarity of—presumption of identity, 577n.
- abbreviation of—sufficiency, 577n.

#### NEBRASKA—

- definition of s. a. in, 39n.
- equality and uniformity clause in constitution of, 96.
- assessment in excess of value of property, 491.

#### NECESSITY—

- for adoption of ordinance, 379-381.
- power for determining, of improvement, vested in council, 440, 440n.

#### NEVADA—

- equality and uniformity clause in constitution of, 102.

#### NEW JERSEY—

- definition of s. a. in, 39n.
- equality and uniformity clause in constitution of, 99.
- assessment in excess of value of property, 492.

#### NEW YORK—

- distinction between "tax" and "special assessment" in, 13.
- when "tax" does not include "special assessment," 33.
- definition of s. a. in, 39n.
- no limitation in, constitution on legislative power over taxation, 100.
- when constitutional provisions as to taking not contravened, 163n.

#### NEWSPAPER—

- designation of some, as an official paper, 368.

#### NORTH CAROLINA—

- definition of s. a. in, 39n.
- equality and uniformity clause in constitution of, 101.
- s. a. for fencing townships authorized in, 101.

#### NORTH DAKOTA—

- equality and uniformity clause in constitution of, 102.

NORWOOD V. BAKER—See note to, on p. 203.

#### NOTARY PUBLIC—

- who is also superintendent of s. a. district, may administer oath, 514.



## INDEX.

(References are to section numbers.)

### NOTICE—

- and opportunity for hearing, essential to "due process," 136.
- requisite of due process, 141, 435n.
- sufficiency of, courts in conflict, 141.
- legislature may prescribe mode of giving, 141.
- of poll or specific tax, not requisite, 142.
- unnecessary where amount due is result of mathematical calculation, 142.
- and hearing, not a matter of favor, but of right, 142.
  - such as adopted to nature of proposed assessment, 143.
  - city charter not providing for, unconstitutional, 143.
  - when requirement as to, directory only, 144.
  - somewhere in proceedings, necessary, 145.
  - what, sufficient to constitute due process, 146.
  - especially necessary where tax may be collected by distress, 146n.
  - not alone sufficient — proper tribunal necessary, 147.
  - what, sufficient, 148.
  - when unnecessary, 149, 164.
  - what, insufficient, 150.
  - necessary to valid apportionment, 218.
- requisites of, 347-352.
- sufficiency of, 353-359.
- what record must show as to, 360.
- how given, 361.
- publication of, etc., 368-373.
- waiver of, 374.
- computation of time as to, 377.
- defect in, of filing commissioner's report, not waived by appearance, 376.
- "may" means "must" in requirement of personal service of, 433.
- requirements of statute as to, mandatory, 434n.
- certificate of publication of, essential to jurisdiction, 437.
- contract let without — appeal unnecessary, 461n.
- of motion to dismiss petition for improvement unnecessary, 462n.
- failure to give, of confirmation, how cured, 516.
- proof of, of meeting of commissioners, 523n.
- charter and ordinance requirements as to, mandatory, 615.
- ordinance for sidewalk must provide for notice, 616.
- insufficient proof of, 628.
- failure to give, to abate nuisance, 794n.
- perpetual injunction for failure to give, 815n.

### NUISANCE—

- in general, 581.
- failure to give notice to abate, 794n.



## INDEX.

(References are to section numbers.)

### NUISANCE (Continued).

restraining sale of property for s. a. to abate, 798.  
complaint failing to state cause for equitable relief as to abating,  
798n.

## O.

### OATH—

of commissioners of assessment, 514.  
notary public may administer, although superintendent s. a. dis-  
trict, 514.

### OBJECTIONS—

to the system of special assessments, 57, 59-63.  
that property is taken without "due process," 64.  
to insufficiency of ordinance, when broad enough, 422.  
when available, 438n.  
not available on application for sale, unless damages shown, 452n.  
to assessments — when made, 484.  
to report of commissioners, when made, 519.  
when, to itemized estimate of cost can be made, 527n.  
that city has not acquired title will not be heard, 546.  
when, to insufficiency of assessor's certificate without avail, 560.  
may be urged, 564.  
that there are no benefits includes, that benefits are excessive, 566.  
must be made so as to show on what point decision asked, or  
deemed waived, 567.  
when, to assessment for drainage districts should be made, 614n.  
technical, will not set aside s. a., 621n.  
where no, filed, confirmation of s. a. is matter of course, 627.  
to confirmation should be filed in writing, 627.  
that action of commissioners does not comply with statute, suffi-  
cient, 627.  
when, not of record, but appearing *aliunde*, should be overruled, 630.  
that tax improperly divided into installments — made on applica-  
tion to confirm, 718.  
omitting to make, as waiver of right to appeal, 761.

### OFFICERS—

See DE FACTO AND DE JURE; MUNICIPAL OFFICERS.  
*de facto*, 579.  
whether assessors appointed by council are *de jure*, not consid-  
ered, 579.  
collection must be made by the, specially designated, 689.

### OFFICIAL PAPER—

See NEWSPAPER.  
in general, 368, 369.  
must be published in English, 370n.



## INDEX.

(References are to section numbers.)

### OFFICIAL PAPER (Continued).

- publication of notice in, 370.
- proof of publication of notice, 371-373.

### OFFSET—

- legality of, of benefits and damages, 156, 483.
- may be done unless for constitutional inhibition, 483, 651, 654.
- only the difference payable, 484, 499.
- not allowable in Illinois for land taken, 536.

### OHIO—

- distinction between "tax" and "special assessment" in, 14.
- equality and uniformity clause in constitution of, 103.
- constitutional provision as to full compensation, 159.
- gives towns power over s. a. for sidewalks, 193.
- assessment in excess of value of property in, 493.

### OMISSION—

- of lot from assessment, 461n, 542, 542n, 814n.
- to assess narrow strip between sewer and next proprietor, 499n.
- of property from assessment, 542, 542n.
- of owner's name from assessment roll does not invalidate s. a.,  
when, 548.
- will invalidate s. a. if statutes require, 550.
- of dollar mark, 578.
- to properly advertise for bids, 622n.
- to make timely protest—equity will not act, 799n.
- to file specification, 813n.
- of conditions precedent, 813n.

### OMNIPOTENCE, LEGISLATIVE—

- See LEGISLATURE, POWER OF.
- valid demand cannot be created by legislative enactment, 169n.
- in general, 170-182.
- when complete over all objects not withdrawn by constitution, 190.
- in fixing taxing district is unquestioned, 228, 468.
- injustice of theory of, 238, 240.
- undoubted as to frontage rule, 501n.

### OPENING—

- See STREETS.
- invalid, of street, 622n.
- measure of damages for land taken for street, 661.

### ORDINANCE—

- taxing abutter one-third cost, 88n.
- validity of, with regard to state constitution and laws, wholly a  
state question, 196.



## INDEX.

(References are to section numbers.)

### ORDINANCE (Continued).

- may exempt property from s. a. if not benefited, 314.
- need not be recited as duly passed in certificate attached to petition, 336.
- s. a. proceedings usually founded on, 342.
- notice may be a condition precedent to passage of valid, 350.
- sufficiency of, as notice, 358.
- necessity for, 379-381.
- adoption — presumption — records, 382-383.
- requisites to validity, 384-385.
- construction of, 386.
- effect of repeal of, 387.
- must be reasonable, 388.
- enactment of, *prima facie* evidence that it is reasonable, 388.
- reference in, to plans on file, 389.
- omission to state locality of improvement, 390.
- must be substantially complied with — variance, 391-392.
- embracing more than one improvement, 393.
- validity — in general, 394-402.
  - sufficiency of description, 403.
  - grade ordinances, 404.
  - paving ordinances, 405-407.
  - curb ordinances, 408.
  - sidewalk ordinances, 409.
  - waterworks ordinances, 410.
  - sewer ordinances, 411-414.
- invalidity — in general, 415-422.
  - invalid grade ordinances, 423.
    - paving ordinances, 424.
    - curb ordinances, 425.
    - sidewalk ordinances, 427.
    - sewer ordinances, 428-429.
    - delegation of power, 430-431.
- evidence, and burden of proof, 432.
- when "may" means "must," 433.
- publication of, 434.
  - insufficient, vitiates s. a. 434.
- construction of requirements, note to 434.
- two-weeks time shall elapse, 434.
- payment in installments, 434n.
- assessing for cost of work, 434n.
- material — notice — jurisdiction, 434n.
- pleading, "duly passed," 434n.
- effect of amending law under which, passed, 434n.
- publication on Sunday — proof, 434n.
- inaccuracies in description, 434n.
- collateral attack on, 434n.



## INDEX.

(References are to section numbers.)

### ORDINANCE (Continued).

when judicial in character, notice, 434n.  
assessability of non-abutting property, 434n.  
new, to remedy defects, 434n.  
conflict between statute and, 450n.  
effect of repealing act on, 461n.  
paving of different streets may be authorized by one, 544.  
will not be declared void merely because oppressive, 606.  
for sidewalk, must provide for notice, 616.  
invalidity of, no defense to confirmation, 624.  
when, void, judgment confirmation is void, 625.  
unreasonable, defense to judgment confirmation, 629n.  
passage of ordinance for change of grade causes no damage, 650.  
initial law governs at time of passage of, 822n.

### OREGON—

when "tax" does not include "special assessment," 33.  
definition of s. a., 39n.  
equality and uniformity clause in constitution of, 104.

### OUTLET—

of sewer may be outside city limits, 268.  
sewer ordinance need not provide for, 414.  
location of sewer, for determination of local authorities, 609.  
assessment for cost of sewer intended as an, 639.

### OVERRULED CASES—

Mayor v. Dorgan, 45 Ala. 310. } By Mayor v. Klein, 89  
Mayor v. Royal St. R. Co. 45 Ala. 32. } Ala. 461 23n  
Palmer v. Way, 6 Colo. 106, by Denver v. Knowles, 17 Colo. 204,  
25n.  
State v. Robert P. Lewis Co., 72 Minn. 87, by S. C. 82 Minn. —,  
170.  
Mauldin v. Greenville, 53 S. C. 285, overruling S. C. 42 S. C., 293.  
By Kansas City v. Ward,  
State v. Leffingwell, 54 Mo. 458. } 134 Mo. 172 and Kan-  
County Court v. Griswold, 58 Mo. 175. } sas City v. Bacon, 147  
Mo. 259.

### OWNERSHIP—Sometimes necessary to s. a., 298.

in s. a. district usually disqualifies owner as commissioner, 513,  
513n.  
assessment of lots together having same, or different, 541.  
of entire block in, but of record in two names—how assessed, 549.  
how city, of land disproved, 571n.



## INDEX.

(References are to section numbers.)

### P.

#### PARKS—

- may be laid out in various towns or counties, 215, 215n.
- public, 256, 257.
- subject to s. a., 282.
- power to levy s. a. and special taxes for, 307n.
- powers of commissioners of, as to exemptions, 315.
- property exempt from s. a., 315.
- when interested persons may make s. a. for, 509.
- assessment for, situated in two towns, how made, 509.
- powers of commissioners of, 523n.
- confirming assessment for, 630n.

#### PARK COMMISSIONERS—

See PARKS.

- when may have power of s. a. conferred on them, 207.
- how regularity of proceedings of, how questioned, 438n.
- assessment of city streets by, 621n.

#### PARTIES—

- in equitable suits — who may be, 805.
- when city not a necessary, 815n.

#### PATENTED ARTICLE—

See MONOPOLY.

- city cannot contract for, at expense of lot owners, 450n.
- drain — requirements additional to contract, 451n.
- use of, eliminates elements of competition, 459.
- distinction between right to use, and monopoly, 459.
- common council not prohibited from using for paving, 459n.
- city may secure right to use before letting contract, 459n.
- when unauthorized use will not avoid s. a., 459n.

#### PAVEMENT—

See PAVING; STREETS.

- objection that present, is sufficient, 405.
- removal of unworn, is an arbitrary act, 443.
- validity of contracts having guaranty for term of years, 453.
- different kinds on one street, 545n.
- what constitutes a, 587-590.
- what is not a, 591.
- assessment for, may include curbs, gutters, cross-walks, etc., 582.
- reconstruction and repairs of, 596.
- when property owner not chargeable with expense of relaying, 618.

#### PAVING—

- See STREET IMPROVEMENTS; REPAVING; PAVEMENT.
- is an exercise of taxing power, not eminent domain, 249.



## INDEX.

(References are to section numbers.)

### PAVING (Continued).

- sufficiency of, ordinances, 405.
- invalid ordinances for, 424, 424n.
- one street by gravel from another, 442.
- contract for — distance not specified, 461n.
- what constitutes a pavement, 587-590.
- what is not a pavement, 591.
- at street intersections, 592.
- resolutions and estimates, 593.
- liability of abutting owners, 594.
- apportionment of tax, 595.
- reconstruction and repairs, 596.
- street railways — liability for, 597.
- for miscellaneous decisions on questions of, see pp. 574, 575.

### PAYMENT—

- of annual tax should be by life-tenant, 20n, 710n.
- of s. a. by life-tenant and remainderman ratably, 20n.
  - made as ordinance directs, 82n, 194.
- legislative power over, almost without limit, 194.
- in installments, 434n.
- different methods of, in one street, 461n.
- change of, by statute does not invalidate contract, 461n.
- method of, governed by law in force when contract was made, 556n.
- as between life-tenant and remainderman, 589a.
- for sewer crossing railway track, 598n.
- pro tanto* for sewer running through private grounds in part, 608n.
- contributions by public, 621n.
- personal liability for payment of s. a. certificates, 668-670.
- municipal liability for payment of s. a. certificates, 671-673.
- from general fund of liability arising from special fund, 675.
- of s. a. in depreciated warrants, 681n.
- liability of petitioner for payment, 682.
- penalties for non-payment of s. a., 687, 721n.
- in installments, 718.
- from general fund, 719.
- when, neither waiver nor estoppel, 720.
- usually a waiver of irregularities in proceedings, 720.
- what constitutes a voluntary, 720.
- by mistake — revivor, 721n.
- in cash or on time — difference in price, 721n.
- in part by general taxation, 721n.
- by municipal warrants, 721n.
- who liable for, 721n.
- for work already done, 721n.
- when liability for, accrues, 721n.
- excess, by one no benefit to another, 721n.



## INDEX.

(References are to section numbers.)

### PAYMENT (Continued).

by mistake discharges both land and owner of any liability, 722.  
in depreciated municipal warrants, 739.  
of percentage of s. a. as a discharge, 750n.  
made voluntarily, without protest, and with knowledge, not recoverable, 769.  
a void s. a. is not validated because it has been voluntarily paid, 769.  
a s. a. made under unconstitutional statute, paid under protest, recoverable, 769.  
proper remedy to recover for tax illegally assessed by action for money had and received, 770.  
of one installment does not conclude owner from challenging the others, 769n.  
when, recoverable when s. a. without jurisdiction, 772.  
recovery back of, of illegal assessment — ignorance or coercion necessary, 773.  
abandoning work — failure of consideration — recovery, 774.  
not essential to recovery of, under unconstitutional s. a., that it should first be declared void, 775.  
voluntary and compulsory, 776.  
under protest, 776n.  
fraudulent statement by officials inducing, 776n.  
to collector with warrant, 776n.  
who may recover, 777.  
only those who institute proceedings may recover, 777.  
mistakes in, 778.  
statute of limitations on, runs from vacation of s. a., 779.  
recovery of illegal tax — plea of city, 778n.  
voluntarily made, with full knowledge, cannot be recovered, 780.  
statutory authority — when necessary for city to refund, 785.  
recovery back because of failure of consideration, 786.  
voluntary, though paid under protest, not recoverable, although partly void, 786.  
to prevent lien is not, under duress, 786n.  
by lessee, 786.  
for grading adjoining property, 786n.  
determination of illegal excess, 786n.  
or tender as prerequisite to equitable intervention, 800.  
from special fund — demand for — bonds, 800n.  
equity will require, of portion of tax due, 801.  
trend of modern decision — when, deemed waived, 801n.  
neglect of duty by treasurer — acts of officer *de facto* — failure to act promptly, 801n.

### PENNSYLVANIA—

distinction between “tax” and “special assessment” in, 15.  
when “tax” does not include “special assessment,” 34.



## INDEX.

(References are to section numbers.)

### PENNSYLVANIA (Continued).

- equality and uniformity clause in constitution, 105, 106.
- of taxation not enjoined by bill of rights, 106n.
- assessment in excess of value of property, 494.

### PENALTIES—

- for non-payment of s. a., 687, 721n.
- only such as provided by statute may be imposed, 687.
- interest after due, 687n.
- relief from, 815n.

### PENALTY CLAUSE—

- in contract, not for benefit of abutting owners, 457.

### PERFORMANCE—

See CONTRACT; WORK.

- of contract, 454.
- corporate authorities sole judges of, 454.
- in case of defective, contract is basis for fixing amount of recovery, 455.
- acceptance as a completed, must be in good faith, 455.
- right of owners to maintain suit for injunction for defective, 455, 455n.
- substantial, is sufficient, 455n.

### PERSONAL LIABILITY—

- special assessment not a, of tax-payer, 12a, 225n, 501, 668.
- proceedings for collection being *in rem*, no, against owner, 669.
- but only a lien on the specific property assessed, 669.
- where property is lessened in value by improvement, 670.
- courts are divided on question of—see decisions in 669n, 670n, 671n, 827n.
- where by statute s. a. has effect of tax, there is a, 686n.

### PERSONAL PROPERTY—

- special assessment of, 55, 275, 295.

### PETITION—

- in general, 327-329.
- sufficiency of signature, and authority for, 330-333.
- requisites of, 334.
- sufficiency of, 335-337, 337n.
- effect of signing, 338.
- dismissal of, 339.
- when notice unnecessary, 352.
- when, necessary to start improvement, all proceedings void without, 416, 416n.
- requiring, of majority of owners in certain district, 436n.



## INDEX.

(References are to section numbers.)

### PETITION (Continued).

- when patented pavement may be laid only upon, contract without, is void, 459.
- notice of motion for dismissal of, unnecessary, 462n.
- liability of one who signs, for payment of s. a., 682.
- no estoppel to deny invalidity of proceedings by signing, 725.
- signing, no waiver of legal s. a., 737a.
- answer to, for certiorari, 752a.

### PHOTOGRAPH—

- when admissible in evidence, 522.

### PIERS—

See LEVEES, DYKES AND BREAKWATERS.

### PLANS AND SPECIFICATIONS—

See COUNCIL.

- reference to, on file, 389, 416.
- when insufficient, 423.
- slight variations from, not increasing cost, will not vitiate s. a., 455.
- failure to estimate rock excavation, when same necessary, 456.
- contract referring to, as annexed, and none annexed, invalid, 456.
- absence of, when required by charter, avoids contract, 456.
- when, become a part of the contract, 456n.
- when required by statute, omission avoids assessment, 524.
- making and filing a necessary preliminary, 534.
- unless charter requirement, may be directory merely, 534.
- sufficiency of, 534n.
- for constructing sewers, 607.
- constructing sewer not on original plan, 607n.
- that original, were changed, may be alleged on application for sale, 607n.
- omission to file, 813n.

### PLEADING—

- waiver must be pleaded if relied on, 376.
- ordinance "duly passed," 434n.
- what complaint on change of grade must show, 597n.
- in proceedings to collect, 691.
- requisites of complaint, 691n.
- counterclaim — demurrer, 692.
- answer to claim of tax title that land is exempt, bad on demurrer, 692.
- general rules of, as to fraud, applicable in s. a. cases, 740.
- allegations sufficient to avoid s. a., 740n.
- and practice on petition for certiorari, 753.
- what does not constitute an allegation of fraud, 797n.



## INDEX.

(References are to section numbers.)

### PLEADING (Continued).

- allegations insufficient to afford equitable relief — nuisance, 798n.
- in suits in equity — in general, 806-807.
- failure to show injury, 807n.

### POLICE POWER—

- as authority to levy s. a. 40.
- sidewalk, sewer, levee and drainage s. a. made under, 40, 252.
- constitutional provisions as to taking not a limitation on, 41.
- incapable of exact definition, 42.
- drainage laws may be referable to, 43, 263.
- street sweeping and sprinkling and removing snow referable to, 44.
- insufficient for modern municipal necessities, 44.
- removal of snow from sidewalk, 273.
- grading and paving cannot be ordered under, 501.
- right to assess cost of making sewer connection exercise of, 610n.

### POSTING OF NOTICE—

- must be for full time prescribed, 363.

### POWER OF COUNCIL.

See COUNCIL.

- as to s. a. exists only in exclusive legislative grant, 439.
- possessed in general of much discretionary power, 439.

### POWER, DELEGATION OF—

- in general, 183, 184, 416, 430, 431.
- legislature may exercise, in fixing taxing districts, 213, 216.
  - amount of tax and mode of raising, 216.
- not a, to fix cost of improvement, 430.

### POWER OF SPECIAL ASSESSMENT—

- a continuing one, 185, 186.
- express statutory authority necessary, 186, 402n.
- strictly construed, 185-189, 380.
- resides in legislature, 323.
- ordinance alone cannot confer, 402n.

### POWER, STATUTORY—

- express, necessary to authorize s. a., 186.
- in general, 190.
- express, must be given for levees, etc., 258.

### PRESUMPTION—

- every, in favor of right of taxation, 15n.
- as to benefits, how far carried, 220.
- legal, is that benefits equal amount of s. a., 220.
- no, of giving of notice, 370.



## INDEX.

(References are to section numbers.)

### PRESUMPTION (Continued).

of waiver of notice, 374.

notice to owners in drainage district, 376n.

adoption of ordinance, 382.

as to statute under which ordinance for collecting tax enacted, 398.  
ordinance fixing locality without resort to, 406.

when no, as to illegal provisions in contract, 452.

as to increase of cost, when rebutted, 452.

that public officers discharge their duties faithfully and lawfully,  
464n.

act within the scope of their powers, 464n.

that things of the substance cannot be held immaterial, 464n.

omission of record to show necessary acts not supplied by, 464n.

that in review of assessment roll under charter, council did its  
duty, 464n.

a conclusive, that s. a. is limited by benefits—when, 464.

that preliminary report was properly made, 464n.

s. a. was made with reference to special benefits alone, 468.

as to acts of commissioners, 523.

that city engineer prepared plans, etc., according to ordinance, 534.

as to meaning of heading “benefits” in assessment roll, 548.

of identity of persons from similarity of names, 577n.

that there has been no abuse of discretion in assessment, 616.

that no sidewalks laid except in front of lots shown in s. a., 617.  
of jurisdiction of court to render judgment in s. a. proceedings,  
633.

when, that majority of owners did not protest, 693n.

in favor of judgment of sale, 699n.

no, that petitioner wants work done other than according to law  
in absence of showing that benefit exists, 778n.

that officers act illegally, or that conditions precedent are not per-  
formed, 804.

### PRINCIPLE—

wrong, of law, 622n.

### PRIORITIES—

See LIENS.

### PRIVATE PROPERTY—

notice requisite to taking of, for public use, 141.

where sewer cannot be reached except through, s. a. for is illegal,  
603.

### PRIVATE SEWERS—

See DRAINS AND SEWERS.

difference between, and public sewers, a physical fact, 608.

general statement of principles regarding, 608.



## INDEX.

(References are to section numbers.)

### PROCEDURE—

- jury of six to assess benefit not a jury trial—majority controls, 447n.
- but not when power is delegated for a private purpose, 447n.
- instructions to jury, 571n, 665n.
- when facts and evidence do not support judgment, 586, 586n.
- effect of decision of appellate court, 622n.
- issue on hearing to objections to confirmation, 629n.
- verdict where benefits less than damages, 642n.
- less than evidence— not set aside on appeal, 642n.
- nominal damages— nonsuit— appeal, 643n.
- when verdict will not be disturbed, 653n.
- in assessing damages, jury may not indulge in vague conjectures, 656.
- view of premises by jury— great weight attached to, 657n.
- the jury— legality of panel— validity of proceedings, 665.
- view of premises— facts acquired on, not evidence, 666.
- questions for jury— benefits, 667.

### PROCEEDINGS—

See ASSESSMENT ROLL: RECORD.

### PROPERTY—

- rights appurtenant to use of, 152.
- when physical injury to, constitutes a taking, 153.
- must be actually taken, or use limited, to require compensation, 155.
- of, damaged for public use, 165, 166.
- all kinds of real, subject to s. a., 280.
- only tangible, can abut a street, 290.
- assessable for sewers only when capable of connection therewith, 294.
- all, directly benefited, should be assessed, whether in fee or for years, 296.
- location of, assessable, 302.
- educational, religious and charitable, not exempt from s. a., 318.
- except by statute, 318, 319.
- cannot be taken by taxation under guise of benefit, 472.
- assessments in excess of value of, 486.
- what, assessable, 537.
- on both sides of street may be assessed, 537n.
- but not for repairs, 537n.
- omission of, from s. a., 542.
- assessment against, by description, usually sufficient, 550.
- change in ownership of, does not affect s. a., 550.
- assessment against unknown owners, 550.
- in two assessment districts, 554.
- assessment of non-abutting, 622n.



## INDEX.

(References are to section numbers.)

### PROPERTY OWNERS—

See **ABUTTING OWNERS; OWNERSHIP.**

- requiring assent of certain proportion of, 436n.
- requiring petition by majority of, in district, 436n.
- commissioners not necessarily disqualified as being, 511.
- name of, necessary in assessment roll if statute requires, 539.
- rights of, to object to judgment of confirmation, 627n.
- not parties to contract between contractor and municipality, 703n.
- when, may be estopped, 727, 732n.
- standing by without remonstrance may estop, 726.
- not estopped to set up facts to show lack of jurisdiction, 734.
- bound to give notice of invalidity of s. a. to any one, 734n, 735.
- when, not estopped, 735.
- duty of, to act promptly and avoid laches, 736.
- when, may have mandamus to compel condemnation, 764.
- when may recover illegal tax paid, 778n.
- when assessed benefits, may enjoin diversion of fund, 811.
- duty of, in reassessment proceedings, 831.

### PROPERTY SUBJECT TO SPECIAL ASSESSMENT—

- in general, 279-280.
- public property, 281-283.
- street railway property, 284-288.
- railroad property, 289-293.
- agricultural lands, 294.
- personal property, 295.
- realty benefited, 296.
- realty dedicated, 297.
- ownership, 298.
- street intersections, 299-301.
- location of, 302.
- "abutting" property, 303-304.
- "adjacent property," 305.
- "adjoining" property, 306.
- "contiguous" property, 307.
- "local" or "vicinity" property, 308.
- fronting property, 309.
- square and block, 310-311.

### PUBLICATION OF NOTICE—

See **NOTICE.**

- may be authorized by legislature, 367.
- strict compliance with statute necessary, 367, 370.
- proof of, 371-373.
  - ordinance, on Sunday only, 398, 434n.
  - in general, 434.
  - requirements for, usually mandatory, 434.
- certificate of, essential to jurisdiction, 437.



## INDEX.

(References are to section numbers.)

### PUBLICATION OF NOTICE (Continued).

evidence—proof of, 572n.

absence of proof of, 621n.

### PUBLIC BUILDINGS—

cost of, payable from general levy, 276.

### PUBLIC GROUNDS—

liability for cost of paving opposite, 594n.

### PUBLIC PROPERTY—

exemption of from s. a., 313.

### PUBLIC PURPOSE—

all taxation by s. a., must be for a, 54, 203, 204, 242, 266.

a limitation on power of s. a., 203.

reclamation of swamp and arid lands a, 205.

must also be for a local improvement to justify s. a., 205.

test of whether a matter is for a, 208.

instances of what constitutes a, 209.

creation of levees, dykes and breakwaters is a, 258.

act for drainage of farms not for a, 266.

road through agricultural land not a, 295n.

when delegation of power to jury for, majority sufficient, 448.

### PURPOSES—

See PUBLIC PURPOSES.

for which s. a. authorized, 242.

legislative provisions for reimbursement, for private, 316n.

### PUMPING WORKS—

See WATERWORKS, PIPES AND MAINS; SEWERS.

for sewerage system, when authorized, 268.

in reclamation district, 526.

### PUNCTUATION—

will not override plain rules of statutory construction, 196.

### PURCHASER—

See SALES; CAVEAT EMPTOR.

at tax sale—in general, 742.

*caveat emptor*, 743.

subsequent, with knowledge, 744, 744n.

## Q.

### QUALIFICATIONS—

of commissioners or appraisers, 510-513.

### QUANTUM MERUIT—

when there may be a recovery on, 772n.

recovery by city on, 815n.



## INDEX.

(References are to section numbers.)

### QUO WARRANTO—

proper method for determining legality of assessment board, 524.  
of inquiring into legality of commissioners, or drainage districts, 765.

## R.

### RAILROADS—

contiguous to street improvement are subject to special taxation, 246.  
right of way, tunnels and enclosed grounds, when not liable to s. a., 246, 289, 290, 292.  
may be assessed for drainage, 290.  
property of, when not assessable, 255, 288n, 289, 321.  
impressed with a public use, 321.  
right of way—no ambiguity in term, 291.  
subject to special taxation, 291.  
statute requiring, to make street crossings—no benefits, 434n.  
expense of paving property of, improperly included in estimate of cost, 527n.

### RATIFICATION—

See CURATIVE ACTS; REASSESSMENTS.

### READVERTISING—

when necessary, 450, 455n.

### REASONABLE—

ordinances must be reasonable, 388.

### REASSESSMENT—

See CURATIVE ACTS; REASSESSMENT STATUTES.

notice of, must be given, 350.  
new assessment will not cure defect when ordinance invalid, 418.  
curative acts—in general, 816-818.  
statutes authorizing, 823.  
constitutionality of, statutes, 824.  
validity of, statutes, 825.  
construction of, statutes, 826.  
must be based on benefits, 827.  
statute of limitations, 828.  
continuation of original proceedings, 829.  
payment of interest, 830.  
duty of property owner, 831.  
when, may be ordered, 832-837.  
not permitted, 838-841.

### REASSESSMENT STATUTES—

validity of, are generally admitted, 823, 823n.  
are constitutional if omitting no requirement which could first have been omitted, 824.



## INDEX.

(References are to section numbers.)

### REASSESSMENT STATUTES (Continued).

- cannot validate retrospectively what it could not originally have authorized, 825.
- construction of—no retrospective effect, unless intention clearly appears, 826.
- must be based on benefits, 827.
- correcting invalid assessment—extent, 827a.
- changing words in, 827a.
- under a new charter, 827a.
- validating warrants—invalid attempts at incorporation, 827n.
- proceedings under, a continuance of old ones, 829.

### RECITAL—

- of jurisdictional facts, is a finding, 635.
- conclusive against collateral attack, 635.

### RECLAMATION—

See DRAINAGE AND DRAINAGE DISTRICTS.

- of swamp and arid lands is a public purpose, 205.
- s. a. for, of swamp lands may be levied on town, 294.
- statute of California requires s. a. according to benefits, 496.
- when cost of pump, etc., in, district, included in cost of work, 526.

### RECONSTRUCTION AND REPAIRS—

- in general, 596.

### RECOVERY BACK—

See PAYMENT.

- by owner, when proceedings abandoned, 463n.
- purchaser at tax sale—when allowed, 742.
- in general, 769-770.
- facts outside the record, 771.
- failure of jurisdiction, 772.
- ignorance or coercion, 773.
- abandoning work—failure of consideration, 774.
- unconstitutional assessment, 775.
- voluntary and compulsory payments, 776.
- regular proceedings have force of judgment, 775n.
- who may recover, 777.
- mistakes in payment, 778.
- when statute of limitations runs on, 779.
- when no recovery, 780.
- vested rights in, of void assessments, 781.
- assessment valid on its face, 782.
  - invalid on its face, 783.
- rule alike as to taxes and assessments, 784.
- because of failure of consideration, 786.
- of costs of suit—when not allowed, 814n.
- by city on *quantum meruit*, 815n.



## INDEX.

(References are to section numbers.)

### RECORD—

- what, must show as to notice, 360.
- ordinance should be placed on, 379.
- of adoption of ordinance—presumptions, 382.
- must affirmatively show compliance with requirement for petition, 416.
- rule of apportionment and method of application must appear on, 467.
- what must affirmatively appear in, 480, 561.
- must show consideration of both benefits and damages if charter requires, 483.
  - commissioners possess statutory qualifications, 511.
  - actual view of premises, 522, 522n.
- evidence *aliunde* to impeach, of assessment, admissible, 523.
- s. a. void if, shows was made before meeting of board called for making, 551.
- what, of assessment proceedings must show, 559.
- every essential prerequisite must appear upon the face of, 559.
- sufficiency of, 560, 561.
- proceedings void on their face, 572n.

### REFERENCE—

- to plans, etc., on file, 389.

### REMAINDERMAN—

- should bear expense of s. a. ratably with life tenant, 21n, 590n, 722, 789n.
- apportionment between, and tenant by courtesy, 469.
- when need not contribute for street improvement, 710n.

### REMONSTRANCE—

- by petitions against improvement, 338.

### RES JUDICATA—

- judgment of confirmation on appeal, when bar to second, 625.
- application of principle to second trial, 625.
- judgments of courts of review are, in subsequent applications, 630n.
- after assessment for park purposes made and divided, validity is, 630n.
- when adjudication of damages is, 645n.
- decree declaring assessment void, no bar—when, 699n.

### REPAIRING AND MAINTENANCE—

- See CONTRACT; STREETS; PAVING.
- of old ditch, 294.
- provisions in contract for, for term of years, 401, 405, 453n.
- street work constituting public improvement, and not, 406.
- contract for future, invalid, 453n.
- agreement for repair of street, 597n.



## INDEX.

(References are to section numbers.)

### REPAVING—

See PAVING; REPAIRS AND MAINTENANCE.  
not a charge against abutting property in Pennsylvania, 249, 250.

### REPEAL—

effect of, of ordinance, 387.

### REPLEVIN—

when not maintainable, 779n.

### REQUISITES—

notice and opportunity for hearing, of due process, 141.  
to validity of ordinance, 384, 385.  
in making assessment, 552.

### RESOLUTION—

in general, 342.  
when sufficient or valid, 343-344.  
insufficient or invalid, 345.  
an initiatory step in s. a., 326.  
ordinance cannot be amended, suspended or repealed by, 383.  
as to kind of stone, complying with ordinance, 445.  
directing clerk to publish notice not illegal delegation of power,  
445.

### RESOLUTIONS AND ESTIMATES—

unnecessary that, should be technical in wording, 593.  
for widening street, 593n.  
description of work, 593n.  
failure to determine material, 593n.  
detailed estimate—variance, 593n.  
meaning of "delivered," 593n.

### RESTRICTIONS—

See CONTRACT; BIDS AND BIDDERS.  
upon freedom of competition, or increasing cost, illegal, 452.  
what constitutes, 452.  
that are not invalid, 453.  
restrictive clause not in ordinance—bidders ignorant, 452n.  
not a part of specifications, and not affecting bidding, 452n.

### RETAINING WALL—

construction of may be payable by s. a., 255.  
when expense of, may be included in cost of work, 526, 582.

### RETROACTIVE LAWS—

generally invalid, 169n.  
legislation not impairing vested right—constitutional inhibition  
as to, 383.



## INDEX.

(References are to section numbers.)

### REVERSAL OF JUDGMENT—

See JUDGMENT.

### REVIEW OF BENEFITS—

determination of council as to amount, 619.

### RHODE ISLAND—

equality and uniformity clause in constitution of, 107.

### RIGHTS AND REMEDIES OF TAXPAYERS—

See CERTIORARI; MANDAMUS; EQUITY; TRESPASS.

when statute creates new right and prescribes remedy, it is exclusive, 680.

existing — effect on, of new statutes giving additional, 700n.

right to appeal purely statutory — remedy for unfair assessment by, 755n.

where s. a. is arbitrary and fraudulent, owner may have relief in equity, 760.

or by a common law action for damages, 760.

election of remedies by taxpayer, 789n.

### ROADS AND HIGHWAYS, COUNTY—

not proper subjects of s. a., 253-254.

mere transfer of, to city, does not make it a street, and subject to s. a., 281.

### ROCK EXCAVATION—

specifications giving no estimate of amount of, avoid contract, 450.

price of, cannot be fixed in ad. for proposals, 457n.

extra cost of, for sewer — to what chargeable, 611.

exorbitant price for, as evidence of fraud, 739.

payment for, in ignorance of invalidity, 776.

### RULE OF ASSESSMENT—

any other, than as prescribed by statute is invalid, 515.

## S.

### SALE—

a legal assessment is the foundation of authority for, 700.

redemption from second, 700n.

for an unpaid s. a. is the execution of a naked power, 700.

liability of non-adjacent lot to, for deficiency, 700n.

of undivided interest — notice, 700n.

when part of tax illegal, is void, 700n.

when, void — *caveat emptor*, 702.

cemetery property not subject to, 702.

no objection to validity of s. a. against school property that it cannot be sold, 702n.



## INDEX.

(References are to section numbers.)

### SALE (Continued).

- for less than amount of tax, 702n.
- of too much land, 702n.
- purchaser at tax,—in general, 742.
  - takes title free from s. a. liens, 742.
- of several lots together, 814n.
- void — unlawful contract, 815n.

### SCHOOL PROPERTY—

- not subject to sale for unpaid s. a., 702n.

### SEAL—

- not necessary to corporate signature to petition, 330.

### SEWERS—

See STREET; DRAINS AND SEWERS; OUTLETS.

- may be laid under police power, 40, 41.
- when notice and hearing of assessment for, unnecessary, 145.
- cost of maintaining, proper subject of s. a., 146.
- a species of drain, 230.
- assessment for, by area, equitable, 230.
  - new sewer to furnish outlet, 294.
- license fee may be charged for use of, 294.
- diversion of natural stream into, may justify s. a., 294.
- when no notice of assessment for privilege of using, necessary, 351.
- ordinances for, 411.
- may be constructed under resolution if charter permits, 411.
- invalid ordinances for, 428.
- fixing starting point, 429.
- requirements for being sufficiently specific, 429.
- method of connection within discretion of council, 441.
- powers over, which council cannot delegate to city engineer, 446.
- purchase of pipe for, from city, is valid, 461n.
- enhanced value of property in future because of, not to be considered, 482.
- cost of lateral and cross drain pipes — when included in cost of work, 526.
- in general, 598.
- not a new servitude, 598.
- assessment by benefits, 599-603.
- future benefits, 604.
- front foot rule, 605.
- sewer districts, 606.
- plans and specifications, 607.
- private sewers, 608.
- outlets, 609.
- connections, 610.
- assessments and objections, 611, 612.



## INDEX.

(References are to section numbers.)

### SEWERS (Continued).

- drainage and drainage districts, 613, 614.
- standing of abutting owners when street regraded for pavement, 582.
- s. a. for, passing through private property, illegal, 603.
- must furnish benefits, or s. a. for is illegal, 603.
- only territory drained by, assessable for costs of, 606n.
- when omission to file general plan of, fatal to s. a., 607.
- must be laid on line indicated by ordinance, 612.
- assessment for cost of, based on valuation, is void, 61.
- entire cost of assessable against land benefited under Indiana statute, 612n.
- what defenses inadequate, 612n.
- character of work not changed by name, 612.
- s. a. for, being a tax, cannot be collected by action, 686n.
- not a necessary part of a street, 816.

### SEWER ASSESSMENTS AND OBJECTIONS—

- sale of frontage after recording of plat does not affect validity of s. a., 611.

### SEWER CONNECTIONS—

See SEWERS; OUTLET.

- charter provisions as to, must be strictly complied with, 609.
- requirements for, with dwellings within power of local authorities, 610.
- that connections cost less on one side of street does not justify variance in s. a., 610.

### SEWER DISTRICTS—

- property in one, not assessable for work done in another, 606.
- but money may be spent in another for outlet or completion of work, 606.
- may be created within limits of a larger one, under certain circumstances, 606.

### SHADE TREES—

- contractor who unnecessarily takes up, liable to owner, 642.
- destruction of shade trees, an element of damage, 657.
- effect of destruction of, on value of whole property, 660.
- urging care in removal of, not an estoppel, 735.

### SIDE HILL—

- city cannot excavate full width of street on, 642.

### SIDEWALKS—

See STREET; SPECIAL TAXATION.

- no rule requiring part of street to be set aside for, 249.



## INDEX.

(References are to section numbers.)

### SIDEWALKS (Continued).

- usually laid under police power, 40, 41, 252.
- may be paid for by s. a., 252.
- removal of snow from, 44, 272-273.
- culverts not a part of, 251.
- removal of snow from, 273.
- in front of part of lot, chargeable to whole lot, 299.
- notice as to, when unnecessary, 351.
- ordinance for, 409.
- city engineer cannot order, except as by ordinance, 409.
- invalid ordinances for, 426.
- not included under macadamizing, 461n.
- assessment for filling under, 506n.
- no objection to s. a. for that it is on private property, 546.
- where general ordinance provides mode of s. a., special ordinance need not recite, 557.
- in general — necessity of notice, 615.
- single improvement, 616.
- what included in, 617.
- power of council over — how exercised, 618.
- review of benefits, 619.
- liability for cost of, 620.
- in general — necessity for notice, 615.
- demand to construct, and refusal, necessary to create lien, 615.
- on each side of street may be included in single improvement, 616.
- what included in cost of construction of, 617.
- power of council over — how exercised, 618.
- review of benefits for, 619.
- liability for cost of, 620.
- unauthorized removal of, an actionable trespass, 767.

### SIGNATURE—

- to petition, must be those of actual owners, 328.
- which does not bind owner, not counted in petition, 329.
- sufficiency of, and authority for, 330.
- sufficiency of, to petition, 335-337.
- effect of, 338.
- unauthorized, may be ratified in certain contingencies, 331.
- effect of, when followed by words *descriptio personæ*, 332.
- relief in equity against, procured by fraud, 341.
- printed, when sufficient in foreclosure proceedings, 680.

### SNOW—

See POLICE POWER.

- removal of, from sidewalk, 272, 273.

### SOUTH CAROLINA—

- only state denying constitutionality of s. a., 8, 109.
- equality and uniformity clause in constitution of, 108.



## INDEX.

(References are to section numbers.)

### **SOUTH DAKOTA—**

- definition of s. a., 39n.
- equality and uniformity clause in 110.

### **SPECIAL ASSESSMENT—**

See ASSESSMENTS; BENEFITS.

- as a source of municipal revenues, 2, 4.
- origin and history of, 5.
- origin in America, 7.
- English precedents, 8.
- distinction between, and tax, 9.
- can be levied only on land, 12a.
- cannot be made a personal liability of the owner, 12a.
- distinction between, and special taxation, 19.
- when, included in word "tax," 20.
- not included in word "tax," 21, 529.
- should be paid ratably by life-tenant and remainderman, 20n.
- not payable by lessee under agreement to pay all taxes, 20n.
- taxes and, defined, 36.
- definitions of, 18, 37, 38, 38n, 56.
- legal theories of power of, 39.
- an exercise of the power of taxation, 47-49.
- constitutional authorization unnecessary for, 50.
- restraints upon power to levy, 54.
- must be for public purpose, on property benefited and properly apportioned, 54.
- what is meant by term, by special assessment, 55.
- of personal property, 55.
- must be within clearly defined district, 55.
- author's definition of, 56.
- objections to system of, 57, 59-63.
- merits of system, 65, 66.
- authority for in state constitutions, 67.
- power of, may be conferred on counties, 93n.
- cost of maintaining sewers, proper subject of, 292.
- power of, a continuing one, 185, 323.
- express statutory power necessary, 186, 190, 509, 559.
- statutes conferring power, are *in invitum*, 195, 323.
- must be for a public purpose, in a fixed district, 203, 204.
- may only be levied by corporations having municipal functions, 207.
- substantially exceeding benefits, is a taking, 237.
- not usual to pay for country roads and highways, 253-254.
- specific purposes for which, authorized, 242-278.
- miscellaneous cases of, 276-277.
- may be levied on street in front of court house, 282.
- exemptions from, 282, 283, 284, 312.



## INDEX.

(References are to section numbers.)

### **SPECIAL ASSESSMENT** (Continued).

- when may be levied on a town, 294.
- power of, resides in legislature, 322.
- various steps in, proceedings, 326.
- petition requisite when required by statute, 327.
- proper basis for — benefits must be considered, 420, 420n.
- unauthorized increase of cost of, will avoid, 447.
- defects in, affecting substantial justice, not aided by charter provisions, 585.
- is a trust fund, 678n.
- failure of city to collect s. a., 678n.
- cannot be collected out of lands not assessed, 697n.
- is a charge against the land and not the owner, 722.
- fraudulently made is absolutely void, 738.
- invalidity of as available to subsequent purchaser as to owner, 744.
- certiorari eminently suitable for review of, proceedings, 745.
- valid on its face, voluntarily paid, when not recoverable, 782.
- invalid on its face, voluntarily paid, cannot be recovered, 783.
- equity will not interfere to vacate s. a. for irregularities, except for fraud, 802.

### **SPECIAL FUND—**

- liability for payment of s. a. arising from creation of, 674.
- general rule as to payment from general fund, 675.
- when no liability for failure to provide, 675.

### **SPECIAL TAXATION—**

See SIDEWALKS.

- what subjects embraced under, 2.
- distinction between, and special assessment, 19, 83, 485.
- power of, under Illinois constitution of 1870, 19.
- only contiguous property subject to, 19, 19n.
- for building embankment, 88n.
- of contiguous property is valid, 222.
- decisions as to, see note at foot of p. 204.
- railroad contiguous to street improvement, subject to, 246.
- estimate for curbing may be included in work payable by, 405.
- in general, 485.
- decisions on, as to sidewalks contrary to principles of s. a., 485n.
- of contiguous property does not violate Illinois Constitution, 619n.

### **SPECIFIC—**

- ordinance must be, 398, 403, 413.
- need not set out each detail, 399.
- instances of paving ordinances sufficiently, 407.
- of curbing ordinances sufficiently, 408.
- sidewalk ordinances sufficiently, 409.
- sewer ordinances sufficiently, 413.



## INDEX.

(References are to section numbers.)

### SQUARES—

See INTERSECTION.

definition of, 310.

location of property in fourths of, determines liability, 299, 300, 572.

omission to assess, formed by street intersections, when proper, 538.

when sidewalks included in improvement of, 538.

when assessment in, invalid, 621n.

### STATUTES AND ORDINANCES CONFLICTING—

201n, 385, 649.

### STATUTES, CONSTITUTIONAL—

in general, 167-169.

tested not by what has been but what may be done under it, 168.

requiring citizens to work in street, or pay three dollars, 169;

making issuance of bonds conclusive evidence of regularity, not jurisdictional, 562.

as to estoppel, 731.

### STATUTES, UNCONSTITUTIONAL—

when no provision for notice and hearing is made, 136.

fixing assessment for certain year as basis of compensation for taking, 176.

for storing debris and promoting drainage, 169n.

drainage act which does not establish boundaries, 169n.

granting private corporation power to lay water rents, 260.

levying annual tax of ten cents per foot on water pipe, 261.

containing more than one subject, rule does not apply to ordinances, 393.

fixing minimum rate of wages on public work, 452.

forbidding employment of alien labor, 452n.

making issuance of street improvement bonds conclusive as to validity of lien, 562.

for laying sewers on private property, to be paid by s. a., 608n.

when, forbidding court to act is unconstitutional, 789n.

when s. a. made under unconstitutional, it is void, and no cloud, 791.

### STREET—

or alley not contiguous property, 217.

power of s. a. generally employed for, improvement purposes, 244.

opening, widening and vacating, 245-247.

grading and paving, 248, 249.

repairing and maintenance, 250.

culverts, 251.

sidewalks, 252.

forming part of park system may be specially assessed, 257, 283.



## INDEX.

(References are to section numbers.)

### **STREET** (Continued).

under power to maintain, Council may construct sewers, 267.  
lighting of, may be subject of s. a., 273.  
not created by mere transfer of country road to city, 281.  
intersections, etc., not assessable, 299, 304.  
s. a. on property terminating in *cul de sac*, 300.  
assessment of alley continuation, 301.  
improvement of alley is a special benefit to abutting lots, 304n.  
may be widened or opened up in sections, 387.  
sufficiency of ordinance fixing width of, 406.  
findings of Council as to unsafety of, not conclusive, 437.  
city may not purchase easement for, 535.  
Legislature may authorize condemnation of fee simple for, 535.  
when, improved in sections, s. a. may be only on property fronting sections, 537.  
intersections — squares formed by are assessable, 538.  
    Council may determine pavement at, 538, 592.  
    when s. a. of, may be omitted, 539n.  
property on both sides of, should be assessed, 542n.  
erroneous omission of property on one side of, invalidates s. a., 542n.  
whole, may be improved under one resolution, though having various names, 544.  
having different widths may be divided into sections accordingly, 544.  
different streets may be paved under one resolution, 544.  
for invalid law as to assessment of street intersections, 556n.  
unlawful obstruction of, a nuisance, 581.  
restriction as to change of grade of, after once duly established, 583.  
putting macadamizing material on, not a change of grade, 586.  
mere surfacing of, not a pavement unless so intended, 587.  
authority to pave, authorizes any kind of pavement, 587.  
exemption from assessment for paving, unless foundation concrete, 597n.  
when provision for repairs invalidates assessment, 597n.  
impairing use of, is a taking of property, 152.  
narrowing roadway paved by owner, 597n.  
what complaint on change of grade must show, 597n.  
sidewalks at intersections of two — invalidity of s. a. for, 618.  
assessment of city streets by park commissioners, 621n.  
change from, to canal, 621n.  
assessment on one side of, only, 622n.  
damages for change of grade of, 644-649.  
shortage of fund for street intersections, 814n.

### **STREET IMPROVEMENTS—**

See PAVING; GRADING; CURBING; SEWERS; MACADAMIZING.



## INDEX.

(References are to section numbers.)

### STREET IMPROVEMENTS (Continued).

- require notice and opportunity for hearing, 144.
- railway contiguous to, subject to special taxation, 246.

### STREET RAILWAY PROPERTY—

- whether subject to s. a. or not, 284-288.
- tracks of, not assessable as "abutting property," 304.
- liability of, for paving, 597, 597n.
- non-assessment of, 621n.

### STREET SWEEPING AND SPRINKLING—

- may be required under police power, 44.
- by s. a., authority doubtful, and courts divided, 44.
- and removing snow from, 272-273.

### SUBDIVIDING LANDS—

- for assessment purposes, 543.

### SUFFICIENCY—

- of signature to petition, 330-333.
- of petition, 335-337.
- of resolution, 343-345.
- of notice, 353-359.
  - publication and proof, 370n.
- of ordinance, how determined, 385.
- description in ordinance, 403.

### SUFFICIENCY OF RECORD—

See RECORD.

- to be determined by inspection of entire proceedings, 560.
- of answer to petition for certiorari, 752a.

### SUITS—

- to vacate assessments, 531.
- what, covered by statute, 531n.

### SUNDAY—

See NOTICE.

- in matters of publication of notice, 370n, 371, 372.
  - ordinance, 398, 434n.
- statute of limitations, 531n.

### SUPERINTENDENT OF STREETS—

- cannot vary contract to alter cost of improvement, 447.
- discretion of Council cannot be delegated to, and city engineer, 447.

### SWAMP LANDS—

See RECLAMATION; DRAINAGE AND DRAINAGE DISTRICTS.

- absence of one commissioner appointed to view and assess, 518.



## INDEX.

(References are to section numbers.)

### SURVEYING AND SUPERINTENDENCE—

expense of may be added to cost of work, 525.

### T.

#### TAKING—

See FOURTEENTH AMENDMENT.

constitutional provisions as to, no limitation on police power, 41.  
of property may be under police power, eminent domain, or taxation, 49.

constitutional restraint on, does not apply to taxation, 49n.  
provisions against, must be construed with those authorizing special taxation, 122.

without due process not violated by front foot rule, 146.

what constitutes a, 151-159.

is not a, 160-164.

prohibition against, includes exercise of taxing power, 152.

impairing use of street may be a, 152, 153.

when, without compensation, not unconstitutional, 152.

removal of lateral support constitutes a, 155.

just compensation for, a judicial act — Council award not conclusive, 157.

notice unnecessary under appropriation for, by frontage, 164.

what is just compensation, 175.

fixing compensation for, on basis of assessment of certain year, 176.

front foot rule not objectionable as authorizing a, 508n.

collection of more than cost of work is a, 528.

damages for, 651.

where property is injured by the improvement, 670.

enforcing collection against property not benefited is a, 679.

what is not a, in s. a. proceedings, 818.

#### TAXATION—

See GENERAL TAXATION.

necessity for new methods of, 1.

division of, into three classes, 2.

theory of equivalents, 3.

comparison of general, with special, 4.

necessary for support of government, 11.

power of, must award owner just compensation, 47.

full authority for levying s. a., 48, 49.

Tenth Amendment, as factor in, 50.

a sovereign power, 50.

may be controlled by the legislatures of the several States, 51.

requisites of, by special assessment, 55.

not equivalent to assessment, 91n.

notice and opportunity for hearing, essential, 136, 141.



## INDEX.

(References are to section numbers.)

### TAXATION (Continued).

- prohibition against taking, etc., includes, 152.
- when express grant necessary for exercise of power of, 152.
- mode of, prescribed by Legislature, must be followed, 191.
- property taken by, must be for public good, 204, 204n.
- what necessary to uniformity of, 210.
- power of, unlimited, 211n.
- must be uniform, 212.
- county roads and highways paid by general, 253.
- general, for part cost, will not relieve lands from s. a., 280.
- is an act of sovereignty, 312.
- cannot disregard apportionment, 501.
- adding certain expense to cost of work, not double, 525.
- no defense to s. a. that general tax to pay part not first levied, 621.

### TAX DEEDS AND CERTIFICATES—

- title under, *ls stricti juris*, and conditions precedent must be complied with, 741.

### TAXES—

See GENERAL TAXATION.

- distinction between, and special assessment, 9.
- comparative definitions, 18.
- when the word, includes "special assessments," 20.
- does not include "special assessments," 21.
- annual, should be paid by life-tenant, 21n.
- and special assessment defined, 36.
- power to levy, is an incident to sovereignty, 67n.
- can be levied only by public officials for public purpose, 123.
- laws for, must have object expressed in title, 198.
- all, must be for a public purpose, 204.
- local, imposed only by consent of people of district, 207.
- for corporate purpose, must embrace entire city, 214.
- sewer assessments a kind of, 263.
- where legal and illegal parts of, can be separated, only latter quashed, 703n.
- rule as to recovery back alike out, and assessments, 784.
- levy of, not a judicial act, 800.

### TAXING DISTRICT—

See APPORTIONMENT.

- clearly defined, essential for levy of valid s. a., 55.
- fixing, a purely legislative function, 213.
- but Legislature may delegate the power to municipalities, 213.
- legislative discretion as to size of, 213.
- should be fixed in advance of s. a., 214.
- may embrace entire city, or fixed part, 214.
- essential to valid local assessment, 214n.



## INDEX.

(References are to section numbers.)

### TAXING DISTRICT (Continued).

- may be created in several towns or counties, 215.
- money raised by s. a. must be spent within, 304.
- when unnecessary to fix, for sewers, 411.
- fixing — apportionment — power of Legislature, 465.
- may be created without regard to boundaries of counties or municipalities, 465.
- extent of, must depend on the facts in each case, 466.
- power of courts over, 466, 467.
- of some kind is essential to a valid tax, 467.
- may be designated by street frontage, 503.
- invalid s. a. in — example, 523n.
- defining, by reference to map, 534n.
- omission of property from assessment establishes a new, 542.
- assessment of property in two, 554.
- sewer districts, 606.

### TAX LIMIT—

- exceeding tax limit, 529.

### TAX ROLL—

See ASSESSMENT ROLL.

### TENANT—

- by the courtesy — estate of, assessable, 298.

### TENANT FOR LIFE—

See LIFE TENANT.

### TENNESSEE—

- power of s. a. in, formerly attributed to police power, 40.
- constitutional authority for s. a. recognized in, 112n.

### TENTH AMENDMENT—

- as factor in authorizing s. a., 50.
- difference between, and old Articles of Taxation, 52.

### TEXAS—

- when "tax" does not include "special assessment," 35.
- power of s. a. attributed to police power, 40.
- equality and uniformity clause in Constitution of, 113.

### THEORY—

- of equivalents, 3, 264.
- legal, of power of s. a., 39.
- that s. a. is a distinct power vested in councils, 39.

### TIME—

- computation of, 377.
- general rule for, 377.
- publication of ordinances — two weeks, shall elapse, 434n.



## INDEX.

(References are to section numbers.)

### TIME (Continued).

- for completion of work, 457.
- extension by statute avoid when of the essence of the contract, 457.
- when, not of the essence of the contract, full performance may be waived.
- validity of contract not let in, 461n.
- proceedings regarded as abandoned unless damages paid in reasonable, 463.
- for making assessment, 551.
- method of payment governed by law in force when contract was made, 556n.
- for making objections usually after assessment and before confirmation, 565.
- when, for filing extended to a certain day, must be filed before court opens that day, 565.
- limitation of, in which to bring action on contract, 688.
- for completion of work—late but sufficient, 690.

### TITLE—

- agreement to give good, includes sewer assessment, 20n.
- assessment foreclosed by lien, 20.
- covenant for, does not include s. a., 21.
- acquiring, before improvement, 546.
- purchase of tax, by administrator, 740n.

### TRESPASS—

See RIGHTS AND REMEDIES OF TAXPAYERS—DAMAGES.

- in, *quare clausum*, plaintiff entitled to consequential damages, 644n.
- a proper action to recover damages when s. a. illegal, 758n.
- advantages of action of, in recovery of damages, 766-768.
- right to, preserved by Oregon Constitution, 766.
- benefits cannot be offset in action for, 766.
- unauthorized removal of sidewalk is an actionable, 767.
- measure of damage for, its value as laid, 767.
- will lie for removal of natural support of land, 768.
- the corporation and all officers connected with the, are liable, 768n.
- lies against a municipal corporation, 768n.
- threatened, by city may be enjoined, 811.

### TRINIDAD LAKE ASPHALT—

- specifications for, not objectionable as fostering a monopoly, 459.

### TRUSTEE—

- effect of signature to petition by, 332n.
- city purchasing s. a. certificate is a, 700n.

### TRUST FUND—

See SPECIAL FUND.

### TUNNELS—

- s. a. of, 246.



## INDEX.

(References are to section numbers.)

### U.

#### ULTRA VIRES—

contract — bond, 461n.

#### UNCONSTITUTIONAL ASSESSMENT—

not essential to recovery that s. a. be first declared void, 775.

#### UNION LABOR—

See CHINESE LABOR.

requirement as to, in ordinance, when without effect, 398.  
unconstitutional, 417.

#### UNPLATTED LAND—

See SUBDIVIDING.

when subject to s. a., 476.

#### UNREASONABLENESS—

See ORDINANCE.

of ordinance makes it void, 411.  
when sewer ordinance void for, 411.

#### USE OF LAND—

immaterial as what, or any, regarding power of s. a., 209.  
damages where there is a restricted, 656.

#### U. S. SUPREME COURT—

distinction by, between "tax" and "special assessment," 10.

#### USURPER—

See DE FACTO AND DE JURE.

### V.

#### VALID ASSESSMENTS—

See INSTANCES.

examples of, 621.

#### VALID CONTRACTS—

See CONTRACT; INSTANCES.

examples of, 461n.

#### VALID RESOLUTIONS—

See INSTANCES.

in general, 343, 344.

#### VALIDITY—

of ordinance — requisites to, 384, 385.  
published in Sunday newspaper only, 398.  
Iowa s. a. statute, 499n.  
Indiana s. a. statute, 499n.



## INDEX.

(References are to section numbers.)

### VALIDITY (Continued).

- test of, of assessment, 621n.
- of confirmation, 639.

### VALUATION—

- time of, the assessment being based on limitation of, 527n.

### VALUE—

- See ASSESSMENT; BENEFITS.
- assessment by, frequently adopted in drainage cases, 231.
- in excess of, of property, 485.
- when payment of full, improper, 497.
- of improvements of doubtful validity, 552.
- on lot by size or width without reference to, invalid, 555.
- witnesses as to, 571n.
- failure to, before assessment, 622.
- of property for subdivision, or future purposes, may be shown, 657.
- market—present use, and that to which adapted, 657n.
- change of market, 658n, 659.

### VARIANCE—

- in dates of publication, 358n.
- between work done and ordinance requirements, 392.
- from former assessment, 827n.

### VERDICT—

- See PROCEDURE.

### VERMONT—

- equality and uniformity clause in Constitution of, 114.

### VESTED RIGHTS—

- purely remedial legislation does not impair, 383.
- extent of contractor's, to have city levy s. a., 678n, 686n.
- where statute creates new right, and prescribes remedy, that is exclusive, 680.
- no, to recover amount paid on void s. a., 781.
- in rights of action or defenses based on mere technicalities, 781.
- in the remedy in force when cause of action arose, 820n, 826.
- when, may be divested, 820n.

### VIADUCTS—

- See BRIDGES AND VIADUCTS.

### VICINITY—

- See "LOCAL" PROPERTY.

### VIEW—

- actual, of property necessary in s. a. by benefits, 232, 480.
- of premises by commissioners, 522.



## INDEX.

(References are to section numbers.)

### VIEW (Continued).

- must exercise their own judgment after, 522.
- report of commissioners as to, not conclusive, 522.
- when, impracticable, properly identified photograph — when competent, 522.
- of premises by jury — great weight attached to, 657n.
- within discretion of trial court to require, 666.
- facts acquired by jury from, are not evidence, 666.
- of premises by trial judge, 666n.

### VIEWERS—

- appointment of, invalid if made before ordinance passed, 419.

### VIRGINIA—

- equality and uniformity clause in Constitution of, 115.

### VOLUNTARY APPEARANCE—

- may amount to a waiver, 737n.

### VOTE—

- charter requirements as to, and record must be followed, 443.
- when requirement as to two-thirds, complied with, 447n.

## W.

### WAGES—

- See CONTRACT; CHINESE LABOR; UNION LABOR.
- fixing minimum rate of, a restriction, 452.
- statute fixing minimum rate of, unconstitutional, 452.

### WAIVER—

- See APPEAL; ESTOPPEL.
- when dedication constitutes, of claim for damages, 268.
- of notice, 374-376.
  - by appearance, 350n.
  - if relied on, must be pleaded, 376.
- performance of sewer contract by Council, 451n.
- objections not urged at confirmation of assessment roll a, 629n.
- when irregularity in attendance of jury not waived, 665.
- when payment neither, nor estoppel, 720.
- and acquiescence involve same principles as estoppel, 737.
- voluntary appearance construed as, 737n.
- as basis of estoppel, 761n.
- bars remedy, 761n.
- must be with knowledge — valid without consideration, 761n.
- two causes of action — objections waived on appeal, 761n.

### WARRANTS—

- village, not negotiable instruments — village not estopped to deny liability, 721n.



## INDEX.

(References are to section numbers.)

### WASHINGTON—

- distinction between “tax” and “special” assessment in, 16.
- definition of s. a., 39n.
- equality and uniformity clause in Constitution of, 116.
- offset of benefits and damages not contrary to Constitution of, 156.

### WATER COURSES—

- improvement of, by s. a., 274.

### WATER RATES—

- are not taxes, but enforceable as a lien, 261.
- annual tax of three cents per foot not enforceable as a s. a., 261.
- ten cents, contrary to Fourteenth Amendment, 262n.

### WATER SHED—

- See DRAINAGE AND DRAINAGE DISTRICTS.
- amount of, not a proper rule for drainage assessment, 614.

### WATERWORKS, PIPES AND MAINS—

- in general, 259-262.
  - ordinances for, 410, 410n.
  - invalid ordinances for, 427.
  - as an entirety, 427.
- annual tax on water pipe by lineal foot, 508n.
- ordinance for laying not void because authorizing, on two streets at right angles, 544.

### WELLS—

- partial expense of digging, paid by s. a., 7.
- and pumps, 43.

### WEST VIRGINIA—

- equality and uniformity clause in Constitution of, 117.

### WISCONSIN—

- distinction between “tax” and “special assessment” in, 17.
- tax on all lots or lands in city is not a s. a., 17.
- meaning of assessment in Constitution of, 36.
- drainage laws of, sustained as valid exercise of police power, 43.
- equality and uniformity clause in Constitution of, 118-120.
- constitutional provision giving remedy for all injuries, 162.
  - as to local acts having subjects expressed in title, 199.
  - special acts amending city charters, 199.
  - cost of improvement chargeable to lot, 248.

### WITNESSES—

- See EVIDENCE.
- commissioners as, 52.
- declarations, and that of their clerks, inadmissible, 511.



## INDEX.

(References are to section numbers.)

### WORK—

See ABANDONMENT; COST OF WORK; EXTRA WORK.  
time for completion, 457.  
unavoidable abridgment of, 461n.  
no costs added unless by statute, 525.  
plans and specifications must conform to resolution for, 534.  
must be public to support s. a., 552.  
including, not ordered by Council, 622n.  
completion of — late, but sufficient, 690.  
protest against proposed — presumption, 693n.  
improper performance of, as defense to collection, 703n, 760n.  
paying for, already done, 721n.  
request of landowner for having certain, done estops him, 727.  
taking action before completion of — estoppel, 732.  
assessment for, already done — remedy by appeal, 760n.  
imperfect — restraining payment, 815n.  
done must substantially comply with ordinance, 39.  
ordinance passed after completion of, invalidates s. a., 417.  
extra, performance of without order, 451.  
done, acceptance of prevents resistance to collection of s. a., 454.  
reserving right to vary amount of work, will not vitiate s. a., 455.  
failure of contractor — completing, without readvertisement, 454n.  
finishing, at increased cost, 455n.  
when assessment for street improvement not void because of extra,  
455n.  
proper performance of, how compelled, 455n.  
description of, 456.



























